APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice-General
Lord Kirkwood
Lord Osborne
Lord Macfadyen
Lord Nimmo Smith

Appeal No: C104/01

OPINION OF THE COURT

delivered by

THE LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

of

ABDELBASET ALI MOHMED AL MEGRAHI

Appellant;

against

HER MAJESTY'S ADVOCATE

Respondent:

Appellant: Taylor QC; Burns QC; Beckett: McCourts, Solicitors, Edinburgh.
Respondent: The Lord Advocate (Boyd QC); AP Campbell QC, Advocate depute; Turnbull QC, Advocate Depute; Lake: the Crown Agent.

14 March 2002

Introduction

[1] On 31 January 2001 the appellant was found guilty of a charge of murdering 259 passengers and crew on board Pan American World Airways ("PanAm") flight PA103 from London Heathrow airport to New York and 11 residents of Lockerbie on 21 December 1988. This Opinion is concerned with his appeal against conviction, which was heard at Kamp Van Zeist from 23 January to 14 February 2002.

[2] In view of the length of this Opinion it may helpful if at the outset we set out a list of its contents, by reference to its paragraph numbers, as follows:

The charge of which the appellant was convicted

[3] The charge narrated that the appellant, having formed a criminal purpose to destroy a civil passenger aircraft and murder the occupants in furtherance of the purposes of Libyan Intelligence Services, while acting in concert with others, did certain acts. These included the purchasing on 7 December 1988 of a quantity of clothing and an umbrella in shop premises known as Mary's House at Tower Road, Sliema, Malta; entering Malta on 20 December 1988 at Luqa airport while using a passport with the false name of Ahmed Khalifa Abdusamad; residing overnight at the Holiday Inn, Tigne Street, Sliema, using this false identity; and placing or causing to be placed on board an aircraft of Air Malta flight KM180 to Frankfurt am Main Airport on 21 December 1988 a suitcase containing said clothing and umbrella and an improvised explosive device containing high performance plastic explosive concealed within a Toshiba RT SF 16 radio cassette recorder and programmed to be detonated by an electronic timer, having tagged the suitcase or caused it to be tagged so as to be carried by aircraft from Frankfurt am Main Airport via London Heathrow airport to New York. The charge went on to state that the suitcase was thus carried to Frankfurt am Main Airport and there placed on board an aircraft of PanAm flight PA103 and carried to London Heathrow airport and there in turn placed on board an aircraft of PanAm flight PA103 to New York; and that the improvised explosive device detonated and exploded on board the aircraft while in flight near to Lockerbie, whereby the aircraft was destroyed and the wreckage crashed to the ground and the passengers, crew and residents were killed. The appellant's co-accused, Al Amin Khalifa Fhimah, was acquitted of that charge.

The general nature of the grounds of appeal

[4] In support of his appeal the appellant has tabled a considerable number of grounds of appeal. At the trial it was not submitted on the appellant's behalf that there was insufficient evidence in law to convict him. In its judgment the trial court rejected certain parts of the evidence relied upon by the Crown at the trial. Nevertheless, it was not contended in the appeal that those parts of the evidence not rejected by the trial court did not afford a sufficient basis in law for conviction. A few of the grounds of appeal maintain that the evidence was not of such character, quality or strength to enable a certain conclusion to be drawn or to justify a particular finding. However, the great majority of the grounds are directed to the trial court's treatment of the evidence and defence submissions. More specifically it is maintained that the trial court misinterpreted evidence, had regard to "collateral issues" and wrongly treated certain factors as supportive of guilt. It is also said that in regard to certain matters it failed to give adequate reasons. In many cases it is maintained that it failed to take proper account of, or have proper regard to, or give proper weight to, or gave insufficient weight to, certain evidence, factors or considerations. It is also maintained that the trial court misunderstood, or failed to deal with, or properly take account of, certain submissions for the defence. In one of the grounds of appeal the appellant seeks to found on the existence and significance of evidence which was not heard at the trial. Before coming to the grounds of appeal in more detail it is convenient for us to deal with two matters of general importance.

The basis of the appeal

[5] Section 106 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") makes provision for a right of appeal against conviction by a jury. Under subsection (3) an appellant may 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) to (3D) below, the existence and significance of evidence which was not heard at the original proceedings; and
> (b) the jury's having returned a verdict which no reasonable jury, properly directed, could have returned."

In the present case only one of the grounds of appeal seeks to invoke paragraph (a) of section 106 (3). Mr Taylor, who appeared for the appellant, expressly disavowed any reliance on para (b). Accordingly, with the exception of that one ground, the appeal is based on allegations of "miscarriage of justice" within the generality of that expression in subsection (3).

[6] In this case the trial took place before a court of judges sitting without a jury ("the trial court"), constituted under article 5 of the High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998 ("the Order in Council"). Article 5(4) provides:

> "For the purposes of any such trial, the court shall have all the powers, authorities and jurisdiction which it would have had if it had been sitting with a jury in Scotland, including power to determine any question and to make any finding which would, apart from this article, be required to be determined or made by a jury, and references in any enactment or other rule of law to a jury or the verdict or finding of a jury shall be construed accordingly."

It is clear that for the purposes of an appeal against the verdict of the trial court, the same provisions apply as in the case of the verdict of a jury, subject to the substitution of references to the trial court in place of references to the jury.

[7] Article 5(6) of the Order in Council provides that in the event of a verdict of guilty:

> "…(b) without prejudice to its power apart from this paragraph to give a judgment, the court shall, at the time of conviction or as soon as practicable thereafter, give a judgment in writing stating the reasons for the conviction."

In the case of a jury a miscarriage of justice may arise out of a misdirection of the jury by the judge in regard to a matter of law or a matter of fact (as to the latter, see e.g. *Crawford v HM Advocate* 1999 SCCR 674). The basis for such an appeal requires to be found in the charge to the jury, read along with their verdict. In the case of the trial court there is likewise scope for a conclusion that there has been a miscarriage of justice arising out of a misdirection of law or a misdirection of fact, that is to say a self-misdirection gathered from its written judgment.

[8] It is plain that a trial court could include in its judgment more than strictly "the reasons for the conviction." In the present case it is clear that the trial court included in its judgment not only factual findings and reasoning leading to conviction of the appellant, but also an account of evidence which it had accepted or rejected, the weight attached to certain evidence and the submissions made to it. It is thus possible for this court to know the basis on which the conviction of the appellant was arrived at, and hence it can determine, for example, whether or not the trial court has misdirected itself by misinterpreting evidence or failing to take evidence into account in arriving at its conclusions.

[9] At the outset, Mr Taylor submitted that a miscarriage of justice could be based on the failure of the trial court to give adequate reasons for its conclusions, including reasons of adequate clarity. This appeared to be without regard to whether or not the failure was a failure to comply with article 5 (6) of the Order in Council.

[10] In our opinion this submission was misconceived. It is not sound in principle or supported by authority. There is no ground for thinking that the perceived inadequacy of the reasons expressed by the trial court, whether performing its duty under Article 5 (6) or otherwise,

is to be regarded as of itself establishing that it was not entitled to come to a particular conclusion. Mr Taylor referred to *Petrovich v Jessop* 1990 SCCR 1, in which a conviction for theft by shoplifting was quashed. It is true that the appeal court stated that the magistrate who convicted the appellant must have "stateable and defensible reasons for drawing the inference of guilt", but the point of the decision was that the meagreness of the reasons which he stated for convicting the appellant indicated that he had failed to consider and assess all the relevant evidence which bore on the question of guilt or innocence, including an alternative to guilt, namely that the appellant had simply forgotten to pay. Likewise in *Ballantyne v McKinnon* 1983 SCCR 97 a conviction was quashed where the sheriff's account of the evidence did not provide a satisfactory basis for conviction. Reference may also be made to *Jordan v Allan* 1989 SCCR 202, in which the appeal court held that the findings in fact made by a justice could not be treated as made on the whole evidence as he had not stated whether or not he believed the appellant or what account he took of his evidence. We do not consider that the decision of the European Court of Human Rights in *Hadjianastassiou v Greece* (1992) 16 EHRR 219 is of assistance. As the Advocate depute pointed out, that case was concerned with a complaint that a denial of access to a finalised judgment within the time limit for the exercise of a right of appeal prejudiced the right of the losing party to "adequate time and facilities for the preparation of his defence".

[11] Mr Taylor also placed reliance on a number of judgments of the Court of Appeal in Northern Ireland dealing with appeals against the decisions of judges sitting without juries in the so-called "Diplock Courts" in criminal trials under section 2 of the Northern Ireland (Emergency Provisions) Act 1973 and similar successive enactments.

[12] It is important to bear in mind that the question for the Court of Appeal in these cases was whether the conviction was "unsafe or unsatisfactory" in accordance with section 9 of the Criminal Appeal (Northern Ireland) Act 1968, now section 2 of the Criminal Appeal (Northern Ireland) Act 1980 (applying the explanation of that test in *R v Cooper* [1969] 1 QB 267 at page 271). It cannot be taken that there is a direct correspondence between the result of applying that test and the outcome of applying the Scottish test of a miscarriage of justice. Nevertheless the decisions are of some interest for present purposes since under section 2 (5) of the 1973 Act and the corresponding provisions of succeeding legislation, the judge had the duty to "give a judgment stating the reasons for the conviction."

[13] Mr Taylor founded on the observations of the Court of Appeal in *R v Bennett* and *R v Wilson*, both unreported but accessible in [1975] NIJB. However, an examination of the first of these cases shows that what the appeal court did was to examine the reasons given by the trial judge where there was virtually no evidence other than identification evidence and that evidence was contradictory and inconsistent. The true deficiency in that case did not lie in the judge's reasons but in the evidence which he set out. The Court of Appeal stated (at page 5 of the transcript) that it found the identification evidence to be unsatisfactory in the absence of an adequate explanation by the trial judge. It concluded that it could not accept the evidence of identification as reliable. In the second of these cases the Court of Appeal pointed out that an examination of the reasons given by the trial judge showed that he had simply left out of account a body of exculpatory evidence.

[14] We consider that the Advocate depute was well-founded in submitting that inadequacy of reasons, of itself, did not constitute a misdirection and hence potentially extend the scope of

section 106 (3). It might, on the other hand, provide the means by which a misdirection was detected, as in *Petrovich v Jessop.*

[15] On the same subject of reasons, it is convenient to refer to a number of observations made by the Court of Appeal in Northern Ireland about the extent to which a judge is expected to explain his decision.

[16] In *R v Wilson* the court observed (at page 15 of the transcript):

> "He did not give all his reasons nor is he obliged to give detailed reasons and we would deprecate any suggestion that his obligation should be widened in this respect."

In *R v Thompson* [1977] NI 74, in referring to the duty of the judge when giving judgment in a trial under the 1973 Act, the Court of Appeal said at page 83:

> "He has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal it can be seen how his view of the law informs his approach to the facts."

[17] In *R v Thain* [1985] NI 457 the Court of Appeal was concerned with the conviction of a soldier who had shot a man whom he had been pursuing. It was maintained in his appeal against conviction that, in reaching his conclusion that he had not shot him in self-defence, the trial judge failed to take into account that there was no easy alternative to hand. The Court of Appeal rejected this criticism. At page 478 Lord Lowry LCJ pointed out that in reaching his conclusion the trial judge must have been well aware, since he had so held, that the appellant did not shoot the deceased in order to effect his arrest. He observed on that page:

> "Where the trial is conducted and the factual conclusions are reached by the same person, one need not expect every step in the reasoning to be spelled out expressly, nor is the reasoning carried out in sealed compartments with no intercommunication or overlapping, even if the need to arrange a judgment in a logical order may give that impression. It can safely be inferred that, when deliberating on a question of fact with

> many aspects, even more certainly than when tackling a series of connected legal points, a judge who is himself the tribunal of fact will (a) recognise the issues and (b) view in its entirety a case where one issue is interwoven with another."

[18] In our view these observations are relevant to a written judgment under article 5 (6) of the Order in Council by which, in similar language, the trial court is required to state "the reasons for the conviction". It is plain that reasons do not require to be detailed; that the trial court does not have to review every fact and argument on either side; and that reasons do not require to be given for every stage in the decision-making process.

[19] Before leaving this subject we would record that Mr Taylor founded on the terms of a report which the trial court provided in accordance with section 113 of the 1995 Act. In that report the trial court states:

> "As we have detailed our findings and explained our reasoning in the Opinion of the Court issued at the end of the trial in accordance with the requirements of the Order in Council, we do not think it appropriate to make any further comment on the evidence or our interpretation of it. We would only say that in order to keep the length of the Opinion within reasonable bounds, we did not attempt to deal with every item of evidence which might be in dispute or with every criticism which was made of the evidence, but confined ourselves to dealing with those items of evidence and those criticisms which appeared to us to be of material importance."

Mr Taylor maintained that in these circumstances it could be taken that the trial court had taken the view that any item of evidence or criticism which was not mentioned in the judgment had been regarded by the trial court as not being of material importance. Assuming that this report requires to be read along with the judgment of the trial court, we do not consider that this means that items of evidence or criticisms which are not mentioned in the judgment were either ignored by the trial court or were regarded by it as being of no significance whatsoever. The judgment sets out, *inter alia*, the evidence which the trial court regarded as being of material importance in supporting the conviction of the appellant, along with criticisms to which that evidence was subjected. In neither case is the account to be understood as going into every detail.

The function of an appeal court

[20] The second matter of general importance is the proper function of an appeal court in a criminal appeal, particularly where, as in the present case, the decision was that of a court of judges which has provided a written judgment giving the reasons for the conviction.

[21] Mr Taylor accepted that this court was not a court of review in the sense in which that expression is used in regard to civil cases. Thus he accepted that it was not open to this court to review all the evidence which was before the trial court in order to determine for itself whether that court had come to the correct conclusion. On the other hand, he submitted that it was open to this court to review the conclusions reached by the trial court in the light of the evidence which it (the trial court) considered to be material. In this connection he referred to a number of decisions in civil cases in which there was a discussion of the role of an appeal court in regard to reliability of evidence or the proper inference to be drawn from evidence. In *Dunn v Dunn's Trustees* 1930 SC 131 Lord President Clyde observed at page 146:

> "My opinion is that a Court of appeal in Scotland is still – as it has always been – competent freely to review decisions on fact by judges of first instance, on the ground that the judge of first instance has misapprehended the meaning or the bearing of a piece of evidence, or the relation of one piece of evidence to another, or on the ground that the evidence of a particular witness is unreliable on account of its inconsistency with itself or of any inherent defect in it – no matter how intelligent and honest the witness may have appeared in the eyes of the judge of first instance during the witness's fugitive appearance in the witness-box."

In *Duncan v Wilson* 1940 SC 221 Lord President Normand at page 224 said:

> "A court of appeal is certainly bound to respect a finding of fact arrived at on an estimate of the credibility of witnesses made by the judge who saw them and heard their evidence. Yet when a question of fact is submitted for review, the court cannot avoid the duty of considering the material brought before it, and of pronouncing its own judgment upon it."

Mr Taylor also cited a passage in the speech of Lord Reid in *Benmax v Austin Motor Company* [1955] AC 370 at page 376 where, after referring to the well-known passage in the speech of Lord Thankerton in *Thomas v Thomas* [1947] AC 484 at pages 487-488 (1947 SC(HL) 45 at page 54), he said:

> "But in cases where there is no question of the credibility or reliability of any witness, and in cases in which the point in dispute is the proper inference to be drawn from proved facts, the appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion."

[22] This raises a fundamental point in regard to the role of the appeal court in criminal cases. It is plain that in the past the appeal court has never taken upon itself the role of resolving issues of fact, any more than the determination of guilt. In *Webb v HM Advocate* 1927 JC 92, more fully reported in 1927 SLT 631 to which we will refer, the Lord Justice-Clerk (Alness) stated at page 631:

> "This is not a court of review. Review, in the ordinary sense of that word, lies outside our province. We have neither a duty nor a right, because we might not have reached the same conclusion as the jury, to upset their verdict."

At page 636 Lord Anderson said:

> "I express my first general observation in negative form to the effect that this Court will not re-try a case of this nature in the sense in which, in a civil process, a court of review deals with the decision of a judge of first instance. It is not the function of this court, but of the jury, to weigh and balance testimony in an endeavour to ascertain, on quantitative or qualitative grounds, how it ought to preponderate. This court, it is true, in an appeal on fact, is bound to read the evidence, but only for the purpose of deciding whether or not the verdict is unreasonable, or to use a term familiar in civil procedure, perverse."

It cannot be doubted that in the case of an appeal against a jury's verdict of guilty the same applies today. The alterations which have been made in the terms in which the right of appeal is expressed have not changed the role of the appeal court. It is not without significance that what is brought under review by means of a criminal appeal against the jury's verdict is "any alleged

miscarriage of justice", and that if the appellant has satisfied the court that there has been such an injustice the court may exercise its power to quash the conviction. So far, this would not be in conflict with Mr Taylor's submission. However, his argument was that the fact that the decision to convict had been taken by a trial court which had supplied a written account of its reasons for convicting the appellant changed the position.

[23] In our opinion this argument is not well founded. The respective roles of the appeal court and the court by which issues of fact are resolved and guilt is determined are not changed by the fact that the normal arrangements have been modified by the Order in Council, and in particular by the requirement that the trial court should deliver a reasoned judgment. While accepting that this court is not a court of review in the sense in which that expression is used in regard to civil cases Mr Taylor failed to recognise the full implications of that acceptance. Putting the matter the other way round, if he were correct that it was, for example, open to this court to review the inferences drawn by the trial court it would not be possible to stop short of the conclusion that this court could in effect substitute its own view of the evidence which was before the trial court, which is plainly wrong.

[24] These considerations are supported by inference from the terms of subsection (3) (b) of section 106 of the 1995 Act. While that provision has not been invoked by the appellant in the present appeal, its terms have a bearing on the scope of review by this court under the section. Subsection (3) (b), where it is invoked, entails that it is for an appellant to show that no reasonable jury could have been satisfied beyond reasonable doubt that the accused was guilty (*King v HM Advocate* 1999 JC 226). Mr Taylor argued that this provision could not apply to an appeal against the verdict in the present case, because in a jury case, as was plain from the decision in *King*, the appeal court had to consider the whole evidence which was properly before

the jury. This did not make sense where the trial court had clearly rejected certain material evidence. We do not accept this argument. If that provision were invoked it would be for the appeal court to consider whether, having regard to the evidence which was not rejected by the trial court, the verdict was one which no reasonable trial court, properly directing itself, could have returned. It is implicit in this exercise that the assessment of evidence may legitimately give rise to differing views, and that evidence may be rejected simply because it is inconsistent with other evidence. That is the responsibility of those who are charged with the task of reaching conclusions as to what facts are proved (*King v HM Advocate* at pages 236 G and 238 B).

[25] The Advocate depute submitted, in our view correctly, that if, in order to demonstrate that there was a miscarriage of justice arising from the trial court's verdict, an appellant had to go the length of showing that no reasonable trial court could have reached that verdict, it made no sense if the appeal court could, by applying a lesser standard in reliance on the general power to review any alleged miscarriage of justice, review the inferences drawn by the trial court or could set aside the trial court's assessment of the reliability of evidence. In this respect he drew a parallel with the issue which was the subject of decision in *Elliott v HM Advocate* 1995 JC 95. We have no doubt that, once evidence has been accepted by the trial court, it is for that court to determine what inference or inferences should be drawn from that evidence. If evidence is capable of giving rise to two or more possible inferences, it is for the trial court to decide whether an inference should be drawn and, if so, which inference. If, of course, the appeal court were satisfied that a particular inference drawn by the trial court was not a possible inference, in the sense that the drawing of such an inference was not open to the trial court on the evidence, that would be indicative of a misdirection and the appeal court would require to assess whether or not it had been material.

[26] We are satisfied that the fact that the trial court delivered a reasoned judgment does not affect the nature and extent of the role of an appeal court in reviewing any alleged miscarriage of justice. The initial question for this court is whether in arriving at its verdict the trial court misdirected itself either in law or as to a matter of fact so that it took a course which is was not entitled to do or failed to do what it should have done. If and to the extent that this has been shown, the further question would be whether a miscarriage of justice has resulted.

[27] As we have already noted, in this appeal it is not maintained that the evidence before the trial court, apart from the evidence which it rejected, was not sufficient as a matter of law to entitle it to convict the appellant. The grounds of appeal, in the main, are concerned with the trial court's treatment of the evidence and defence submissions. We have also noted that in many of the grounds it is said that the trial court failed to take proper account of, or have proper regard to, or give proper weight to, or gave insufficient weight to, certain evidence, factors or considerations. In the course of this Opinion we will discuss each of the grounds of appeal. However, at this stage we would observe that, for the reasons which we have given above, where it is not said that a trial court has misdirected itself by ignoring something, the amount of weight which should be attached to it is a matter solely for the trial court, and not for the appeal court.

The judgment of the trial court

[28] The written judgment of the trial court, given in accordance with article 5 (6) of the Order in Council, was extensive. It contained 90 paragraphs. As will be seen, many of the issues of fact which were considered in it were not in dispute at the trial, and many of the trial court's findings in fact are not affected by the grounds of appeal. In order that the matters raised in the grounds of appeal may be understood in their proper context, we propose at this stage to

summarise the relevant law and the judgment, with particular reference to the issues with which we are concerned.

[29] At the trial, as in all criminal trials in Scotland, the burden of proving the guilt of the accused lay on the Crown, and so remained throughout the trial. In order to secure a conviction against either accused, the Crown had to succeed in proving his guilt beyond reasonable doubt. Corroboration, that is to say, evidence coming from at least two independent sources, was required to prove the essentials of the Crown case. In the present case these were, in relation to each accused, first, that the crime of murder had been committed and, secondly, that the accused in question was criminally responsible for its commission. Applying these tests, the trial court held that the guilt of the appellant had been proved, but acquitted his co-accused.

[30] As the trial court explained in para [2] of the judgment, it was not disputed, and was amply proved, that the cause of the disaster was the explosion of a device within the aircraft. Nor was it disputed that the person or persons who were responsible for the deliberate introduction of the explosive device would be guilty of the crime of murder. The matter at issue in the trial therefore was whether or not the Crown had proved beyond reasonable doubt that one or other or both of the accused was responsible, actor or art and part, for the deliberate introduction of the device.

[31] Since the Crown case against both accused was based entirely on circumstantial evidence, it is appropriate at this stage to make reference to the requirements of proof by such evidence, and what approach to it was open to the trial court. The rule that proof of guilt requires corroboration was reaffirmed in *Morton v HM Advocate* 1938 JC 50. At page 52 the Lord Justice-Clerk (Aitchison), delivering the opinion of the court, described it as a firmly established and inflexible rule of our criminal law that (with certain statutory exceptions) a

person cannot be convicted of a crime on the uncorroborated testimony of one witness however credible. On the same page, passages in Baron Hume's *Commentaries on the Law of Scotland Respecting Crimes*, vol. ii, pages 383-4, were quoted with approval. In these passages Hume spoke of corroboration of the direct evidence of one witness by that of another, or by circumstantial evidence. He went on to speak of a case where all the evidence was circumstantial. In such a case, he said, it was not to be understood that two witnesses are necessary to establish each particular, "because the aptitude and coherence of the several circumstances often as fully confirm the truth of the story, as if all the witnesses were deponing to the same facts."

[32] So it was open to the trial court to hold the guilt of the appellant to be proved on the basis of circumstantial evidence coming from at least two independent sources. Before us, the Advocate depute relied on three cases in support of two further propositions which he advanced. The first proposition was that in a circumstantial case it is necessary to look at the evidence as a whole. Each piece of circumstantial evidence does not need to be incriminating in itself; what matters is the concurrence of testimony. The second was that the nature of circumstantial evidence is such that it may be open to more than one interpretation, and that it was precisely the role of the trial court to decide which interpretation to adopt.

[33] The first case relied upon by the Advocate depute was *Little v HM Advocate* 1983 JC 16. At page 20 the Lord Justice-General (Emslie), delivering the opinion of the court, referred to an argument for one of the appellants in that case, that "each of the several circumstances founded upon by the Crown was quite neutral", and said:

> "The question is not whether each of the several circumstances 'points' by itself towards the instigation libelled but whether the several circumstances taken together are capable of supporting the inference, beyond reasonable doubt, that Mrs Little in fact instigated the killing of her husband by MacKenzie."

[34] The second case was *Fox v HM Advocate* 1998 JC 94, in which the Crown had relied on circumstantial evidence as affording corroboration of the direct evidence of one witness. In the course of a passage disapproving of the decision in *Mackie v HM Advocate* 1994 JC 132 that circumstantial evidence is corroborative only if it is more consistent with the direct evidence than with a competing account given by the accused, the Lord Justice-General (Rodger) said at pages 100 -101:

> "[I]t is of the very nature of circumstantial evidence that it may be open to more than one interpretation and that it is precisely the role of the jury to decide which interpretation to adopt. If the jury choose an interpretation which fits with the direct evidence, then in their view – which is the one that matters – the circumstantial evidence confirms or supports the direct evidence so that the requirements of legal proof are met. If on the other hand they choose a different interpretation, which does not fit with the direct evidence, the circumstantial evidence will not confirm or support the direct evidence and the jury will conclude that the Crown have not proved their case to the required standard."

This passage is, in our view, equally applicable where there is no direct evidence and the evidence is wholly circumstantial. In the same case Lord Coulsfield said at page 118:

> "[I]t seems to me to be wrong to try to divide cases into different categories by reference to the nature of the evidence which is relied on, and if there were a rule that each piece of evidence must be incriminating, I would find it difficult to see why that should not apply in every case. I do not, however, think that it is necessary that each piece of evidence, of whatever kind, should be incriminating in that sense. The proper approach, it respectfully appears to me, is already given by Hume, that is, that what matters is the concurrence of testimonies. Whether a single piece of evidence, or a number of pieces of evidence, are incriminating or not is a matter which can only be judged in the whole circumstances taking all the evidence together."

[35] Thirdly, in *Mack v HM Advocate* 1999 SCCR 181, the Lord Justice-General (Rodger), in delivering the opinion of the court, said at page 185:

> "There is nothing strange in discovering that circumstantial evidence may give rise to a number of possible inferences since that is one of the characteristics of evidence of that type. When presented with such evidence, the jury have to decide whether they draw the inference that the accused is guilty of the crime."

[36] In our opinion these three cases, and the passages from them which we have quoted, support the propositions advanced by the Advocate depute, with which we did not understand Mr Taylor to take issue. To these passages we would add one from *King v HM Advocate* 1999 JC 226, a case to which we have previously referred in another context. At page 238 C-D the Lord Justice-General (Rodger), delivering the opinion of the court said:

> "[I]t is by no means unusual to find that there is a body of evidence in a case which is quite inconsistent with the accused's guilt. Evidence supporting an alibi defence is necessarily of that nature and, while it is often possible for the Crown to undermine alibi witnesses on the ground perhaps that they are partial or untrustworthy, that is by no means always the case. In such a situation juries may none the less be satisfied of the accused's guilt beyond reasonable doubt on the basis of the Crown evidence and come to the view that they must accordingly reject the alibi evidence as wrong. The jury must consider all the evidence but, having done that, they can reasonably reject the alibi evidence precisely because it is inconsistent with the Crown evidence which they have decided to accept."

The same applies to the trial court, which was entitled to reject evidence which was inconsistent with the guilt of the appellant precisely because it was inconsistent with circumstantial evidence pointing to his guilt which it had decided to accept.

[37] Although, as we have said, certain matters were not in dispute before the trial court, nevertheless it heard evidence, and proceeded to make findings in fact, about matters relevant to proof of commission of the crime charged as well as proof of the guilt of the appellant. In paras [3] to [15] the trial court considered the evidence which established that the cause of the disaster was indeed the explosion of a device within the aircraft. It referred to the police operation which led to the recovery of tens of thousands of items of debris which had fallen to the ground, and the examination of some of them by the relevant specialists. It accepted evidence which established that the detonation of an explosive device within the fuselage caused the shattering of an area on the port side of the lower fuselage in the forward cargo bay area, followed by the total disruption and disintegration of the aircraft. The port side forward cargo bay was loaded with luggage in

containers. An aluminium container AVE 4041 was situated immediately inboard of and slightly above the shattered area of the fuselage. The trial court accepted evidence that the nature of the damage to the container led to the conclusion that the explosion occurred within the container. There were traces of chemicals used in the manufacture of plastic explosives, including Semtex. Evidence relating to the examination of fragments which showed various signs of explosives damage led to the further conclusion, which the trial court accepted, that the explosion had taken place within a brown hard-shell Samsonite suitcase of the 26" Silhouette 4000 range, which was thereafter referred to as "the primary suitcase". There was evidence also that the primary suitcase had been situated immediately above an American Tourister brand suitcase.

[38] Examination of other fragments led to the conclusion, which the trial court also accepted, that the explosive device was contained within a Toshiba RT-SF 16 radio cassette player which had been within the primary suitcase. The suitcase also contained, at the time of the explosion, 12 items of clothing and an umbrella. Some of these items were identifiable by labels. This led to enquiries being made in Malta, and in particular a shop called Mary's House, Tower Road, Sliema, which was a shop run by the Gauci family, Tony Gauci being one of the partners. The trial court accepted evidence from Mr Gauci that he had sold these items to a man, whom he recognised as being a Libyan, in 1988. This led the trial court to state, in para [12]: "We are therefore entirely satisfied that the items of clothing in the primary suitcase were those described by Mr Gauci as having been purchased in Mary's House." The trial court also stated that it would return to Mr Gauci's evidence in more detail in connection with the date of the sale and the identification of the purchaser. These issues are the subject of various grounds of appeal, which we will discuss in due course. As we read para [12], however, the trial court accepted Mr

Gauci's evidence that the purchaser was a Libyan, and we did not understand that finding to be the subject of any challenge.

[39] Another crucial item, as the trial court described it, that was found during the search of the debris was a fragment of green coloured circuit board which was extracted from a remnant of a shirt which had been within the primary suitcase. Subsequent enquiries led to identification of this fragment as coming from a timing device known as an MST-13, of a type which had a single-sided circuit board. The fragment originated from an area of the connection pad for an output relay of a circuit board of this type of timer. MST-13 timers were made by a Swiss company, MEBO AG, which in 1985 had its offices in an hotel in Zurich, and was engaged in the design and manufacture of various electronic items.

[40] In para [15] the trial court summarised its findings in fact up to that point in the following terms:

> "The evidence which we have considered up to this stage satisfies us beyond reasonable doubt that the cause of the disaster was the explosion of an improvised explosive device, that that device was contained within a Toshiba radio cassette player in a brown Samsonite suitcase along with various items of clothing, that that clothing had been purchased in Mary's House, Sliema, Malta and that the initiation of the explosion was triggered by the use of an MST-13 timer."

No issue was taken with any part of this passage during the course of the appeal.

[41] It is convenient at this point to refer to certain findings in fact which were made by the trial court later in the judgment, and which were also not in issue before us. These were derived principally from the evidence of two witnesses, Abdul Majid and Edwin Bollier. Mr Majid had been a member of a Libyan organisation called the Jamahariya Security Organisation ("JSO"), later named the External Security Organisation ("ESO"). The trial court concluded its discussion of his evidence by stating that it was unable to accept him as a credible and reliable witness on any matter except his description of the organisation of the JSO and the personnel involved there.

The trial court accordingly accepted his evidence about the organisation of the JSO in 1985, in particular in a passage in para [42] in these terms:

> "He gave evidence about the organisation of the JSO in 1985. In particular he said that the director of the central security section was Ezzadin Hinshiri, the head of the operations section was Said Rashid, the head of special operations in the operations department was Nassr Ashur, and the head of the airline security section was the [appellant] until January 1987 when he moved to the strategic studies institute."

In December 1985 Mr Majid was appointed as assistant to the station manager of Libyan Arab Airlines ("LAA") at Luqa airport. This post, the trial court accepted, was one which was normally filled by a member of the JSO.

[42] Mr Bollier and Erwin Meister formed MEBO in the early 1970s. The trial court found Mr Bollier to be at times an untruthful and at other times an unreliable witness. It did, however, accept certain parts of his evidence. In particular, it accepted that in or about July 1985 on a visit to Tripoli Mr Bollier received a request for electronic timers from Said Rashid or Ezzadin Hinshiri and that he had had military business dealings in relation to the Libyan government with Ezzadin Hinshiri since the early 1980s (para [49]). It also accepted his evidence that he had supplied twenty samples of MST-13 timers to Libya in three batches, and that he may well have been correct when he said that the Libyan order was met with the supply of timers which had circuit boards of both the single-sided and the double-sided types. It accepted that in 1985 he himself delivered five of these samples on a visit to Tripoli, that in the same year he delivered another five to the Libyan Embassy in East Berlin, and that in 1986 he delivered the remaining ten personally in Tripoli (para [50]). It also accepted Mr Bollier's evidence that he attended tests carried out by the Libyan military in the Libyan desert at Sabha which involved, *inter alia*, the use of MST-13 timers in connection with explosives and in particular air bombs. He said that the

timers were brought by Nassr Ashur. Mr Bollier attended there as a technical expert. The trial court said in para [53]:

> "From the way in which he gave evidence about these tests we are persuaded that he did indeed attend such tests, although it is not clear when they were carried out or what was their purpose."

In para [54] the trial court stated:

> "We also accept Mr Bollier's evidence, supported by documentation, that MEBO rented an office in their Zurich premises some time in 1988 to the firm ABH in which the [appellant] and one Badri Hassan were the principals. They explained to Mr Bollier that they might be interested in taking a share in MEBO or in having business dealings with MEBO."

[43] In para [88] the trial court made findings in fact which were based on such of the evidence of Mr Majid and Mr Bollier as had been accepted, in these terms:

> "We accept the evidence that [the appellant] was a member of the JSO, occupying posts of fairly high rank. One of these posts was head of airline security, from which it could be inferred that he would be aware at least in general terms of the nature of security precautions at airports from or to which LAA operated. He also appears to have been involved in military procurement. He was involved with Mr Bollier, albeit not specifically in connection with MST timers, and had along with Badri Hassan formed a company which leased premises from MEBO and intended to do business with MEBO."

[44] In para [87] findings in fact were also made which, with one exception, were not the subject of challenge in the appeal. The paragraph is in these terms:

> "On 15 June 1987 the [appellant] was issued with a passport with an expiry date of 14 June 1991 by the Libyan passport authority at the request of the ESO who supplied the details to be included. The name on the passport was Ahmed Khalifa Abdusamad. Such a passport was known as a coded passport. There was no evidence as to why this passport was issued to him [this sentence is challenged]. It was used by the [appellant] on a visit to Nigeria in August 1987, returning to Tripoli via Zurich and Malta, travelling at least between Zurich and Tripoli on the same flights as Nassr Ashur who was also travelling on a coded passport. It was also used during 1987 for visits to Ethiopia, Saudi Arabia and Cyprus. The only use of this passport in 1988 was for an overnight visit to Malta on 20/21 December, and it was never used again. On that visit he arrived in Malta on flight KM231 about 5.30 pm. He stayed overnight in the Holiday Inn, Sliema, using the name Abdusamad. He left on 21 December on flight LN147, scheduled to leave at 10.20 am. The [appellant] travelled on his own passport in his own name on a number of occasions in 1988, particularly to Malta on 7 December where he stayed until 9

> December when he departed for Prague, returning to Tripoli via Zurich and Malta on 16/17 December."

In para [39] the trial court found that the check-in for LAA flight LN147 to Tripoli on 21 December was between 0850 and 0950 hours.

[45] The Crown case against the appellant depended on evidence relating to two matters. The first of these was summarised by the trial court at para [17] of the judgment in these terms:

> "The Crown case is that the primary suitcase was carried on an Air Malta flight KM180 from Luqa airport in Malta to Frankfurt, that at Frankfurt it was transferred to PanAm flight PA103A, a feeder flight for PA103, which carried it to London Heathrow airport, and that there, in turn, it was transferred to PA103."

The second matter relied on by the Crown, to which we shall return in due course, was the identification of the appellant by Mr Gauci as the purchaser of the clothing and the umbrella, and the related issue of the date of the purchase.

[46] As the trial court explained at para [16], consideration of the evidence relating to the provenance of the primary suitcase and the possible ways in which it could have found its way into container AVE 4041 involved consideration of the procedures at various airports through which it might have passed. This started with an account of practices relating to baggage checked in by intending passengers for carriage in aircraft holds. Each item of baggage had attached to it a tag bearing, ordinarily, the name of the airline, or the first airline, on which the passenger was to travel and the destination. Where the journey was to be completed in more than one leg or stage, the tag also carried the name of any intermediate airport. This enabled the baggage handlers at the airport of departure, at any intermediate airport and at the destination to deliver or transfer the item to the correct flight and to return it to the passenger at the final destination. Baggage checked in at the airport of departure was referred to as local origin baggage. Baggage which had to be handled at an intermediate airport was generally referred to

as transit baggage. A distinction was normally made between two groups of transit baggage. Online baggage was baggage which arrived at and departed from an intermediate airport on aircraft of the same carrier. Interline baggage arrived on an aircraft of one carrier and departed with a different carrier. Baggage was intended to be carried on the same aircraft as the passenger to whom it belonged, but from time to time baggage was misdirected or delayed and had to be carried on a different flight. Such items were identified by an additional special tag, known as a rush tag, and were normally only sent in response to a request from the destination airport, following a claim made by a passenger for baggage which had not been delivered at the destination. It was normal to take steps to prevent items of baggage travelling on an aircraft unaccompanied by the passenger who had checked them in, unless there was sufficient reason to regard the items as safe.

[47] Flight PA103 took off from Heathrow shortly before 1830 on 21 December 1988. Before its departure, the aircraft was parked at stand K14. Flight PA103A arrived from Frankfurt at stand K16. Some online baggage was unloaded from flight PA103A, on which it had been carried loose in the hold, into container AVE 4041 at stand K16. The container was then driven directly to stand K14 and loaded into the hold of flight PA103.

[48] The trial court considered evidence relating to the placing of baggage into container AVE 4041 and its movements before it was taken to stand K16. At Heathrow there were a baggage build-up area, where baggage checked in at Heathrow was sent before being taken to the aircraft when it was ready for loading, and the interline shed, which was a separate building, where interline baggage was taken after being removed from incoming flights. After being brought to the outside of the shed, it was carried into it by a conveyor belt. In the interline shed, interline baggage for a PanAm flight was identified, separated from other airline baggage and examined

by x-ray before being placed in a container or set aside to await the outgoing flight. On 21 December 1988 John Bedford, a loader-driver employed by PanAm, was working with other persons in the interline shed. He set aside container AVE 4041 to receive interline baggage for flight PA103. The container was identified as the container for that flight by Mr Bedford, who wrote the information on a sheet which was placed in a holder fixed to the container. A number of items were placed in the container. The trial court considered in some detail evidence from Mr Bedford and other witnesses, which led them to accept that Mr Bedford placed a number of suitcases in the container. He then left the interline shed for a time. On his return, two cases had been added to the container. There was a conflict of evidence between Mr Bedford and the x-ray operator, Sulkash Kamboj, an employee of Alert Security, an affiliate company of PanAm, as to how these two cases had come to be added to the container. The trial court preferred the evidence of Mr Bedford that he had been told by Mr Kamboj that the latter had placed them in the container during the former's absence. The trial court also accepted that in his evidence Mr Bedford adopted a prior statement in which he described one of the two cases as "a brown or maroony-brown hardshell Samsonite-type case". Flight PA103A was a little delayed. Mr Bedford finished work soon after 1700 hours, which was his normal finishing time. To wait for the incoming flight would have taken him beyond his normal finishing time. It was accordingly arranged that he should take the container to the baggage build-up area. Mr Bedford drove the container to a position near the baggage build-up area and left it there. It was from there that it was taken out to stand K16. Container AVE 4041 accordingly contained both baggage which had been placed in it in the interline shed, including the two cases referred to by Mr Bedford, and baggage which was loaded into it from flight PA103A.

[49] At para [24], the trial court stated:

> "It emerges from the evidence therefore that a suitcase which could fit the forensic description of the primary suitcase was in the container when it left the interline shed. There is also a possibility that an extraneous suitcase could have been introduced by being put onto the conveyor belt outside the interline shed, or introduced into the shed itself or into the container when it was at the build-up area."

[50] Before reaching a conclusion about the possibility of the introduction of the primary suitcase into the airline baggage system at Heathrow, the trial court turned to consider the evidence relating to Frankfurt airport. At that airport, PanAm had their own security and baggage handling staff. There was a computer controlled automated baggage handling system. Each item of baggage was placed in an individually numbered tray as it was taken into the system. The trays were placed on conveyor belts and instructions were fed into the computer to identify the flight to which the baggage was to be sent, the position from which the aircraft was to leave and the time of the flight. The trays were dispatched to a waiting area where they circulated until an instruction was fed in to summon the baggage for a particular flight, whereupon the items would be automatically extracted from the waiting area and sent to the departure point. Local origin baggage was received at check-in desks, and passed into the system. Transit baggage was taken to one of two areas, known as V3 and HM, where it was fed into the system at points known as coding stations. There were seven coding stations in V3. The general practice was that baggage from an incoming flight was brought either to HM or to V3 in wagons or containers and would be directed by an employee called the interline writer to one or more of the coding stations. The proper practice was that each coding station should not deal with baggage from more than one incoming flight at a time. Normally there were two employees at each coding station. One would lift the items of baggage from the wagon or container and place each item in a tray. The other would enter into the computer, in a coded form, the flight number and destination for the outgoing flight, taking the information from the tag attached to

the item. Records were kept identifying the staff working at particular stations, the arrival times of aircraft, the arrival times of consignments of baggage at HM or V3, and the station or stations to which the baggage from a particular flight was sent. The computer itself retained a record of the items sent through the system so that it was possible, for a limited period, to identify all the items of baggage sent through the system to a particular flight. The computer controlling the baggage handling system contained its own clock, which had a tendency to diverge from real time. It was reset at the start of each day, but by 1600 or 1700 hours the discrepancy might be as much as two or three minutes. Times entered in records not generated by the computer were obtained by the staff from the airport clock or from their own watches.

[51] PanAm had x-ray equipment at Frankfurt, which was used to x-ray interline baggage. The practice of PanAm at Frankfurt was to carry out a reconciliation between local origin passengers and baggage and online passengers and baggage, to ensure that every such passenger who had baggage on the flight was accounted for, but there was no attempt to reconcile interline passengers and their baggage.

[52] The trial court considered in some detail documentary and other evidence relating to baggage unloaded from flight KM180, and baggage sent for loading onto flight PA103A. Flight KM180 reached its parking position at 1248 hours on 21 December 1988. It was unloaded by employees of the airport authority. According to the record, the unloading took place between 1248 and 1300 hours. Andreas Schreiner, who was in charge of monitoring the arrival of baggage at V3 on that day, recorded on the interline writer's sheet (production 1092) that one wagon of interline baggage from flight KM180 arrived at V3 at 1301 hours. A coder, Yasar Koca (who was not called as a witness), was working at station 206 in V3. He completed a worksheet (production 1061) which bore to show that one wagon of baggage from flight KM180

was coded at station 206 between 1304 hours and a later time which the trial court held to be 1310. No passenger on flight KM180 had an onward booking from Frankfurt to London or the United States. All the passengers on the flight retrieved their checked-in baggage at their destinations. The Malta documentation for flight KM180 did not record that any unaccompanied baggage was carried. There was, however, evidence from which the trial court inferred that there was an item of baggage which was neither accompanied nor otherwise accounted for. A computer printout (production 1060) relating to baggage sent for loading onto flight PA103A bore to record that an item which had been placed in tray number B8849 was coded at station 206 at 1307 hours and was transferred and delivered to the appropriate gate to be loaded on board flight PA103A. Discussion of this and other evidence, along with the submissions of counsel, led the trial court to state at paras [31] and [35] that there was a plain inference that an unidentified and unaccompanied bag travelled on flight KM180 from Luqa airport to Frankfurt and there was loaded on flight PA103A. Flight PA103A departed for London at 1653 hours.

[53] The trial court then turned to consideration of evidence relating to Luqa airport. After a description of the arrangements for baggage there, it stated, in para [38]: "On the face of them, these arrangements seem to make it extremely difficult for an unaccompanied and unidentified bag to be shipped on a flight out of Luqa." After reference to the evidence of Wilfred Borg, the Air Malta general manager for ground operations at the time, the trial court stated: "Mr Borg conceded that it might not be impossible that a bag could be introduced undetected but said that whether it was probable was another matter." The check-in for flight KM180 opened at 0815 and closed at 0915 hours, and the doors of the aircraft were closed for departure at 0938 hours. At para [39] the trial court referred to documentary evidence which showed that there was no

discrepancy in respect of baggage loaded onto the flight, the flight log and the load plan each showing that 55 items of baggage were loaded. It went on to state:

> "If therefore the unaccompanied bag was launched from Luqa, the method by which that was done is not established, and the Crown accepted that they could not point to any specific route by which the primary suitcase could have been loaded … The absence of any explanation of the method by which the primary suitcase might have been placed on board KM180 is a major difficulty for the Crown case, and one which has to be considered along with the rest of the circumstantial evidence in the case."

[54] At para [40] the trial court turned to consideration of what evidence there was to establish any involvement on the part of either or both of the accused. In relation to the appellant, it stated that there were three important witnesses, Mr Majid, Mr Bollier and Mr Gauci. We have already referred to the trial court's treatment of the evidence of Mr Majid and Mr Bollier. In discussing Mr Gauci's evidence, at para [55] the trial court referred to an identification by Mr Gauci of the appellant at an identification parade on 13 April 1999 (not 13 August 1999, as stated by the trial court), using the words as written in the parade report: "Not exactly the man I saw in the shop. Ten years ago I saw him, but the man who look a little bit like exactly is the number 5." Number 5 in the parade was the appellant. In court, Mr Gauci identified the appellant, saying: "He is the man on this side. He resembles him a lot." The trial court then turned to consideration of various issues bearing on the reliability of these identifications, which included a discussion of statements made and descriptions given by Mr Gauci on a number of previous occasions, as well as evidence given by him in court. This led in turn to consideration of a number of issues, which included the month in which and the day of the week on which the purchase from Mr Gauci was made, the weather at the time of the purchase, whether Christmas decorations had been put up in Tower Road, Sliema at that time, and a statement by Mr Gauci that his brother Paul (who was not called as a witness) did not work in the shop on that particular afternoon because he had gone home to watch a football match on television. After discussion of these issues, the trial court

reached the conclusion, at para [67], that the date of purchase was Wednesday 7 December 1988. After further discussion of the reliability of Mr Gauci's identification of the appellant, including reference to his demeanour when giving evidence, the trial court stated, at para [69], that it was "satisfied that his identification so far as it went of the [appellant] as the purchaser was reliable and should be treated as a highly important element in this case."

[55] At para [70] the trial court referred to a notice lodged by each of the accused prior to the start of the trial, in identical terms, which was treated as a special defence of incrimination. As it observed, this notice did not in any way affect the burden of proof. There was no onus on the defence to prove that any of the persons referred to in the schedule to the notice were the perpetrators of the alleged offence. Its sole purpose was to give notice to the Crown prior to the start of the trial as to the possible effect of evidence which the defence might lead in the course of the trial. The only persons incriminated in the schedule to the notice to whom reference requires to be made were: "1. Members of the Palestinian Popular Struggle Front ["PPSF"] which may include Mohammed Abo Talb… 2. Members of the Popular Front for the Liberation of Palestine – General Command ["PFLP–GC"]." The trial court considered evidence relating to the PFLP-GC and the PPSF, of the latter of which Abo Talb was a member, as part of their consideration of the Crown case against each of the accused. It is clear from the discussion of this evidence that it did not lead the trial court to have a reasonable doubt about the guilt of the appellant (and it was not because of this evidence that the appellant's co-accused was acquitted). No issue arises in this appeal as to the trial court's treatment of this evidence.

[56] Because the terms of para [82] of the judgment were subjected to differing interpretations by counsel in the course of the appeal, we think it appropriate to quote it in full:

> "From the evidence which we have discussed so far, we are satisfied that it has been proved that the primary suitcase containing the explosive device was dispatched from

> Malta, passed through Frankfurt and was loaded onto PA103 at Heathrow. It is, as we have said, clear that with one exception the clothing in the primary suitcase was the clothing purchased in Mr Gauci's shop on 7 December 1988. The purchaser was, on Mr Gauci's evidence, a Libyan. The trigger for the explosion was an MST-13 timer of the single solder mask variety. A substantial quantity of such timers had been supplied to Libya. We cannot say that it is impossible that the clothing might have been taken from Malta, united somewhere with a timer from some source other than Libya and introduced into the airline baggage system at Frankfurt or Heathrow. When, however, the evidence regarding the clothing, the purchaser and the timer is taken with the evidence that an unaccompanied bag was taken from KM180 to PA103A, the inference that that was the primary suitcase becomes, in our view, irresistible. As we have also said, the absence of an explanation as to how the suitcase was taken into the system at Luqa is a major difficulty for the Crown case but after taking full account of that difficulty, we remain of the view that the primary suitcase began its journey at Luqa. The clear inference which we draw from this evidence is that the conception, planning and execution of the plot which led to the planting of the explosive device was of Libyan origin. While no doubt organisations such as the PFLP-GC and the PPSF were also engaged in terrorist activities during the same period, we are satisfied that there was no evidence from which we could infer that they were involved in this particular act of terrorism, and the evidence relating to their activities does not create a reasonable doubt in our minds about the Libyan origin of this crime."

[57] In considering the evidence which could be regarded as implicating either or both of the accused, the trial court bore in mind that the evidence against each of them had to be considered separately, and that before either could be convicted it would have to be satisfied beyond reasonable doubt as to his guilt and that evidence from a single source would be insufficient. After considering the evidence against the second accused, it expressed the opinion that there was insufficient corroboration for any inference that might be drawn from certain entries in his 1988 diary. Accordingly he fell to be acquitted.

[58] The trial court then turned to the case against the appellant. Since it had not been proved that the second accused was a party to the crime, it followed that the entries in his diary could not be used against the appellant and the members of the court put that matter entirely out of their minds. The trial court then went on to consider evidence to which we have already referred relating to the appellant's visits to Malta from 7 to 9 December 1988, using his own passport,

and on 20 and 21 December 1988, using the passport in the name of Abdusamad. It then referred to the identification evidence of Mr Gauci, the appellant's position in the JSO, his involvement with Mr Bollier and a number of other matters. These included the appellant's departure for Tripoli on the morning of 21 December "at or about the time the device must have been planted." It may be noted that elsewhere the trial court found that check-in for flight KM180 was from 0815 to 0915 hours, while check-in for flight LN147, on which the appellant travelled, was between 0850 and 0950 hours. In para [89] the trial court concluded with, *inter alia*, this statement:

> "[H]aving considered the whole evidence in the case, including the uncertainties and qualifications, and the submissions of counsel, we are satisfied that the evidence as to the purchase of clothing in Malta, the presence of that clothing in the primary suitcase, the transmission of an item of baggage from Malta to London, the identification of the [appellant] (albeit not absolute), his movements under a false name at or around the material time, and the other background circumstances such as his association with Mr Bollier and with members of the JSO or Libyan military who purchased MST-13 timers, does fit together to form a real and convincing pattern. There is nothing in the evidence which leaves us with any reasonable doubt as to the guilt of the [appellant], and accordingly we find him guilty…."

The provenance of the primary suitcase

[59] It was plainly an essential part of the Crown case that the primary suitcase containing the clothing and umbrella purchased at Mary's House, Tower Road, Sliema, Malta, and the improvised explosive device, and appropriately tagged, was placed on board Air Malta flight KM180 from Luqa airport in Malta to Frankfurt am Main airport; that it then passed through Frankfurt airport, where it was placed on board PanAm flight PA103A, and that it was thus carried to London Heathrow airport, where, in turn, it was placed on board flight PA103 to New York.

[60] It is evident from numerous grounds of appeal that they focus, in different ways, on the several stages of the journey just described. In the interests of clarity, it is convenient to categorise them according to the stage or stages of the journey to which they relate and further, by reference to subject matter.

The Frankfurt evidence

[61] In regard to Frankfurt airport, a number of matters require to be considered. These are:

(i) the accuracy of Frankfurt airport records;

(ii) the interpretation of those records by the trial court;

(iii) the possible alternative explanations for the bag carried in tray B8849;

(iv) the implications of the procedure for the x-ray examination of baggage at Frankfurt airport;

(v) the loading of baggage at Frankfurt airport on to flight PA103A; and

(vi) the issue of the extent to which unaccompanied baggage was carried on flight PA103A.

The accuracy of records

[62] This matter is the subject of the criticisms of the decision of the trial court focused in grounds of appeal B1 (a), (b) and (c), B1 (d) (iii), B2 (i), and C, in part. Grounds of appeal B1 (a), (b) and (c) are in the following terms:

> "The court misdirected itself as to the accuracy of the records from Frankfurt airport from which it found that an inference could be drawn that an unaccompanied bag travelled on KM180 from Luqa airport to Frankfurt and was there loaded onto PA103A.
>
> (a) The court misdirected itself as to the application of a presumption of accuracy in respect of records from Frankfurt airport (para 32). No such presumption was

applicable in this case. In any event, the daily resetting of the computer clock did not eliminate inaccuracy and the employees filling out the worksheets did not have an interest in accurate time recording.

(b) No such presumption could be applied to coders' worksheets (production 1061) in circumstances where portions thereof were illegible and where there was evidence that the times shown on those records could have been taken from a variety of sources and the author of the entries of relevance was not called as a witness to explain them or the practice he followed at work. Nor could it be applied to the computer printout (production 1060) since the evidence was that the time shown therein was prone to inaccuracy.

(c) Any such presumption was in any event rebutted by evidence that the system of compiling records was liable to inaccuracy and that the records were themselves inaccurate in a number of respects."

[63] In support of these particular grounds of appeal, Mr Taylor submitted that the trial court had erred in its approach to the evidence relating to Frankfurt airport and that the finding made in para [35] of the trial court's judgment that an unaccompanied item of baggage travelled from Luqa to Frankfurt on flight KM180 and was there loaded on to flight PA103A was not supported on a proper view of the evidence. It was not the case that the appellant was simply submitting that the trial court should have taken a different view of the evidence. It was rather that the trial court had erred and that its errors had influenced it in making material judgments adverse to the appellant. The court had applied a presumption of accuracy in respect of airport business records relating to Frankfurt airport. Such a presumption was not applicable in a criminal case. While a "presumption of regularity" had been referred to, and taken into account, in criminal cases in limited circumstances, no presumption of accuracy of business records had been applied in any previous criminal case in Scotland. It was only in relation to acts of official or administrative bodies, where the matter in issue had not been challenged in cross-examination, that a presumption of accuracy had been taken into account. Neither of these factors applied in the present case. The Crown had not founded on any presumption, nor had it founded on any special

status attaching to the documents by virtue of section 279 of, and Schedule 8 to, the 1995 Act. In any event, the basis on which the trial court had applied this presumption was flawed. In developing these submissions, Mr Taylor referred to the matters set forth in para [29] of the judgment. He drew attention to the contents of the interline writer's sheet, production 1092. He also drew attention to production 1061, a worksheet completed by a coder purporting to record the coding of baggage from flight KM180, which had been carried out at coding station 206 in area V3. There was an issue concerning the interpretation of this document. He also drew attention to a computer printout, production 1060, generated on the initiative of Mrs Bogomira Erac, a computer programmer at Frankfurt airport. This document was discussed by the trial court in para [30] of its judgment. It was evident that the trial court had taken into account a presumption of accuracy of these records of Frankfurt airport "in order to allow it to reinforce the inference and overcome defence submissions which were based on the evidence in the case. In effect, in having regard to this presumption, the court cast a burden on the defence to satisfy the court that the records were not accurate." It was evident from the terms of para [32] that the trial court had applied a presumption. In that paragraph, it said: "The records were records regularly kept for the purposes of the airport business, and can be accepted in the absence of some reason to doubt their accuracy." The terms of that sentence, it was submitted, went beyond the drawing of an inference of fact from evidence.

[64] In support of his submissions Mr Taylor drew attention to *McIlhargey v Herron* 1972 JC 38, *Valentine v McPhail* 1986 SCCR 321, *Pickard v Carmichael* 1995 SCCR 76 and *Donaldson v Valentine* 1996 SCCR 374, cases which demonstrated that in certain circumstances the court in criminal matters had had regard to a presumption of regularity. However, that process was limited to acts of an official or administrative nature. Such a presumption, it was submitted,

could be relied upon only where the matter in issue was unchallenged in evidence. That meant that it could not be relied upon in the present case where there was active controversy relating to the matters in question. Further, the trial court had claimed that the records involved in the present case had been "regularly kept"; that was said to be demonstrably erroneous.

[65] Mr Taylor went on to seek to derive assistance from a number of other authorities. These included Alison, *Principles and Practice of the Law of Scotland*, ii, 599, *Dickson on Evidence*, third edition, paras 114 and 1225 and *Walkers on Evidence*, first edition, pages 54 to 55. Reference was also made to *Erskine's Institute of the Law of Scotland*, as relied upon in *Dickson*.

[66] Mr Taylor next submitted that, even if the presumption which had been relied upon was generally applicable in criminal cases, it was not applicable in the particular circumstances of this case. In para [32] of the judgment the trial court made certain observations about the computer clock at Frankfurt airport. It stated that "there was an interest in accurate time-keeping since one of the purposes of keeping records was to be able to trace baggage consignments through the system". The trial court appeared there to take the view that these circumstances rendered the presumption applicable. He then referred to passages of evidence concerning the accuracy of the computer clock, the practice of coders and related matters, including evidence of Mrs Erac, Mehmet Candar, Joachim Koscha, Andreas Schreiner and Gunther Kasteleiner. It appeared that while the coders were, no doubt, told to be accurate in their work, the evidence was that they did not always succeed in this.

[67] Mr Taylor next made submissions in support of ground of appeal B1 (b). In this connection he drew attention to features of production 1061, image 100. There was a major problem in regard to the legibility of the time recorded as that of completion of coding of the baggage from KM180. The only witness who was asked to interpret the document, Mr

Schreiner, interline writer, had been unable to make out the correct time. Yasar Koca, the man who made the entry in this document, did not give evidence. The result of that was that the time of the completion of the coding was uncertain. In addition the coder's method of time ascertainment was unknown. In these circumstances it was impossible to apply any presumption of accuracy. Such evidence as there was concerning methods of time ascertainment by coders came from Mr Koscha. He indicated that they might use their own watches or the coding hall clocks. That meant that errors could not be excluded. In regard to the computer printout, production 1060, Mrs Erac testified that the computer could be set at the start of each day by means of the use of a variety of other clocks. Accordingly the times which it recorded had been potentially inaccurate. Furthermore, the trial court had failed to recognise the importance of the fact that Mr Koca had not been adduced as a witness. Against that background the trial court should have been very slow to conclude that tray B8849 contained a bag from flight KM180. The trial court, while recognising that state of affairs, had not responded to the submissions made to it regarding its implications. On that basis it could be criticised, as appeared from *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123.

[68] Mr Taylor next made submissions in support of ground of appeal B1 (c). It had been the appellant's submission to the trial court that there had been demonstrated "omissions, mistakes and examples of records being completed out of sequence", as appeared from the evidence of Mr Koscha. He had acknowledged that mistakes had been made, that entries were not always chronological and that coders might forget timeously to complete entries and make them later. In para [33], the trial court itself referred to a number of instances in which the records showed that there were small discrepancies in the commencing and finishing times entered for coding particular consignments. This showed that baggage from more than one flight might have been

coded at the same station at the same time. It was therefore difficult to understand why the trial court felt that it was permissible to apply a presumption of accuracy to the material entries. The records had not been regularly kept, in the sense of being accurately kept. This contrasted with the circumstances referred to in *Dickson on Evidence*, II, para 1225 of the compilation of mercantile and business books with care for the purpose of preserving a true record of transactions. Regularity was a pre-requisite of admissibility of evidence. In the circumstances the trial court had not been entitled to apply any presumption. In support of his contention concerning the unreliability of the records of Frankfurt airport, Mr Taylor drew attention to a number of examples of demonstrable inaccuracy in production 1061. Even the entry immediately preceding the crucial entry for flight KM180 was itself erroneous. The Crown could gain no comfort from the circumstances relating to the baggage of Karen Noonan and Patricia Coyle, elicited from Mr Kasteleiner. Those circumstances could cast no light upon the accuracy of the records made by the coder Koca at coding station 206. The mere fact that others might have done their jobs properly did not help the court to decide whether or not he had done so. Mr Taylor went on to make a number of further detailed submissions based on the evidence before the trial court, which he argued demonstrated the unreliability of the documentary records at Frankfurt.

[69] The Advocate depute in reply observed that the essential criticism of the trial court was that it had erred in law by applying a presumption of accuracy. He submitted that, when the reasons of the trial court were properly understood, it was plain that no such presumption had been applied by it. He argued that that became clear if the basis upon which the evidence concerned had been admitted was recognised and when the approach of the trial court to it was examined. The evidence had been recorded in a number of different types of document

generated at Frankfurt airport. Most of the evidence given about these documents had been taken from witnesses who were not themselves their authors. In order that this documentary material might be admitted in evidence, the Crown had relied upon section 279 of, and Schedule 8 to, the 1995 Act. Paras 2 to 6 of the Schedule were concerned with the admissibility of evidence in the form of a statement as to fact contained within business documents. If the conditions specified in para 2 were satisfied, the statement as to fact contained within the document was rendered admissible as evidence. This did not necessarily mean that it provided conclusive proof of the fact. The condition set out in para 2(1)(b) could be satisfied by a certificate, as provided for by para 4. Otherwise the satisfaction of the conditions required to be established by direct evidence or by inference drawn from evidence. The underlying philosophy of these provisions was the recognition that, in view of the circumstances in which such documents were made, they were likely to be sufficiently reliable as to be an adequate substitute for oral evidence. The effect of these statutory provisions was that the content of the documents was rendered admissible as evidence. It then would fall to be assessed by the court in the same way as any other evidence. In particular the court would no doubt take into consideration the procedures in any particular business with a view to deciding the extent to which it could rely upon evidence so admitted.

[70] In the circumstances of the present case, it had been clear from a very early stage that the Crown was intending to rely on records rendered admissible by these provisions. During the evidence of Wilfred Borg an objection had been taken to the admissibility of the documentary evidence which had been put to him. The objection related to the adequacy of the certification of the document concerned. After discussion, this objection had been repelled. Thereafter, there had been no further objection to the admissibility of any of the airport documentation. Nothing

had been said in the closing submissions on behalf of the appellant to suggest that any individual document had failed to satisfy the tests set out in para 2(1) of Schedule 8.

[71] The Advocate depute next turned to examine the way in which he contended the trial court had treated the evidence concerned. He argued that, in considering the meaning to be attributed to the sentence concerning record keeping in para [32] of the judgment, it was necessary to look more generally at what the trial court said. In para [17], having correctly described the nature of the Crown case, the trial court observed that:

> "This case is largely dependent on oral and documentary evidence relating to the three airports. From this evidence, it is alleged, an inference can be drawn that an unidentified and unaccompanied item of baggage was carried on KM180 and transferred to PA103A at Frankfurt and PA103 at Heathrow."

This demonstrated that the trial court had understood that it had to assess the evidence and that no question of any presumption arose. It had then gone on to examine the evidence that might vouch the inference. In paras [26] to [30] it provided a description of the procedures operated at the material time at Frankfurt airport and an explanation of the contents of the relevant documentary productions. The question for the trial court was whether or not it could draw an inference that an item of baggage which had come to Frankfurt on flight KM180 had been transferred to and left on flight PA103A. It did not appear to be disputed that, if the documentary evidence at Frankfurt was examined at face value, it appeared to show the transfer of an item of baggage from KM180 to PA103A. The question for the trial court had been whether or not that was an inference that could be drawn and whether or not that inference could be regarded as reliable.

[72] It was evident, the Advocate depute submitted, from the terms of para [33] that it adopted that approach. In that paragraph the trial court marshalled the various points of criticism of the reliability of the Frankfurt records that had been advanced. It specifically recognised that errors

could exist. Having done so, it expressed itself in a fashion that was entirely inconsistent with the application of any legal presumption; the recognition of the possibility of error was inconsistent with the adoption of such a presumption. The sentence in para [32], to which such importance had been attributed by the appellant, had to be read in the context of the trial court's description of the way in which it had approached the documentation at Frankfurt. In paras [33] and [34] it had given detailed consideration to the various points put before it concerning the documentary records, so far as relevant. In para [35] it had expressed its conclusion as to the weight to be given to the various points which had been made, which included the suggestion that baggage from some other source than KM180 was being processed at station 206 at the material time. Having regard to the way in which the trial court had expressed itself, it was apparent that it had properly understood the nature of the evidence concerned and had assessed that evidence in an appropriate way, namely, by looking at it in the way that it would look at any other evidence. It therefore followed that the criticism made in ground of appeal B1 (a) failed. Since paragraphs (b) and (c) presupposed that a presumption such as was mentioned in paragraph (a) had been relied upon, they also were unsound. Furthermore, it had to be recognised that none of the particular conclusions which were reached by the trial court had been criticised against the criterion provided by section 106 (3) (b) of the 1995 Act in these particular grounds of appeal.

[73] The criticisms of the approach of the trial court proceed upon the basis that in para [32] the trial court applied a "presumption of accuracy" in respect of documentary records from Frankfurt airport, in circumstances where no such presumption was applicable. This contention was based almost exclusively upon that part of para [32] which is in these terms: "The records were records regularly kept for the purposes of the airport business, and can be accepted in the absence of some reason to doubt their accuracy." In assessing the validity of this criticism, in

our opinion, it is necessary to look at the evidential background to the matter and to see how the trial court did in fact treat the documentary records relating to events at Frankfurt airport. First of all, it appears to us clear that the documentary records had been rendered admissible in evidence under the provisions of section 279 of, and Schedule 8 to, the 1995 Act. While at an early stage in the trial proceedings, objection had been taken to the admission of certain documentary evidence relating to events at Luqa airport, after discussion of the issue it had been recognised that the point taken had been misconceived and the objection had been repelled. Thereafter, during the course of the trial, documentary evidence from airports, and in particular Frankfurt airport, was treated as admissible under the terms of paragraph 2(1) of Schedule 8 to the 1995 Act. It is worth observing that in the present appeal there is no suggestion that the documentary evidence was wrongly treated as admissible. In these circumstances, the statements made in the documentary material were a source of evidence which fell to be evaluated in the same way as any other evidence in the case.

[74] As to the treatment of that evidence by the trial court, we note that in paras [26] to [28] the trial court describes the operation of the baggage control system at Frankfurt at the material time. In paras [29] and [30] it deals in detail with the particular events at Frankfurt which are crucial in this case. It there examines the contents of productions 1092 and 1061, which have already been mentioned. In para [30] the trial court considers the significance of production 1060, the computer printout generated by Mrs Erac. In these two paragraphs the court narrates what the documents bear to record. In para [31] the trial court expresses its view as to the inference which may be drawn from the documentary evidence as a whole. In para [32] it deals specifically with a range of criticisms of the reliability of the documentary evidence relating to Frankfurt which had been advanced on behalf of the appellant. In addition, it explains why it

was not persuaded that those criticisms undermined confidence in the evidence. It is in this context that the trial court makes the observation concerning the records which is now the focus of the appellant's criticism. In these circumstances, we consider that that sentence does not possess the significance sought to be attributed to it by the appellant. It appears to us to be an observation that the records were regularly kept for the purposes of the airport business, which we understand to mean no more than that it was an established part of the procedures followed at the airport at the material time that such records should be kept. In saying that those records could be accepted in the absence of some reason to doubt their accuracy, we consider that the trial court was simply saying that they could properly be regarded as reliable unless some specific reason existed to doubt their reliability. We consider that these statements by the trial court are no more than the expression of a conventional approach to documentary evidence rendered admissible in any case. For these reasons, we consider that the submission that the trial court applied a "presumption of accuracy" is unfounded.

[75] As we have noted earlier, Mr Taylor for the appellant relied upon the cases of *McIlhargey v Herron, Valentine v McPhail, Pickard v Carmichael* and *Donaldson v Valentine*. These were all criminal cases in which issues arose as to whether certain inferences of fact could properly be made in the circumstances of the facts found established. We do not see them as laying down any general principles of the kind contended for. Nor do we find the passage from *Alison* relied upon by the appellant of any assistance in the circumstances of this case. It is concerned with certain categories of records which, unlike records of courts, do not prove themselves. However, where section 279 of, and Schedule 8 to, the 1995 Act apply, rendering documentary material admissible as evidence, the passage does not appear to us to assist. The passage from *Dickson on Evidence* para 114 appears to us to deal with a presumption which was not relied upon by the

trial court in this case. As regards the passage at para 1225, we do not consider it to be of assistance, dealing as it does with issues of admissibility, as opposed to the weight which may properly be given to documentary evidence which has been established to be admissible. The passage in *Walkers on Evidence*, first edition, at pages 33-34, deals in our opinion with a presumption relating to business books, on which the trial court did not rely.

[76] In the course of argument on these grounds of appeal, from time to time, it was contended that in relation to certain matters of detail, the trial court had erred, was wrong, or had not adopted a proper view of the evidence. Having regard to what we have already said concerning the extent to which this court is entitled to interfere with a decision of fact by the trial court, we do not regard these criticisms as relevantly formulated. In these circumstances we reject grounds of appeal B1 (a), (b) and (c).

[77] We consider next the criticisms in grounds of appeal B1 (d) (iii) and B2 (i), which possess essentially the same subject matter. These grounds are in the following terms:

> "B1. The court misdirected itself as to the accuracy of the records from Frankfurt airport from which it found that an inference could be drawn that an unaccompanied bag travelled on KM180 from Luqa airport to Frankfurt and was there loaded on to PA103A…
>
> (d) the court misinterpreted, ignored or gave insufficient weight to the evidence undermining the accuracy of records of Frankfurt airport in respect that: …
>
> (iii) the court failed to have proper regard to the inaccuracy in respect of time of the computer print-out and the inaccuracy of the coders worksheets. ; and
>
> B2. The court erred in concluding in para 35 that none of the defence submissions cast doubt on the inference from the Frankfurt documents and other evidence that an unaccompanied bag was transferred from KM180 to PA103A in respect that:
>
> (i) the court failed to have proper regard to the inaccuracy of the computer record, production 1060, combined with the potential inaccuracy of the times recorded in the coders' worksheets, production 1061 (para 32). …"

[78] In support of these grounds of appeal, Mr Taylor referred to the submissions which he had made on this matter before the trial court. He drew attention to the problem that, even if the coders were faithfully checking their watches, it was difficult to be sure that they were using an accurate time source. The evidence of Mrs Erac was that, while she set the time in the computer system at the beginning of each day, once again the time reference was unknown. On account of the characteristics of the computer, by 1600 or 1700 hours the computer time might have varied by two to three minutes from real time. If the computer clock on 21 December 1988 at around 1300 hours had departed from real time by more than three minutes, that in itself would undermine the inference that tray B8849 carried a bag from flight KM180. Before the trial court, Mr Taylor had given examples illustrating this point. While he recognised that it was true that the scope for error had been reduced by the fact that the time recorded for the coding of the bag (1307 hours) was in the middle of the period recorded for the coding of baggage from flight KM180 at station 206, that did not mean that the risk was completely eliminated. He submitted that because of this the trial court's approach to this matter was flawed. If error had taken effect in the way contemplated in his illustrations, the bag in tray B8849 could not have come from flight KM180, but would have come from flight LH1498, which, according to production 1061, image 100, had been coded between 1257 and 1303 hours on that day. There was also a significant possibility that luggage from flight LH669 had been being coded at the material time.

[79] Turning to ground of appeal B2 (i), Mr Taylor drew attention to para [35] of the judgment. The evidential basis for this ground of appeal had already been discussed. Mr Schreiner and Mr Candar had both given evidence concerning inaccuracies in the times used in coding. The trial court had not given proper weight to the possibility that errors in time recording had undermined the inference which the Crown sought to draw. Had the trial court

done so, it would have been unable to reach the view expressed in para [35]. When challenged, Mr Taylor submitted that this formulation was appropriate in the context where a trial court had given reasons for its decision, and that it would not have been appropriate had there been a trial by jury. The trial court had brushed to one side all of the criticisms made of documentation and record keeping at Frankfurt.

[80] In reply to these submissions, the Advocate depute submitted that ground of appeal B1 (d) (iii) as formulated related solely to the weight of the evidence; it was claimed that the trial court had failed to have "proper regard" to certain inaccuracies. However, it was plain from the judgment of the trial court that it had been well aware of the criticisms made on behalf of the appellant which were founded on these inaccuracies. It had taken them into account when it had reached its conclusion. Accordingly, in these circumstances, this ground of appeal provided no proper basis for interference by an appeal court. The weight given to the evidence could have founded an appeal only if the appellant had sought to contend, in reliance on section 106 (3) (b) of the 1995 Act, that no reasonable trial court properly directing itself could have returned a verdict of guilty. This had not been done. It could not be said that the trial court had merely noted the submissions, but otherwise ignored them. In the light of para [32], it was clear that it had had regard to the possibilities of error as to time. The Crown's primary position was that, the appellant not having based this ground of appeal on section 106 (3) (b) of the 1995 Act, there was no need for this court to consider a review of the evidence on the matter. However, the Advocate depute contended that, if such a review were conducted, it would be clear that the trial court had been quite entitled to deal with the matter in the way in which it had done; its approach to the matter had been a reasonable one. The point made in the last sentence of para [32] regarding the centrality of the time of coding of the relevant bag by reference to the period

of time attributed to the coding of baggage from flight KM180 was a sound one. In addition, if one were to accept that the period of coding of baggage from flight KM180 ran between 1304 and 1316 hours, instead of 1310 hours, a possible reading of the relevant record, on the day in question, then there would be an even greater margin for the coding of the bag, unless one were to hold that other baggage had been coded at the same time, of which there was no record.

[81] The Advocate depute submitted that it appeared that the appellant was seeking to demonstrate, either that the system at Frankfurt as a whole was incapable of providing sufficiently accurate information reliably to track the source of a particular item of luggage, or that the way in which the system was operated was compromised by the practices of employees. Evidence relating to the accuracy of the computer printout had been given by Mrs Erac. She said that, by 1600 or 1700 hours on any particular day, the time difference between the computer clock and real time might be two or three minutes. It was also pertinent to take into account the evidence of Mr Koscha, who explained the use made of coders' worksheets. His evidence showed that the task of tracing an item of baggage from a coding station by the use of such records was commonplace. It could reasonably be inferred from this evidence that the system itself was capable of effectively performing the task expected of it. For example, it had been used by the appellant to demonstrate that a bag from flight LH1071 from Warsaw had been transferred through the baggage system to flight PA103A. It was also used to demonstrate the transfer of baggage from flight LH631 from Kuwait. Thus, in these two respects, the appellant himself had relied upon the accuracy of the system. In that context it was interesting to note that the bag from Warsaw and the bags from Kuwait had been processed about an hour and a half and two and a half hours after the bags from flight KM180. If the appellant's point relating to the computer clock were correct, it ought to mean that the records would become less reliable as the

day wore on. A further example of how the appellant's general attack on the reliability of the system was unfounded came from the evidence relating to the baggage of passengers Karen Noonan and Patricia Coyle. They had travelled on flight LH1453 from Vienna to Frankfurt, where they had boarded flight PA103A. They had five pieces of luggage. Apart from the bag which appeared to have come from flight KM180, the computer printout of ingested baggage for flight PA103A showed that five other items of luggage had been processed in hall V3, as appeared from the evidence of Mr Kasteleiner. The computer printout showed that three of the five pieces were coded at station S0012 and the remaining two at station S0011 at times when the relevant coders' worksheets showed that those two stations were processing baggage from flight LH1453. The remains of all of these five items of baggage were recovered from around Lockerbie. The fact that that baggage could be successfully traced through the documentation was of importance, since those items had been processed in the same hall as the baggage from flight KM180 had been, about half an hour earlier. The trial court had not thought fit to mention this particular evidence, but there was no obligation upon it to mention all of the evidence which was of significance.

[82] As regards the possibility that the system was compromised by the practices of employees, while it emerged from the evidence that errors or inaccuracies could be demonstrated on the face of some of the documentation, no attempt had been made to suggest that any deficiency or inaccuracy existed in the worksheet records relating to flight KM180. Much of the criticism which had been directed against the operation of the system had been based upon speculation. Against this background, it could be said that the trial court had properly understood the evidence and had been entitled to reach the conclusion which it did in para [32].

[83] In regard to ground of appeal B2 (i) the Advocate depute pointed out that the ground was framed using the words "the court failed to have proper regard" to certain matters and that it had erred in reaching the conclusion which it did in para [35] of the judgment. In this connection, the Advocate depute repeated the criticism of the formulation of this ground which he had made in relation to ground B1 (d) (iii). He also reiterated the points made concerning the evidence in relation to ground of appeal B1 (d) (iii). In addition to those points, the Advocate depute referred to the evidence of Mr Koscha, which showed that even the coding of single items of luggage was recorded. That explained why in the case of some records, no finishing time for coding was recorded.

[84] In our opinion, it is important to recognise the terms in which these two grounds of appeal have been framed. Ground B1 (d) (iii) contains the words "The court failed to have proper regard to" the inaccuracies there mentioned. In ground B2 (i), it is said that "the court failed to have proper regard to the inaccuracy" of the records there mentioned. In our view, these particular formulations do not recognise the proper role of an appeal court, whether or not it had been provided with a statement of the reasons for the conviction of an appellant. It is not our function to substitute our own conclusions on the evidence for those of the trial court. The weight which it attached to different pieces of evidence, and in particular the importance which it attributed to the alleged shortcomings of the records kept at Frankfurt airport was, in our opinion, a matter for it. Only if the trial court adopted a view which no reasonable trial court could have adopted would we be entitled to interfere. However, that is not an issue in this ground of appeal, as we have already explained. Accordingly, in these circumstances, we do not consider that these grounds of appeal have been relevantly framed. In that matter therefore we agree with the submission made by the Advocate depute.

[85] It is quite plain from what the trial court says in para [32] that it took into account the possibility of the various errors founded upon by the appellant and reached its own conclusion upon the matter. Accordingly it cannot be said to have ignored the evidence or its implications. Looking at the evidence to which our attention was drawn, we are satisfied that the trial court was entitled to take the view which it did. In this respect, two aspects of the evidence impressed us as pointing towards that conclusion. The first of these is reflected in the last sentence of para [32], where it is observed that the suspect case was recorded as being coded in the middle of the time attributed to baggage from flight KM180, so that the possible significance of such errors as were founded upon is reduced. It appears to us that this point is rendered the stronger, if anything, by acknowledgement of the possibility that the end point in time of the coding of that baggage might be taken to be 1316 hours. The Advocate depute indicated that he was content to proceed upon that basis. If that is done, the margin of comfort as regards the effect of inaccuracies is enhanced.

[86] In addition, the trial court had before it evidence in relation to the baggage of passengers Karen Noonan and Patricia Coyle. The fact that they flew from Vienna to Frankfurt on flight LH1453 was the subject of agreement by joint minute. They had between them five pieces of baggage, all of which were checked in at Vienna. The computer printout of ingested baggage for flight PA103A shows that five items of baggage were processed in hall V3. Three of those pieces were coded at station S0012 between 1239 and 1241 hours and the remaining two pieces were coded at station S0011 between 1240 and 1241 hours on the day in question. According to the coders' worksheets, between these times each of those two stations was processing baggage from flight LH1453. The remains of these five items of luggage were recovered around the crash site. It appears to us that the submission by the Advocate depute, based on this and other

material, that the documentary records compiled at Frankfurt could be used for the purpose of tracking baggage and that the results obtained could be relied upon, was well founded. In any event, in our opinion, the trial court was quite entitled in the light of such material to take that view. In all these circumstances we regard these grounds of appeal as without merit.

[87] We consider next the criticism of the trial court's approach focused in ground of appeal C. That ground, so far as relevant in the present context, is in these terms:

> "The court erred in failing to deal with defence submissions as to the effect on the Crown case of the Crown's failure to call witnesses…Koca…"

[88] Mr Taylor submitted that the failure of the Crown to call Mr Koca as a witness was a factor to which the trial court ought to have had regard when assessing the weight to be attached to the circumstantial case which the Crown had advanced before it. Had Mr Koca given evidence, his evidence would have cast light upon a number of areas of controversy. These were whether he completed worksheets contemporaneously, whether he estimated time, what source he used for any times entered in the worksheets, and whether the coding of baggage from flight KM180 ended at 1310 or 1316 hours. As it was, all of these questions and others remained unresolved on account of his absence as a witness. The Crown had required to rely on the bare documentation and to ask the trial court to draw an inference from it that it showed that an unaccompanied bag had been transferred from flight KM180 to flight PA103A. The absence of Mr Koca as a witness was a significant factor which was capable of undermining the inference which the trial court felt able to draw. In this connection reference was made to *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123, per Lord Gill at page 1222. It was submitted that the trial court's failure to deal with the submissions made at the trial on this topic constituted an error in law. In other words, the trial court had drawn an inference in relation to the Crown's circumstantial case on the basis of evidence which it has failed properly to assess.

The Crown's position appeared to be that the trial court had responded to these submissions to the effect that failure to call the named witnesses was a factor to which the trial court should have had regard when assessing the weight to be attached to the Crown's circumstantial case, in para [32]. That was an erroneous contention. The case of *Jordan v Allan* 1989 SCCR 202 showed that the bare narration in a judgment of evidence or a contention was insufficient to indicate that the matter had been considered and dealt with. All that had been done by the trial court in para [32] was to mention the existence of the appellant's submission.

[89] The Advocate depute submitted that the opening words of para [32] showed that that court had fully understood the submission made in relation to the absence of Mr Koca as a witness. In the succeeding passages of para [32], the trial court narrated the various detailed propositions advanced in support of the contention that the inference under consideration ought not to be drawn. Subsequently it went on to explain why it did not see any strength in any of those propositions. Accordingly, far from erring in failing to deal with the submissions made, based on the absence of Mr Koca, the trial court had considered and made a decision on those submissions. No error of law existed.

[90] Furthermore, the appellant's present submissions ignored the existence and significance in the context of section 279 of, and Schedule 8 to, the 1995 Act. The underlying assumption of those statutory provisions was that an individual would not normally be called to speak to the contents of a document which was a routine record, since such an individual would be unlikely to remember details of the transaction concerned.

[91] In regard to the deciphering of the record of the finishing time of the coding of baggage from flight KM180, it was accepted that this was something with which Mr Koca might have dealt, had he been called as a witness, as had been the Crown's original intention. However, in

cross-examination of Mr Schreiner, who had been taken through the entries concerned, it was elicited that the finishing time was either 1310 or 1316 hours. That was a position with which the Crown had been content, and therefore it was decided not to call Mr Koca.

[92] It had also to be understood that the criticism of the Crown for not calling Mr Koca was part of a more general attack related to whether the trial court ought to draw the relevant inferences from the Frankfurt airport documents and whether such inferences could be relied upon. It was clear that the trial court had dealt with those matters. There was no valid comparison between the present circumstances and the circumstances of the case of *Jordan v Allan*. In that case, the justice had completely failed to consider the appellant's evidence.

[93] We have reached the conclusion that ground of appeal C, so far as it relates to Mr Koca, possesses no merit. In para [32], the trial court narrates the submissions made on behalf of the appellant in relation to the drawing of the inference there mentioned. These submissions are described in detail, including that specifically related to the fact that the Crown had not called Mr Koca as a witness. Thereafter in the latter part of para [32], the trial court expresses its conclusions on these submissions. Accordingly, in our view it cannot be said that the trial court merely narrated the appellant's submissions and thereafter ignored them. For that reason we consider that the case of *Jordan v Allan* is readily distinguishable from the present case. In that case the justice merely narrated that the appellant had given evidence, but failed to indicate whether he found the evidence acceptable or otherwise or what significance he considered it to possess. Furthermore, we agree with the submission made by the Advocate depute that the background to the present issue includes the use by the Crown of the provisions of section 279 of, and Schedule 8 to, the 1995 Act. It appears to us that where those provisions are employed the underlying assumption is that in many cases, the maker of a documentary record will not be

called to give evidence concerning its contents. That appears to us to diminish any force in the criticism that Mr Koca was not called in this case.

[94] One of the questions with which, it may be, he could have dealt was that of the end time of the coding of baggage which had been unloaded from flight KM180. However, given the position, explained by the Advocate depute, that the Crown were content to proceed upon the interpretation of the record given in evidence by Mr Schreiner, it appears to us to be understandable why they decided not to call Mr Koca. Had the appellant wished to lead evidence from Mr Koca for any of his purposes, the witness was, of course, available to him. Finally we should indicate that we do not consider that the passage relied upon from *Caledonia North Sea Ltd v London Bridge Engineering Ltd* supports the appellant's contentions in the circumstances of this case.

The interpretation of records

[95] This issue is focused in ground of appeal B1 (d) (ii). It is also related to the matter in ground C with which we have already dealt. Ground of appeal B1 (d) (ii) is in the following terms:

> "The court misdirected itself as to the accuracy of the records from Frankfurt airport from which it found that an inference could be drawn that an unaccompanied bag travelled on KM180 from Luqa airport to Frankfurt and was there loaded on to PA103A …
>
> (d) the court misinterpreted, ignored or gave insufficient weight to the evidence undermining the accuracy of records of Frankfurt airport in respect that: …
>
> (ii) the court misinterpreted the evidence of Schreiner as to the time of the completion of coding on production 1061 at para 29."

[96] In supporting this ground of appeal, Mr Taylor drew attention to the terms of para [29] of the judgment and, in particular, the sentence in which it said, in regard to the deciphering of the

record of the time for the completion of the coding of baggage from flight KM180 on production 1061, that "the figure for the completion of coding might be 1316, but Mr Schreiner preferred the reading 1310, which is more consistent with what can be seen on the document." He then went on to draw attention to what Mr Schreiner had in fact said about the matter on day 37 of the trial at page 5732:

> "Q: Can you tell me, please, what time you think that is recorded there for the end time, please?
>
> A: It could be 1310, it could be 1316. I can't really see clearly."

Given that evidence it was submitted that the trial court had quite simply misinterpreted the evidence concerned, as it was plain that Mr Schreiner had expressed no preference. What it appeared that the trial court had done was to use its own assessment of the record. In doing so, it was apparent that it had followed a course of action which had been condemned in *Steele v HM Advocate* 1992 SCCR 30, that is to say it made up its own mind as to what evidence revealed where expert evidence was necessary for that purpose. In the same connection reliance was placed upon *Gray v HM Advocate* 1999 SCCR 24. Such a course was plainly objectionable, since it amounted to the eliciting of evidence outwith the presence of the appellant where he had no opportunity to cross-examine. To demonstrate the objectionable nature of what had been done, Mr Taylor also relied upon *Sandells v HM Advocate* 1980 SLT (Notes) 45 and *Aitken v Wood* 1921 JC 84.

[97] Mr Taylor next drew attention to submissions before the trial court which had been made on the significance of this issue by reference to an illustration of the consequences of assuming a finishing time of 1316 hours. The effect of this was to show that an end time of 1310 hours was more likely, having regard to the number of items of baggage involved, whereas, if an end time of 1316 hours was assumed, then the process of coding items from flight KM180 had taken

rather longer than might have been expected. This circumstance might suggest that bags additional to those from flight KM180 had been coded at station 206 at the same time. Thus this particular error on the part of the trial court had led it into minimising the possibility that bags other than those from flight KM180 had been being coded at station 206 at the relevant time. Mr Taylor also drew attention to the fact that the Crown appeared to accept that the trial court had erred in the respect alleged.

[98] In responding to these submissions, the Advocate depute accepted that it was not apparent from the transcript of the proceedings that Mr Schreiner had preferred an end time of 1310 hours. However, the trial court had said that he had expressed a preference. It was submitted that there could have been some form of emphasis in his evidence, which was not discernible from the printed word, by which he indicated such a preference. Such an emphasis might be a natural component of oral testimony, which was exactly the kind of process referred to in the opinion of Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Company Ltd* 1919 SC (H.L.) 35, at pages 36 to 37. However, on being pressed on this matter, the Advocate depute accepted that it was not obvious from the transcript how any preference could have been expressed.

[99] Turning to the suggestion made by the appellant that the trial court had transgressed the principles described in *Steele v HM Advocate* and *Gray v HM Advocate*, the Advocate depute pointed out that, in the passage of the evidence of Mr Schreiner under consideration, the cross-examiner had been aiming to obtain an interpretation from the witness and to move the witness from one interpretation to another. In dealing with the cross-examination of Mr Schreiner, the trial court had had two different kinds of evidence before it, namely the physical evidence of the document and the oral evidence given about the document by the witness. The trial court had

been entitled to bring these two different pieces of evidence together in dealing with the issue. Plainly the trial court had been entitled to examine the document and to consider the testimony given about it. As regards *Sandells v HM Advocate* and *Aitken v Wood*, in each of those cases the decision-making tribunal had sought to arrive at a decision of fact by its own examination or experimentation in the absence of any evidence as to the particular issue. That was not what had happened here. On the contrary, the cases of *Donnelly v HM Advocate* 2000 SCCR 861, *Steele v HM Advocate* and *Gray v HM Advocate* were of greater relevance. In the present case the trial court had had some evidence from Mr Schreiner about the interpretation of the document. It was legitimate for the trial court to consider that evidence, provided it did not indulge in speculation. While there was scope for a difference of opinion about the digit involved, the trial court's view of the matter should be allowed to stand, unless it was one which no reasonable trial court could have reached.

[100] The Advocate depute submitted that if this court were to hold that the trial court had misdirected itself in relation to the matter under consideration, the question of the materiality of such misdirection would arise. The submission of the Crown was that any misdirection in respect of the matter concerned was not material. Hence, there was no miscarriage of justice arising out of it. The whole purpose of the exercise conducted by the appellant at the trial was to persuade the court that items of baggage other than those from flight KM180 were being processed at the same coding station without there having been any record of that. Thus the purpose of the appellant had been to show that, with an end time of 1316, the time taken in the coding had been longer than necessary for the number of items of baggage being processed from flight KM180. However, the fact of the matter was that there was no evidence to vouch the proposition that an end time of 1316 would have indicated the passage of a time too long for the

processing of baggage from flight KM180, notwithstanding that Mr Taylor in his closing submissions had conducted an arithmetical exercise which sought to come to such a view. That exercise had been spurious, having no evidential basis. Furthermore, materiality was dependent upon the trial court having been prepared to hold, first, that there were missing wagons of baggage from flight LH669, which the trial court did not hold, and, secondly, that any such missing items would have been coded at station 206 without there being any record made of that. There was no evidence of such a thing. In that respect, the appellant's argument depended upon speculation.

[101] In para [29] the trial court says, in relation to the completion time for coding of the baggage from flight KM180, as recorded in production 1061:

> "It was suggested that the figure for the completion of coding might be 1316, but Mr Schreiner preferred the reading 1310, which is more consistent with what can be seen on the document."

Having considered Mr Schreiner's evidence, which we have quoted above, we are satisfied that the trial court did misinterpret his evidence as to that matter. We are unable to reach a conclusion as to why the trial court came to think that he favoured the time 1310. There is nothing in the judgment which casts any light on that matter. We are quite unable to accept the argument advanced by the Advocate depute to the effect that there may have been some form of emphasis in the oral evidence given by Mr Schreiner, not obvious from the bare words recorded, that could properly entitle the trial court to conclude that there was a basis for saying that he had expressed a preference for 1310. While we accept the view of Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Company Ltd* at pages 36-37 that "….witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an

impression upon the man who saw and heard them which can never be reproduced in the printed page….", we are at a loss to understand how, in the context of this case, such considerations can undermine the clear meaning of what Mr Schreiner himself said when he in fact declined to express a preference. In these circumstances, we conclude that in this regard the trial court misinterpreted the evidence of Mr Schreiner and thus misdirected itself.

[102] In the passage in para [29], and particularly in the words "…the reading 1310, which is more consistent with what can be seen on the document", there is some basis for supposing that the trial court itself conducted a critical examination of the document, with a view to deciding which of the competing figures had been intended by the writer. We are not persuaded that this demonstrates that the trial court itself transgressed the limitations on what may be done by a fact-finding tribunal on its own account, as explained in such cases as *Steele v HM Advocate* and *Gray v HM Advocate.* In this connection we think that it has to be recognised that the trial court was hearing evidence about the contents of the document and had the document itself before it. We consider that it was within its proper competence to examine the document itself, provided that it did not purport to undertake an exercise where some particular expertise was necessary. We can detect no suggestion in its judgment that it did any such thing.

[103] The question which next must be considered is whether the misdirection of the trial court is of such materiality as to give rise to a miscarriage of justice. As we understood the argument advanced for the appellant, the contention was that this misdirection was material and did give rise to a miscarriage of justice on account of the significance attributed to a coding completion time of 1316 hours. The suggestion was that if the completion time was to be taken to be 1316 hours, then the coding process took "rather longer than one would expect, and this may suggest that bags additional to those from KM180 were encoded at station 206 at this time." In support

of this argument Mr Taylor drew our attention to the submissions which he had made to the trial court as to the likely time to be occupied by the coding of the interline baggage from flight KM180, based on the evidence of Mr Koscha. It was contended that the calculation showed that a completion time of 1310 hours was more likely than one of 1316 hours, having regard to what was known of the amount of luggage involved. However, it is not in controversy that there exists no record of the coding of baggage at station 206 at the material time from any source other than flight KM180. That appears to us to be a matter of great importance. The only evidence of which we are aware which might be thought to suggest that coding of baggage might occur without a record being made of it is the evidence relating to an inspection by Lawrence Whittaker, which is the subject of ground of appeal B2 (ii), with which we deal below. We cannot regard that material as giving rise to any serious concern that the coding of baggage would have taken place on the date in question at the material time on a significant scale without a record having been made of it. This causes us to conclude that the inference sought to be drawn by the appellant from the later coding completion time was based on no more than speculation. For these reasons we have reached the conclusion that the misdirection on the part of the trial court, which we have held did occur, had no material consequence adverse to the appellant's interest. Accordingly we reject this particular ground of appeal. Ground of appeal C, so far as it relates to Koca, has a bearing on the issue of the interpretation of records, but we have already dealt with that matter.

Alternative explanations for the bag in tray B8849

[104] This matter is the subject of the criticisms of the approach of the trial court focused in several grounds of appeal. These are B1 (d) (i), B2 (iii) and (iv), B1 (d) (iv), B2 (ii) and B2 (v). We deal with these grounds in that order.

[105] Ground of appeal B1 (d) (i) is in these terms:

> "(d) the court misinterpreted, ignored or gave insufficient weight to the evidence undermining the accuracy of records of Frankfurt airport in respect that:
>
> (i) the evidence of Koscha did not account for one and a half missing wagons of baggage (para 33). Nor did that evidence explain an absence of any record of the encoding of those wagons."

[106] Mr Taylor began his submissions in support of this ground of appeal by drawing attention to the terms of para [33] of the judgment. The defence had sought to found on entries relating to interline baggage which arrived at V3 between 1221 and 1237 hours on 21 December 1988. It was recorded that four wagons of baggage came from LH669, a Lufthansa flight from Damascus. The worksheets on production 1061 recorded that one and a half wagons from that flight were coded at station 202 between 1258 and 1307 hours and one wagon was coded at station 207 between 1303 and 1309 hours. There was no other record of coding of baggage from that flight, so that on the face of the records one and a half wagons were not accounted for. Mr Taylor also drew attention to the evidence of Mr Koscha, who had testified that certain wagons of luggage from flight LH669 had been taken to Customs. He submitted that Mr Koscha's evidence was capable of accounting for an increase in the number of trolleys or wagons of baggage emerging from Customs, but not for a decrease. It therefore could not account for the absence of any record of the coding of one and a half wagons of baggage from flight LH669, which must have been coded somewhere. The complaint which was reflected in this ground of appeal was that the trial court, having been specifically referred to the passage in the evidence of Mr Koscha dealing with this issue, had misinterpreted that evidence. The thrust of his evidence had been that, for ease of inspection, the contents of wagons might be laid out on trolleys in a single layer, and that these trolleys might then be taken to the coding station. That would, of course, result in an increase in the number of receptacles, not a decrease, and therefore it did not account for the one

and a half missing wagons from flight LH669. The other two and a half wagons had been coded at stations 202 and 207. This misinterpretation by the trial court was of significance in respect that the missing wagons from flight LH669 might have been coded through station 206, whilst other baggage from that flight was being coded at proximate stations in the period after 1304 hours on 21 December 1988.

[107] The Advocate depute accepted that, if the trial court had misinterpreted or ignored evidence in the present context, that would amount to misdirection. However, to the extent that this ground of appeal criticised the trial court for having given insufficient weight to certain evidence, it was irrelevant. The weight to be given to evidence was a matter for the trial court. Turning to the specific criticism made in this ground of appeal, the Advocate depute submitted that it was clear that the trial court had not ignored the argument. The criticism was apparently that it had misinterpreted or misstated the evidence of Mr Koscha in dealing with the submission concerned.

[108] It was apparent, said the Advocate depute, that this criticism of the trial court was predicated upon Mr Taylor's interpretation of the evidence of the witness Koscha. The claim was that no other interpretation of that evidence was possible and that, if the trial court had adopted another one, then they had misinterpreted or misstated the evidence.

[109] The background to this matter was narrated in para [33] of the trial court's judgment. The appellant founded on the fact that four wagons of luggage had arrived in hall V3 from the flight concerned. That information had been taken from the interline writers' record, the first record made of luggage arriving in the processing hall. According to the records kept by the coders, only two and a half wagons of this luggage appeared to have been coded. This apparent problem had been put to Mr Koscha. He had considered that the disparity might be explained by

what occurred at Customs, where the luggage might go after arriving in the interline shed and before going to the coding station. In addition, it was submitted that it had to be appreciated that the interline writers who made the first record, expressed in numbers of wagons, did so regardless of how many suitcases were on each wagon, whereas the coders recorded in units such as half wagons, single cases, two cases or three cases. That was evident from the evidence of Mr Schreiner. There was therefore a distinction between the system used by the interline writers for recording baggage when it arrived and the recording of baggage by coders as it was being processed. In addition, in the present context it was important to understand what happened when bags were taken to Customs. Mr Koscha explained that, if luggage was sent to Customs for inspection, that might, depending on the circumstances, involve reloading to facilitate inspection. In addition, the witness agreed that Customs could reload wagons after they had finished inspecting the baggage and then send them to the coding stations. There was no way of knowing what Customs had done on any particular occasion. It was submitted that there was nothing in the evidence of Mr Koscha which suggested that the reloading of baggage inspected by Customs would necessarily involve that the outgoing wagons could only exceed the number of incoming wagons. Against this background of evidence, it was entirely conceivable that luggage recorded as four wagons on arrival might be reloaded following Customs inspection into two and a half wagons, which was then processed by the coders. What was plain was that the trial court did not adopt the view that one and a half wagons of luggage were missing, or had been unrecorded. The trial court had considered the appellant's submission concerning these matters and had reached the conclusion that the apparent disparity could be explained by the practice at Customs. In the light of the evidence, it was impossible to characterise that decision as misinterpretation of the evidence and hence misdirection.

[110] Furthermore, it was important to understand what lay behind the appellant's submission. It was that one and a half wagons of "missing" baggage might have been coded without being recorded at coding station 206 between 1304 and 1316 hours. This contention was wholly speculative. Furthermore, it was a matter of comment that, although a witness who had been processing baggage at station 206 at the material time, namely Mr Candar, was led in evidence, no suggestion had been put to him that he had dealt with luggage other than that from flight KM180 during the period of time in question.

[111] It was apparent from the way in which this ground of appeal was supported in submission that the criticism of the trial court was based on a misinterpretation of the evidence, which is reflected in the following sentence in para [33]:

> "The witness Joachim Koscha, however, referred to notes in the records which indicated that wagons of luggage from that flight had been taken to Customs, as happened from time to time, and gave evidence that wagons taken to Customs might be reloaded in different ways, which might account for the discrepancy."

The reference to "that flight" was a reference to flight LH669 from Damascus to Frankfurt.

[112] We have carefully considered the evidence of Mr Koscha, which is the focus of this particular ground of appeal, about the consequences of interline baggage being taken to Customs at Frankfurt for examination following its reception by the interline writers and prior to its being coded for onward transmission. It appears to us clear from the evidence of this witness that luggage being sent to Customs for inspection would be put on to wagons in such a way as to facilitate that inspection. That would involve the luggage being laid upon a wagon one layer deep. There might also be complete unloading so that the luggage could be checked by a dog. In addition, luggage which went to Customs would be reloaded on to wagons by them for transmission to coding stations. On some occasions items of luggage released by Customs might be taken individually to coding stations, so as not to cause further delay. There was no way of

telling exactly what had occurred in relation to any particular consignment of baggage which had been sent to Customs.

[113] Against this background of evidence, while it was recorded that four wagons of baggage came from flight LH669 and while the worksheets in production 1061 record that two and a half wagons of baggage from that flight were coded, it is apparent from the evidence of Mr Koscha that those records do not lead to the necessary conclusion that one and a half wagons of baggage were not accounted for, in view of the fact that wagons of luggage from the flight had been taken to Customs. It appears to us that, in the light of this material, the sentence in para [33] of the judgment which has been criticised in fact correctly reflects the evidence given by Mr Koscha. Furthermore, we consider that his evidence did not have the effect of undermining the accuracy of the Frankfurt records referred to. On this basis, it is our view that the trial court's dismissal of the submission by the appellant made to it that baggage from flight LH669 was likely to have been dealt with at the same time as baggage from flight KM180 and that the suspect bag might have come from the Damascus flight was a course which the trial court was quite entitled to take. In these circumstances we conclude that this particular ground of appeal possesses no merit.

[114] Ground of appeal B2 (iii) is in these terms:

> "The court erred in concluding in para 35 that none of the defence submissions cast doubt on the inference from the Frankfurt documents and other evidence that an unaccompanied bag was transferred from KM180 to PA103A in respect that…
>
> (iii) the court failed to have proper regard to the finding that the evidence seemed to demonstrate that baggage from more than one flight might have been encoded at the same station at the same time (para 33)."

This ground of appeal is, of course, focused upon that part of para [33] of the trial court's judgment that is in these terms:

> "Reference was also made to a number of other instances in which the records showed small discrepancies in the commencing and finishing times entered for coding particular

> consignments, which on their face seem to show that baggage from more than one flight might have been coded at the same station at the same time."

[115] It was submitted that the tacit acceptance of this proposition appeared to be inconsistent with the conclusion which the trial court had reached and expressed in para [35] of its judgment. If it were accepted that baggage from more than one flight might have been coded at station 206 at the same time after 1304 hours, the inference that tray B8849 contained a bag from flight KM180 would be substantially undermined.

[116] In response to these contentions, the Advocate depute drew our attention to a coders' worksheet, production 1061, image 76, which appeared to demonstrate that bags from two different flights had been coded at the same station at the same time. It was accepted that according to the procedures operated at Frankfurt airport at the material time such a thing ought not to have happened. However, Mr Koscha had thought that there was an explanation: it arose from the bracketing together of two entries with a single reference to them in the right hand column of the document. This might have entailed that the exact source of luggage being coded at that particular coding station could not be identified precisely, but that the luggage concerned would have been seen as coming from one of two flights. The Advocate depute emphasised that what was important was that the documentation had faithfully recorded what was being done.

[117] It was clear, said the Advocate depute, from the passage already quoted from para [33] of the trial court's judgment that there had been no factual error in its understanding of the evidence; it was accordingly a matter for that court to decide what weight it considered appropriate to give to evidence of apparent departures from proper practice. In all the circumstances, it could not be said that the conclusion which it had reached in para [35] of its judgment was one which it was not entitled to reach.

[118] Once again, we consider it necessary to draw attention to the terms in which this ground of appeal has been expressed. The allegation which it contains is that "the court failed to have proper regard" to certain matters. As we have already said in another context, this does not recognise the limitation in the role of an appeal court. It is a matter for the trial court to determine the weight and significance which should be attributed to evidence which it accepts.

[119] To the extent that this ground of appeal relates to the evidence from Mr Koscha, referred to in our narrative of the Advocate depute's submissions, an explanation was provided in his evidence for what was recorded in the documents.

[120] There was no dispute that the proper practice at Frankfurt airport at the material time was that the baggage from more than one flight should not be coded at a single coding station at the same time. However, the assumption underlying this ground of appeal appears to be that, if such a thing occurred in consequence of a departure from proper practice, that would necessarily involve a material risk that an item of luggage would be coded in such a way as to result in its transmission through the baggage system to a flight upon which it was not intended to go. As we understand the evidence, that would not occur unless the coder made an error in the coding process which had that effect. No doubt that circumstance was one of those to which the trial court had regard in taking the view which it did in para [35] of its judgment. In any event, we are not persuaded that the trial court reached conclusions on these matters which it was not entitled to reach. Accordingly we reject this ground of appeal.

[121] In ground of appeal B2 (iv) it is alleged that "the court misinterpreted the evidence of Koscha in concluding that it accounted for the missing one and a half wagons of baggage (para 33)." Neither Mr Taylor nor the Advocate depute saw this ground of appeal as raising any issue separate from those raised in ground of appeal B1 (d) (i), with which we have already dealt.

Accordingly we shall reject this ground of appeal for the reasons which we gave in relation to our rejection of that earlier ground.

[122] We deal next with ground of appeal B1 (d) (iv), which is in these terms:

> "The court misdirected itself as to the accuracy of the records from Frankfurt airport from which it found that an inference could be drawn that an unaccompanied bag travelled on KM180 from Luqa airport to Frankfurt and was there loaded on to PA103A. …
>
> (d) the court misinterpreted, ignored or gave insufficient weight to the evidence undermining the accuracy of records of Frankfurt airport in respect that: …
>
> (iv) the court misdirected itself in respect of the evidence of Whittaker at para 34 by requiring certainty from that witness that no record was made of the coding in of a suitcase which he had witnessed."

This ground of appeal arises out of the following passage in para [34] of the trial court's judgment:

> "There were other comments on the operation of the [Frankfurt baggage] system to the effect that there were indications that there might be informal working practices, such as one coder giving assistance to another which might lead to inaccurate recording. There was also evidence as to how individual bags which were found in the wrong place were dealt with, which might have the same result. In this connection, emphasis was placed on the evidence of Lawrence Whittaker, an FBI special agent who was present when enquiries were being made at V3, and who observed a person, whom he described as dressed appropriately for the area, bringing a suitcase to a coding station and coding it in, but did not see any record being made. Mr Whittaker could not be absolutely certain that no record was made."

Lawrence Whittaker gave evidence about observations which he had made at Frankfurt airport between 19 and 22 September 1989. During this period, along with others, he observed the procedures followed in area V3. He testified that he had seen what he described as "a portion of an event." What he saw was an individual appropriately dressed as an employee at Frankfurt airport arrive at a coding station with a single suitcase which he placed in a tray. The individual then used the keypad at the coding station to code the suitcase and send it on its way. Mr Whittaker did not see the individual making any documentary record of what he had done in any

sheet. Mr Whittaker did not make a formal report concerning what he had seen, although he mentioned it in informal communications with his employers and others. He explained in his evidence that he regarded what he had seen as "not overly significant".

[123] In supporting this ground of appeal, Mr Taylor drew our attention to the background which we have described. He said that the significance of the matter was that the evidence disclosed a case in which a single bag had been coded: no-one had challenged the person who had done this and no record had been made. The point was that, had something similar occurred on 21 December 1988 at station 206 at the material time, the inference that tray B8849 came from flight KM180 would be ill-founded. It was accepted that, since between the times recorded in the coder's worksheet Mr Koca had been coding baggage, precisely the same kind of event could not have occurred during the time when he was working. However, if the sort of time errors occurred which were envisaged in the appellant's submissions, such an event could have occurred shortly after Mr Koca ceased coding baggage from flight KM180 and yet still have appeared on the face of the printout to have occurred at 1307 hours. The event described by Mr Whittaker also tended to demonstrate that the system at Frankfurt operated in a less than rigid manner.

[124] It appeared from para [34] of the trial court's judgment that it had declined to give weight to these issues because the evidence of Mr Whittaker had fallen short of absolute certainty. Absolute certainty was not normally required of any witness. Thus the court had misdirected itself. By imposing a requirement for absolute certainty, the trial court had been able to dismiss the submissions which highlighted the risk of the coding of a single bag amongst a trolley of bags from another source. Had the court approached the evidence of Mr Whittaker in a proper manner, that is by being prepared to consider what inferences could reasonably be drawn from it,

there could be an alternative explanation for the crucial entry in the computer printout at 1307 hours on the 21 December 1988.

[125] In reply, the Advocate depute submitted that there was no significance in the fact of the coding of a single piece of luggage. For a variety of reasons that had not been uncommon. However, dealing with the precise point focused in this ground of appeal, the evidence did not go so far as to make it clear that no record had been made of the coding witnessed by Mr Whittaker. There had been no examination of documentation. The individual concerned had not been challenged as to whether he had made a record of what he had done. In observing that Mr Whittaker could not be certain that no record was made of the coding in question, the trial court had merely been accurately recognising the facts. It could not be taken from what the trial court had said in para [34] that it was "requiring certainty" from Mr Whittaker in considering the submissions made about the effect of his evidence. What the appellant had been endeavouring to do with the evidence of Mr Whittaker was to suggest that it demonstrated an example of coding without a record being made and to infer from that that an item could have been coded without a record being made at station 206 at 1307 hours on 21 December 1988. That leap of logic ignored two facts. First, what Mr Whittaker observed took place at an unmanned coding station and secondly, not only was station 206 occupied at the material time, but a record had been made by the coders of what they were doing at that time. In any event, it was plain from the terms of para [34] of the trial court's judgment that it had considered the significance of the evidence of Mr Whittaker. To suggest otherwise was to misread the paragraph. Reliance by the appellant on the evidence of Mr Whittaker had been part of a larger attack on the reliability of the records of baggage handling at Frankfurt airport, which plainly the trial court had considered in some detail. Its conclusion had been set forth in para [35], where it explained that none of the points made by

the defence seemed to it to cast doubt on the inference there mentioned. In relation to this matter, the trial court's approach could not be characterised as outwith the range of what it was entitled to adopt.

[126] The contention expressed in this ground of appeal is that the trial court misdirected itself in respect of the evidence of Mr Whittaker by requiring certainty from that witness in relation to the issue of whether a record had been made of the coding of a suitcase which he had observed. It was argued that the trial court had wrongly applied to his evidence some higher standard of proof than that which would have been appropriate. In our opinion, that contention is unfounded. What the trial court says in para [34], in the passage which we have quoted, in our judgment is no more than a summary of what Mr Whittaker himself said in his own evidence. That is apparent from the cross-examination of Mr Whittaker on day 77 at pages 9340 to 9341. In that part of his evidence the following interchange took place:

> "Q: And if the system in ordinary operation is that the worker within the booth will also fill out a worksheet to record the details of the flight that he is dealing with, do I take it that you would not be close enough to see whether this particular worker made an entry in a notebook?
> A: It would be very likely that that could have been missed, yes.
> Q: Well, you just wouldn't be close enough….?
> A: I was not in a position where I could say with any degree of certitude that he did or he did not. I did not see him make a notation.
> Q: I understand.
> A: But I can't say that he did not."

Thus, it appears to us that the words used by the trial court in para [34] are simply a close reflection of the words used by Mr Whittaker.

[127] While this ground of appeal is focused precisely, the discussion of it ranged over wider considerations. While we do not consider it necessary to do so, it may be appropriate to comment that what was observed by Mr Whittaker was the coding of a single suitcase at an unmanned coding station. That contrasts with what was happening at 1307 hours on 21

December 1988 when Mr Candar and Mr Koca were manning the coding station which was handling baggage from flight KM180. In the light of this contrast, we consider that the trial court was quite entitled to treat the evidence of Whittaker and the inferences which the appellant sought to draw from it in the way in which it did. For all these reasons we reject this ground of appeal.

[128] We deal next with ground of appeal B2 (ii), which is in the following terms:

> "The court erred in concluding in para 35 that none of the defence submissions cast doubt on the inference from the Frankfurt documents and other evidence that an unaccompanied bag was transferred from KM180 to PA103A in respect that: …..
>
> (ii) the court failed to have proper regard to the evidence of Whittaker who described a single suitcase being encoded without seeing a record being made (para 34)."

Plainly this ground of appeal is closely related to that with which we have just dealt. In relation to this ground, Mr Taylor simply said that, in dealing with the earlier ground, he had set out the issues and evidence relating to this one. He went on to say that, had the trial court taken a less exacting approach to the evidence of Mr Whittaker and its implications, it was difficult to see how it could have reached the conclusion which it did at para [35] of its reasons. In relation to this ground of appeal the Advocate depute indicated that he had covered all that he wished to say in dealing with the earlier related ground.

[129] Despite the fact that neither Mr Taylor nor the Advocate depute presented separate arguments on this ground of appeal, we note that it contains language which is similar to that used in earlier grounds where it says that "the court failed to have proper regard to" the evidence of Mr Whittaker. As we have already observed, we do not consider this formulation to be relevant. Beyond that, we would simply say that we are of the view that the trial court did in fact take the evidence of Mr Whittaker into account prior to reaching the conclusion which it

expresses in para [35] of its judgment, which conclusion we consider it was entitled to reach. In these circumstances we reject this ground of appeal also.

[130] We turn next to ground of appeal B2 (v), which is in these terms:

> "The court erred in concluding in para 35 that none of the defence submissions cast doubt on the inference from the Frankfurt documents and other evidence that an unaccompanied bag was transferred from KM180 to PA103A in respect that: …
>
> (v) the court failed to take account of the defence submissions … as to the effect of the evidence of Candar who indicated that he would as a matter of practice be prepared to encode a case for a colleague without knowing where it came from."

[131] This ground of appeal focuses upon evidence given by Mr Candar, who worked at Frankfurt airport at the material time loading suitcases. His duties sometimes involved him working at coding stations in area V3. His questioning ran as follows:

> "Q: Did it never happen that one or two or perhaps three suitcases were brought to you at 206, for example, by a colleague who asked you to code that suitcase or those suitcases through your station at 206?
> A: If it's my work friend, if it's a friend next to me, and if they have brought three or five suitcases, then I would code it, but I wouldn't know where he has brought the suitcase from, from the car or from where. But definitely I will code the suitcases that is brought to me by my friend.
> Q: If an individual who appeared to be an official at the airport appeared at your coding station with an individual bag and asked you to code that through, did you ever do such a thing?
> A: If it's a person working at the airport, if they are working at the airport and they are wearing clothing … but if it's a stranger, that hasn't got the airport uniform, then obviously we would ask them who they are."

[132] Mr Taylor pointed out that, had Mr Koca done such a thing as was described in this passage of evidence, it was possible that the bag in tray B8849 had not come from flight KM180. Since Mr Koca had not been called to give evidence, it was difficult to understand how the trial court could have felt confident that there had been no doubt about the inference which it drew from the evidence. While there existed no record of any such event in the coders' worksheets, it was not known what practice Mr Koca had adopted in relation to recording. In addition, part of

the background was that luggage from flight LH669 was being redistributed among neighbouring coding stations at about the material time. It had already been submitted that some of that baggage had not been accounted for. A further part of the background which was relevant was that in some instances luggage became lost during transport at the airport and, on being found, would usually be taken to the closest coding station, where, according to the evidence of Mr Koscha, it would be coded.

[133] In reply, the Advocate depute submitted that the presentation of this ground of appeal on behalf of the appellant had been based upon a misconstruction of the evidence of Mr Candar. While it was true that the trial court had not specifically referred to the defence submission, that was not surprising. What was apparent from a full and proper reading of the evidence of Mr Candar was that, so far as he was concerned, any bag which he coded would be recorded. That statement was made by him in his evidence in the context of his going to another coding station to help out. He was not asked whether he would undertake the coding of bags for another employee without making a record. It was a plain inference from his evidence that, if he was at his own coding station and had been asked to code for a colleague, he would make a record of this as well. The flight from which any particular bag had come, by whatever means, would always be known, because that information was available on the tag which was attached to the suitcase. A further important consideration was that Mr Candar had not been asked during the course of his evidence whether, during the time that he was involved in the coding of baggage from flight KM180, any person came and asked him to code any other baggage. Since he had been at station 206 loading bags on to the belt for coding, he would have been the person to ask about that. In all these circumstances the proposition which the appellant sought to derive from Mr Candar's evidence was based upon speculation that he might have coded a bag for a

colleague during the processing of bags from flight KM180, and that, contrary to his practice, he would not have made any record of having done so. When one understood correctly the evidence given by Mr Candar, it was no surprise that the trial court attached no merit to the criticisms made.

[134] It was accepted by the Advocate depute that the trial court had not made any express mention of the defence submission. Nevertheless, we note that, in the opening sentence of para [34], it makes a general reference to "other comments on the operation of the system to the effect that there were indications that there might be informal working practices." What is apparent is that it attached little importance to the submission. In the light of the whole evidence given by Mr Candar as to his working practices, to which our attention was drawn by the Advocate depute, it is our view that the trial court was well entitled to do so. In particular, it is clear from Mr Candar's evidence that, although he would have been prepared to code suitcases brought to him by a colleague, he would have recorded what he was doing. That circumstance appears to us to deprive the submission of any force. Furthermore, we regard it as of importance that Mr Candar, along with Mr Koca, had been involved in coding of the luggage from flight KM180 at the material time. Yet it was never put to him that he had participated in the coding of items of baggage at that time which had not come from flight KM180. Against this background, it appears to us that the defence submission amounts to no more than speculation. For these reasons we reject this ground of appeal.

The x-ray procedure

[135] In para [34] the trial court states:

> "In both [statements], Mr Maier explained that he had had some limited training in the use of the machine, but said that in the course of using it he had taught himself to

> distinguish various sorts of electrical equipment, and that he knew how to tell if explosives were present, from their appearance. Neither statement directly dealt with the question whether, and if so how, Mr Maier would detect explosives hidden in a radio cassette player. What he said was that the approach in dealing with electrical equipment was to see whether it presented a normal appearance, for example whether it had a plug. Other evidence, however, particularly that given by the witness Oliver Koch, Alert [Security]'s trainee manager at the time, shows that the standard of training given to Alert [Security] employees was poor. That was also the view of the FAA investigators who visited Frankfurt in 1989. Mr Maier's description of what he looked for does not suggest that he would necessarily have claimed to be able to detect explosives hidden in a radio cassette player. There was no expert evidence as to the ease or difficulty of detecting such hidden devices. The x-ray examination is one of the factors to be taken into account but it is only one factor to be weighed along with the others."

Ground of appeal B6 states, under particular reference to para [34] of the judgment, these points as follows:

> "In dealing with the x-ray procedure at Frankfurt, the court ignored material parts of the evidence of Maier's previous statements to the effect that he could say that there "was no explosives in the bags for flight 103"; ignored the evidence of Koch that staff would have been able to recognise a radio cassette going through the x-ray machine; misinterpreted the evidence of FAA [Federal Aviation Administration] investigators when it found that they viewed the standard of training for Alert Security employees to be poor; …"

This ground of appeal also refers to the deterrent effect of the x-ray procedure. We deal with that matter later in para [258] *et seq*.

[136] As regards the first point in this ground of appeal, it should be noted that at the time of the trial Kurt Maier, who had been the x-ray operator, was ill and unable to give evidence in person. Accordingly evidence of statements previously given by him was led in accordance with section 259 of the 1995 Act. One was the report of his statement when he was interviewed by representatives of the FAA on 5 January 1989, which was spoken to in evidence by the witness Naomi Saunders. The second statement had been taken on 7 February 1989 by Hans Jurgen Fuhl, an officer of the German police, who spoke to it.

[137] In presenting his submissions on this part of this ground of appeal, Mr Taylor pointed out that, on the Crown case, Mr Maier must have failed to observe the improvised explosive device, which meant that he and his equipment could not have performed the very task which they had been intended to perform. Of course, his non-observance of the device could indicate that it was not there to be seen. That point was acknowledged by the court in para [34] when it observed that x-ray examination was one of the factors to be taken into account to be weighed along with the others. Mr Taylor submitted that the trial court had not given this factor due weight because of its errors in interpreting the evidence. He drew attention to what Mr Maier had said in his first statement, namely that he could say without question that "there was no explosives in the bags for PanAm flight 103". It had to be borne in mind that Oliver Koch had given evidence about the standard of his work. He had been regarded as a careful operator who had had time to do his job properly and was aware of the need to scrutinise radios, following the warning which had been issued by Interpol about the use of a type of Toshiba radio to conceal an explosive device. It was apparent from his second statement that he had been aware of that warning. He had seen relevant pictures of a radio bomb. He was aware of the components of a bomb. Despite evidence that Mr Maier demonstrated caution and competence, the trial court appeared to have given no weight to Mr Koch's views.

[138] As regards the second point, Mr Taylor submitted that the trial court appeared to have ignored the evidence of Mr Koch to the effect that staff of Alert Security, who were responsible for the x-ray examination of baggage, would have been able to recognise a radio cassette on the x-ray machine.

[139] As regards the third point, Mr Taylor pointed out that David Tiedge of the FAA had given no evidence about the quality of training at all. Ms Saunders had not said that the training

of employees of Alert Security was poor. These were the only FAA inspectors who had given evidence after visiting Frankfurt in 1989. Accordingly there was no evidence in the case to support the finding made by the trial court in para [34].

[140] Mr Taylor submitted that, in the light of these points, the trial court had underestimated the significance of evidence relating to the x-ray procedure which undermined the Crown theory. The trial court's errors in this regard had caused it to underestimate the force of a material consideration, which amounted to a material misdirection.

[141] Mr Taylor next made submissions concerning the Crown's response to this ground of appeal, in which it was suggested that the appellant's submissions relating to the implications of the x-ray procedure at Frankfurt airport were in conflict with his submissions in regard to the x-ray procedure at Heathrow airport. Mr Taylor said that that suggestion was simplistic and did not survive a proper consideration of the relevant evidence and circumstances. In the first place, the appellant had suggested a number of ways by which the primary suitcase could have reached the container AVE 4041 at Heathrow, only one of which involved passing through an x-ray examination. In any event, the evidence of Mr Kamboj indicated that the improvised explosive device would not have been detected by the x-ray examination at Heathrow. Mr Kamboj had not been informed of the Toshiba warning. All this contrasted with the evidence from Mr Maier that he could have recognised plastic explosives under x-ray examination.

[142] The Advocate depute, in reply, said that ground of appeal B6 differed from other grounds of appeal in respect that it was alleged in it that the trial court had ignored certain evidence, namely that of Mr Maier and Mr Koch. However, he submitted that it was difficult for the appellant to support those assertions since both of those witnesses were referred to in para [34] of the judgment. It was not clear upon what basis the appellant was saying that evidence of these

witnesses had been ignored. It appeared that ultimately the appellant's submissions on these matters were focused on the question of the weight given to their evidence. In this connection it was important to recognise that, at the end of para [34] of the judgment, the trial court had said that x-ray examination was one of the factors to be taken into account, but that it was only one factor to be weighed along with the others. In substance the appellant's submissions were, in effect, that the trial court had not given the factor of x-ray examination due weight. In particular, as regards Mr Maier, the complaint appeared to be that the trial court had given no weight to his view that he was sure that there were no explosives in the bags for flight PA103A. However, the appellant had not shown that the trial court had made an error about his evidence, as opposed to maintaining that it had not given it the weight which Mr Taylor regarded as sufficient.

[143] The Advocate depute outlined the evidence relating to the x-ray procedure at Frankfurt airport. On the afternoon of 21 December 1988 Mr Maier had been responsible for x-ray examination. The task for the trial court had been to assess what weight was to be given to his view that no explosives were to be found in any bag destined for flight PA103A. Thus it had to consider a number of matters, including his training and experience, the capability of the staff and the system and the particular approach adopted by him. As regards training and experience, Mr Koch had given evidence as to what training was delivered. It was apparent from his answers that it was very limited. The Advocate depute then drew attention to the evidence about the capability of the staff and the system. There had been evidence to show that there had been a recognition of the limitations of the x-ray equipment and also the persons who operated it. Evidence had been given by Alan James Berwick about enquiries by the FAA which had identified certain shortcomings in relation to Alert Security. The training given to operatives was very limited. No formal training had been given in the identification of explosives. There

was no particular difficulty in the detection by x-ray examination of objects such as a cassette player. Such items were quite common in luggage. However, it was a different matter to detect an explosive device within such equipment. Wulf Krommes, the duty station manager for PanAm at Frankfurt, had accepted this in his evidence. Furthermore, there was evidence from John Scott Orkin, an expert in the analysis of technical devices used by terrorist organisations, indicating that the best place to hide an electronic timing device would be within another electronic device such as a portable radio or cassette player.

[144] The evidence of Mr Maier concerning the examination of electronic devices indicated the weakness of the security system, as operated at the material time. He said that he looked for a plug on an electrical device, the existence of which cleared his doubts about the existence of any explosive device. Plainly an electronic device equipped with a plug could also contain an explosive device. Against the background of these obvious weaknesses in the x-ray security system at Frankfurt at the material time, it could not be said that the trial court was not entitled to reject the evidence of Mr Maier that there was no explosive in the bags for flight PA103A. On any view, it could not be said that the trial court had simply ignored his evidence.

[145] Likewise, so far as Mr Koch was concerned, he had given evidence as to the limited and inadequate training given to Alert Security employees. Against that background, the trial court was quite entitled to decline to accept the evidence which he gave, to the effect that any Alert Security employee would have been able to recognise a radio bomb, whatever was the level of that employee's qualification.

[146] Turning to that part of the ground of appeal which alleged misinterpretation by the trial court of the evidence of the FAA inspectors, the Advocate depute said that there was evidence from Mr Berwick concerning the FAA enquiries, which had resulted in criticism of the standards

achieved by Alert Security, including those related to training. Thus there had been no misinterpretation of the evidence of the FAA investigators.

[147] The first of these criticisms alleges that the trial court ignored certain parts of Mr Maier's previous statements, to the effect that he could say there "was no explosives in the bags for PanAm flight 103". In that para [34] the trial court goes into some detail regarding the contents of Mr Maier's statement. In our opinion, it is quite inconceivable that the trial court failed to observe what he had said in his first statement. It is to be observed that in neither of his statements did he indicate how he would have expected to detect explosives hidden in a radio cassette player.

[148] Against this background, we cannot accept that the trial court ignored the particular part of Mr Maier's statement referred to in the ground of appeal. In these circumstances, as submitted by the Advocate depute, the question comes to be whether the trial court was entitled to make the assessment which it did of the contents of Mr Maier's first statement. In our opinion it was entitled to take the approach which it did. In view of what Mr Maier said about the practices which he followed in relation to electrical equipment, the trial court, in our opinion, was quite entitled to reject the particular part of his statement.

[149] As to the second criticism, we note that Mr Koch was asked whether an x-ray machine operator would be vigilant for the presence of suspect radios in suitcases. He replied: "As regards the radio bomb, as far as I know, everyone was informed and would have been able to recognise such an item through the x-ray machine, whatever their level of qualification."

[150] In para [34] of the judgment, the trial court refers to Mr Koch's evidence. He was a trainee officer of Alert Security in Frankfurt, having responsibility for the training of screener officers. The passage of evidence which is the subject of this part of this ground of appeal

appears to us to be an expression of opinion on the part of Mr Koch. The trial court plainly must have had that opinion in mind in connection with the subject matter of para [34]. It would appear that it reached a conclusion inconsistent with the opinion expressed by Mr Koch. It cannot be said that the trial court ignored his evidence on this matter. The question must be whether the trial court was entitled to reach a conclusion inconsistent with this opinion. In our view it plainly was. In this connection the statements given by Mr Maier were plainly of importance. Also relevant was the evidence concerning the very limited training given to x-ray operatives such as Mr Maier.

[151] The third particular criticism alleges that the trial court misinterpreted the evidence of the FAA inspectors when it found that they regarded the standard of training for employees of Alert Security as poor. In support of this particular criticism, it was pointed out that there were only two witnesses from the FAA, namely Mr Tiedge and Ms Saunders. It was said on behalf of the appellant that neither of these witnesses gave evidence concerning the standard of training for Alert Security employees at Frankfurt airport. That is true. However, we do not understand that the trial court purport to base its statement in para [34] about the standard of training upon the evidence of these witnesses. Accordingly the question comes to be whether the trial court was entitled to reach the conclusion it did in the light of the whole evidence in the case. In that connection the evidence of Mr Berwick is of significance. In December 1988 he worked with PanAm as a corporate security manager. He gave evidence concerning enquiries undertaken by the FAA in relation to the shortcomings of Alert Security. He then went on to explain that in consequence of those enquiries they had been issued with certain violations. In the light of this evidence, we consider that the trial court was entitled to express the view which it did in para [34].

[152] We accordingly reject the parts of ground of appeal B6 which we have considered above.

The loading of baggage on to flight PanAm 103A

[153] Grounds of Appeal B3, and C in part, relate to this matter. Ground of Appeal B3, with which we deal first, is in these terms:

> "The court misinterpreted the evidence of Kasteleiner at para 31 as indicating that it could be taken from the documents that no baggage was left at the gate. The court proceeded erroneously to draw an inference therefrom that all items sent there were loaded onto PA103A."

[154] In support of this ground of appeal Mr Taylor said that its focus was a passage in para [31] of the trial court's judgment, where it said:

> "Defence counsel submitted that there was no evidence that baggage sent to the gate was actually loaded onto the flight, nor was there any count of the number of bags loaded. There was however evidence from Mr Kasteleiner that it could be taken from the documents that no baggage was left at the gate and it can be inferred that all items sent there were loaded."

He submitted that that passage involved a misunderstanding or misinterpretation of the evidence of Mr Kasteleiner. Mr Taylor referred to that evidence, and submitted that it was quite clear that Mr Kasteleiner spoke of luggage for flight PA103A being removed from the baggage transport system at the appropriate gate, but that did not mean that that baggage had in fact been loaded on to the aircraft. In particular, his evidence showed no more than that the bag which had been in tray B8849 had been discharged from the baggage transport system after 1512 hours on 21 December 1988 to gate room B44. The Crown had failed to call a witness to speak to the actual loading of the interline baggage, which, it alleged, included the item of baggage on tray B8849. That failure was also focused in ground of appeal C, to the extent that it related to Kilnic Tuzcu, with which he would deal in due course. It appeared that the Crown had merely relied on documentary records to persuade the trial court that the item of baggage in tray B8849 had been

loaded on to the aircraft. That had been a crucial point in the case, on which the trial court had misdirected itself.

[155] In reply, the Advocate depute accepted that the trial court had misstated the evidence of Mr Kasteleiner. On a fair reading of his evidence, it was clear from what he had said that no baggage for flight PA103A had been left in the baggage transport system; not that no baggage had been left at the gate where bags would be sorted after their removal from that system. Mr Kasteleiner was an employee of the company which had responsibility for managing the computerised baggage transport system. In the case of baggage being sent for a departing PanAm flight, the baggage for that flight would have been collected at the delivery gate and dealt with by PanAm staff, rather than members of the staff of Frankfurt airport. The crucial part of para [31] was the statement: "There was however evidence from Mr Kasteleiner that it could be taken from the documents that no baggage was left at the gate and it can be inferred that all items sent there were loaded." It had to be considered whether the trial court had drawn the inference that all items sent to the gate had been loaded from the evidence of Mr Kasteleiner or from other evidence. The Advocate depute submitted that it was Mr Kasteleiner's evidence, in association with the documents, that gave rise to the inference that the baggage concerned had been extracted from the baggage transport system and deposited at the gate, but it was entirely different evidence that demonstrated the movement of baggage from the gate to the aircraft. The question was whether the misdirection focused in the comment of the trial court had any materiality; if the evidence plainly demonstrated loading of baggage on the aircraft after its arrival at the gate, the misdirection would be immaterial.

[156] The Advocate depute pointed out that, in his closing submissions to the trial court, Mr Taylor had said that Mr Kasteleiner's evidence showed no more than that the luggage concerned

had gone to the gate room. Then he had submitted: "For some reason, the Crown leave it to inference that the bag was in fact loaded on to the aircraft." That characterisation of the Crown's position before the trial court was incorrect and may have misled that court. The Crown's position before the trial court had not been that Kasteleiner's evidence vouched loading. It was vouched by inference arising from other evidence. In this connection it was important to understand the operation of the loading system for PanAm flights at Frankfurt in 1988. After baggage was delivered at the appropriate gate room for loading on to a particular aircraft, PanAm loading staff collected it with a view to its being loaded on to the aircraft. A load master supervised the loading and ensured that items were loaded in accordance with the load plan. As the trial court had noted in paras [19] and [28], prior to 21 December 1988 a system of x-raying interline baggage had been instituted at Frankfurt by PanAm. There was overwhelming evidence that, once the facility had been set up, there was no interline reconciliation between passenger and bag, such as had previously been required. The trial court had rejected the evidence of Roland O'Neil and Monika Diegmuller to the effect that there continued to be a reconciliation of interline passengers and baggage, but only to that extent.

[157] The evidence before the trial court had shown that, after delivery at the gate room, bags were sorted into various categories including interline bags, as appeared from the evidence of Mr O'Neil. He had been the load master for flight PA103A. He had given evidence that the interline bags had been taken from the gate area for x-ray examination. That examination had been performed by Mr Maier. The bag which had come from flight KM180 had arrived at the output point in the gate room at 1523 hours. It had been an early arrival. It had gone, along with other interline baggage, for x-ray examination, which would itself permit the court to draw the inference that the interline baggage was thereafter loaded. But there was clear evidence that the

interline baggage due for flight PA103A was in fact loaded on to the aircraft. In this connection the Advocate depute referred to a joint minute, which demonstrated that passengers Karen Noonan and Patricia Coyle had themselves been interline passengers on flight PA103A, with five items of checked-in luggage. They had travelled from Vienna to Frankfurt on flight LH1453. The remains of all five items of their luggage were recovered in the Lockerbie area. These circumstances showed that their interline luggage had been taken from the gate to be x-rayed and had then been loaded. Since the interline baggage had been gathered together at the output point of the baggage transport system and then taken as a group of bags for x-ray examination, shortly prior to loading, there was no reason to suppose that any of that baggage had been left at the gate. Reverting to para [31] of the judgment, it made no sense to claim that the trial court had inferred from the evidence of Mr Kasteleiner that all relevant items had been loaded, because that was not the way in which the issue had been dealt with at the trial. The trial court in that part of its judgment was doing no more than explaining in short form that the necessary inference could be made from the evidence available. This court was not prohibited from considering the evidence and matter of agreement, to which he referred. If this court were to hold that the trial court had drawn the necessary inference of loading from the evidence of Mr Kasteleiner alone, that would constitute a misdirection on its part. However, in the light of the evidence of Mr O'Neil and the material mentioned, the misunderstanding or misdirection was immaterial. There had never been any submission to the effect that there was insufficient evidence in law to enable the trial court to conclude that the particular bag concerned, along with others, had been loaded on to flight PA103A.

[158] In our opinion, in order to reach a decision upon this ground of appeal, it is necessary to consider the evidence of Mr Kasteleiner, which it is alleged the trial court misinterpreted. He

exercised control over the baggage transport system at Frankfurt. Under reference to his log book for 21 December 1988, he confirmed that flight PA103A was to leave from position 44. At 1512 hours he had given the order to provide the luggage for that flight. His order resulted in the luggage being directed by the baggage transport system to the output point B44, a gate luggage room, where it was discharged. The destination of luggage for the flight in question had been changed at 1621 hours to B41, a different but nearby luggage room. Accordingly the luggage for the flight was extracted from the system at gates B44 and B41. It is clear from the evidence of Mr Kasteleiner that baggage for flight PA103A was extracted from the system and delivered to gate room B44 and latterly B41. However, he did not give evidence indicating, or from which it could be inferred, that that baggage was in fact loaded on to the relevant flight. Nor did he exclude the possibility that an item of baggage might have been left at the gate. In the light of that, we consider that the trial court went too far in saying in para [31]: "There was however evidence from Mr Kasteleiner that it could be taken from the documents that no baggage was left at the gate …". To that extent the trial court misunderstood or misinterpreted his evidence and, in our opinion, it misdirected itself. In these circumstances, the question comes to be whether that misdirection is of such materiality as to give rise to a miscarriage of justice.

[159] In this connection, the trial court says in para [31] that "it can be inferred that all items sent there were loaded". That is of course a reference to items sent to gates B44 and 41. The question then is whether there was evidence or other material from which such an inference could properly be drawn. The position of the Crown was that there was, in the form of the material concerning passengers Karen Noonan and Patricia Coyle contained in the joint minute and also in the evidence of Mr O'Neil. In another connection we have already considered the significance of what was agreed in relation to these two passengers. Suffice it to say here that

that material shows that their interline baggage from flight LH1453 from Vienna was processed at Frankfurt and loaded onto flight PA103A.

[160] Mr O'Neil described how, on arrival in the gate room, baggage was separated into different groups. Interline luggage was separated out into a group of its own. Subsequently it was taken to a location where it was x-rayed. Thereafter Mr O'Neil said: "Then they were taken to the gate and placed in front of the plane." Once all of the baggage was ready to be loaded it was then loaded on to the plane in accordance with a loading plan, in which task the witness had assisted.

[161] As can be seen from para [28] of its judgment the trial court plainly accepted Mr O'Neil's evidence as to the practice which was followed, generally and on this occasion, of the interline baggage being taken for x-ray examination prior to being taken for loading on to flight PA103A. At the trial it was not suggested that there was insufficient evidence in law to entitle the trial court to conclude that the bag which had been on tray B8849 had been loaded on to flight PA103A, or that the trial court should not infer that the interline baggage for flight PA103A was in fact so loaded. This inference could be drawn from the evidence of Mr O'Neil, who was responsible for the loading of the flight and participated physically in this task, and it was not suggested to him that any item of that interline baggage had been left behind on the tarmac or elsewhere so that it was not carried by flight PA103A. The joint minute relating to interline passengers Karen Noonan and Patricia Coyle, taken together with the recovery of fragments of their baggage, provided confirmation of this, if such were needed. In the light of these considerations it is our opinion that not only was the trial court entitled to infer that the baggage was loaded on board the aircraft but that this inference was inevitable. That being so, in our judgment, it cannot be concluded that the misunderstanding or misinterpretation of the evidence

of Mr Kasteleiner by the trial court was material or has resulted in any miscarriage of justice. Accordingly we reject this ground of appeal.

[162] We turn now to the related matter of that part of Ground of Appeal C. which relates to Mr Tuzcu. This ground of appeal is in the following terms: "The court erred in failing to deal with defence submissions as to the effect on the Crown case of the Crown's failure to call witnesses … Tuzcu." In supporting this ground of appeal, Mr Taylor referred to the submissions which he had made on the subject to the trial court. The trial court had failed to give proper consideration to the Crown's failure to call this individual as a witness which was a material misdirection on the crucial issue of whether the unaccompanied bag had been transferred to flight PA103A. It appeared that the trial court had given no consideration to his absence. He was the most likely candidate as the person who had been responsible for transferring items of baggage on to flight PA103A.

[163] In reply, the Advocate depute accepted that in para [31] of the judgment the trial court did not mention specifically that portion of the appellant's submission concerning Mr Tuzcu. However, in that connection, the first question was why the appellant contended that this particular individual would have been an important witness. It was said that his importance was that it was most likely that he took the baggage for x-ray examination, removed it from x-ray and took it out to the aircraft. However, on two occasions in his evidence Mr O'Neil, the load master, categorically ruled out any suggestion that Mr Tuzcu was involved in this way in loading flight PA103A. The only person at the trial who had suggested that Mr Tuzcu might have been involved in loading the flight was Mr Taylor. Accordingly there was no evidence to suggest that Mr Tuzcu would have been able to give any material evidence. Against this background, there was no merit in this ground of appeal.

[164] We recognise that the trial court in para [31] of its judgment makes no reference to the failure of the Crown to lead Mr Tuzcu as a witness, or to the submissions made on behalf of the appellant as to the consequences of that failure. In our opinion, whether those features of the trial court's judgment constitute a basis for criticism or not depends upon, *inter alia*, whether he might have given evidence material to the resolution of an issue before the court. While Mr Taylor asserted that Mr Tuzcu was a potential witness of that nature, the evidence in the trial suggests otherwise. Mr O'Neil indicated that in the afternoon Mr Tuzcu had been taking the luggage for the London flight PA103A out of the baggage system and putting it into carts or carriages. He had also separated the luggage into different categories. Mr O'Neil was asked specifically whether Mr Tuzcu had taken the interline bags to be x-rayed, to which he replied that he had not; he had been in charge only of taking the luggage off the baggage transport system. We are unaware of any evidence in the case which suggests that Mr Tuzcu's responsibilities on the day in question extended beyond those described by Mr O'Neil. In these circumstances, while the trial court made no mention of him or the submissions made in relation to his absence as a witness, we cannot regard that as a basis for criticism of its judgment. Accordingly we reject this ground of appeal also.

The extent of unaccompanied baggage

[165] Ground of appeal B7 states:

> "The court failed to have proper regard to the evidence of unaccompanied bags. In para 33 the court misunderstood the defence submission regarding baggage carried on PA103A additional to that shown on production 1060. The submission was that 21 online items of baggage from Berlin fell to be added to the total of 111 shown on production 1060 making 132 whereas only 118 items were shown on production 199, the passenger list, which did include the online baggage from Berlin. The explanation for the difference of 14 was that these items were or could be unaccompanied baggage. Further, the court failed to deal with the evidence relating to the unaccompanied bag from

> Warsaw in para 33. The existence of unaccompanied baggage on PA103A was a material factor of which the court failed properly to take account."

[166] It is claimed, first, that the trial court misunderstood a defence submission suggesting that a total of 14 items of unaccompanied baggage were carried on flight PA103A. Secondly, it is claimed that the trial court failed to deal with the evidence relating to a further unaccompanied bag from Warsaw.

[167] Mr Taylor maintained that, having concluded at para [35] that an unaccompanied bag was transferred from flight KM180 to flight PA103A, the trial court had to consider whether that item contained the bomb. A relevant consideration to weigh against the suggestion that this bag contained the bomb was that the evidence disclosed, or at least gave rise to a strong inference, that there were several other unaccompanied bags on flight PA103A. If it could be shown that there were more than one unaccompanied bag on flight PA103A, that weakened any inference that the bomb was contained in the unaccompanied bag from flight KM180. The submission was that the trial court's error in this area amounting to misdirection had caused it to over-estimate the strength of the inference to be drawn.

[168] Mr Taylor submitted that the trial court appeared to have accepted in para [33] of the judgment that there was indeed an unaccompanied bag from Warsaw on flight PA103A, but did not appear to have recognised the significance of this. Quite apart from that, however, Mr Taylor submitted that there was a strong inference that there may have been 14 unaccompanied bags on flight PA103A, in regard to which the terms of para [33] demonstrated that the trial court had misunderstood the defence submissions which he repeated to us. Production 1060, a computer printout for flight PA103A, demonstrated a total number of 111 bags, which could be divided into two categories, namely bags which were checked in at Frankfurt airport and other bags which were interline bags. To discover the total number of bags destined for the aircraft, 21

online bags had to be added, making a total of 132 bags. That figure had to be compared with a figure of baggage items in a printout of the passenger manifest for flight PA103A which was production 199. It bore to show a total of 118 checked items attributable to passengers on flight PA103A. What emerged from this exercise was that there were 14 unaccompanied bags on the flight. In para [33] the trial court showed that it had misunderstood the submissions which had been made to it. The main point which had been made was that the existence of such a large number of unaccompanied bags on the flight tended to undermine the significance to be attached to the circumstance that an unaccompanied bag from flight KM180 had also been transferred to that flight. In explaining its position in para [33], the trial court ignored the inference from the evidence of Mr Kasteleiner that 21 items of baggage from Berlin did not form part of the 111 bags vouched by the computer printout.

[169] It was evident from the terms of paras [19] and [20] of the judgment that the trial court had regarded unaccompanied baggage as a significant consideration. The same view appeared from para [82] of the judgment. In all the circumstances the trial court had failed to give due weight to the number of unaccompanied bags on flight PA103A, it having misunderstood the evidence and the submissions made to it. This was a material misdirection on its part.

[170] In response to questions by the court, Mr Taylor sought to explain the status of production 199 by reference a joint minute. He pointed out that Monika Diegmuller had given evidence that passengers against whose name the letters TXL appeared in the passenger manifest had come from Berlin.

[171] In reply, the Advocate depute began by drawing attention to the background to this ground of appeal. He pointed out that in the trial the Crown had sought to persuade the court that upon the evidence two inferences should be drawn, first that an unaccompanied bag was

transferred from flight KM180 to flight PA103A, and secondly that the improvised explosive device was contained within it. This ground of appeal related to a submission to the trial court relating to the second of those matters.

[172] Dealing first with what might be called the Warsaw bag, he submitted that it was plain that the trial court had had regard to the evidence concerning it. That was evident from the terms of para [33] of the judgment. As to the 21 bags said to have come from Berlin, the Advocate depute submitted that the trial court ought never to have entertained this submission, since the evidence said to underpin it was not available to it as a matter of law. It would have been a misdirection on the part of the trial court to have regard to this. At the trial there had been discussion of the possibility that a passenger might have been duped into carrying the bomb. That had led on to a discussion of the actions of a deceased passenger Khaled Jaafar, and, in turn, to a consideration of the absence of a security check of online baggage belonging to passengers when they checked in at the originating airport. Mr O'Neil had given evidence that there had been 21 such bags on a PanAm flight from Berlin. Subsequently in submissions, Mr Taylor had moved on to a consideration of the significance of those 21 bags. He had contended that those bags had to be added to the total of 111 derived from production 1060. He had then sought to compare the resulting total with the passenger manifest.

[173] The Advocate depute submitted that, in view of the matters now raised, which, with the exception of the point about the Warsaw bag, depended upon the use of the passenger manifest, it was crucial to understand the status of that document as a matter of evidence. That could be seen from a joint minute, which contained an agreement in the following terms:

> "That Crown production 199 is a passenger manifest for the feeder flight PA103A from Frankfurt to London Heathrow on 21 December 1988. Passenger No 63 on that list is noted as 'Jafar K'. The manifest bears to record that he had two items of baggage that he

> had checked in for carriage in the hold on that flight. That passenger is the Khaled Jaafar referred to in paragraph 2 (104) of the Joint Minute read on 5 May 2000."

It had been understood prior to the conclusion of the joint minute that the document production 199 could not be relied upon for accuracy. Its inaccuracy was evident from a comparison between the way in which it bore to record the baggage of Karen Noonan and other evidence which could be relied upon in regard to that topic. There had been no evidence before the trial court at all as to how production 199 had been generated or where the information contained within it had originated. Accordingly, and in particular, the total number of bags listed in that document was never discussed in evidence for good reasons, standing its "understood inaccuracy". Despite that state of affairs, in his submissions (which came after those of the Crown) Mr Taylor had put the document before the trial judges, inviting them to examine it for themselves and to identify entries relating to the number of bags involved. That was a wholly inappropriate approach, standing the document's lack of evidential status. It was also an invitation to the court to do what he had criticised it for doing with the coder's worksheet. Furthermore, the reasoning leading to that conclusion that there had been 14 unaccompanied bags on flight PA103A depended upon the contention that the 21 Berlin bags fell to be added to the 111 appearing on the computer printout, in order to ascertain how many bags had been carried on the flight. In these circumstances it was plain that there had been no evidential basis for the submissions referred to in this ground of appeal. Thus it would have been improper for the trial court to reach a conclusion as to the number of unaccompanied bags carried on the flight. It followed that if the trial court had given effect to the submissions under discussion, it would have misdirected itself in law. It was impossible to comprehend how the rejection of that submission could constitute a misdirection. Accordingly, that part of this ground of appeal should be rejected.

[174] The Advocate depute went on to submit that, if this court did not agree with his submissions so far, it might require to consider the effect of any error made by the trial court in following counsel's submissions. Any misunderstanding on its part as regards the number of unaccompanied bags on the flight PA103A was immaterial, since there were in any event unaccompanied bags on the flight. At no time had the Crown suggested that the inference in respect of the bag from flight KM180 might be enhanced by reference to it having been the only unaccompanied bag or even one of a few of such bags. In para [82] of the judgment the trial court had explained the factors that had influenced it in drawing the inference that the bag from flight KM180 contained the bomb: the number of unaccompanied bags on flight PA103A did not feature in that paragraph. The true position was that, as soon as there were any more than one unaccompanied bag on flight PA103A, it was the other evidence relating to the bag said to contain the bomb that became the dominant consideration. As soon as there were even two unaccompanied bags on the flight, it was necessary to look elsewhere to find which of those two bags contained the bomb. Thus the matter set out in this ground of appeal played no part in the court's decision as set out in para [82]. In any event, it was obvious from the language used by the trial court in para [33], when referring to the issue of the 21 bags, that it had come only to the most tentative of views. In all these circumstances this ground of appeal should be rejected.

[175] As regards Mr Taylor's statement that in para [35] the trial court expressed a conclusion that an unaccompanied bag was transferred from flight KM180 to flight PA103A, we refer to our discussion in para [270]. As has already been observed, this ground of appeal contains two distinct elements, the allegation concerning the trial court having misunderstood the defence submission referred to and the trial court allegedly having failed to deal with evidence relating to the Warsaw bag. It is convenient to deal with the second matter at this stage. In para [33] of the

judgment the trial court's handling of this matter is set out. It found, on the basis of the part of production 1060 referred to, that an item coded at a station in area HM at 1544 hours on 21 December 1988 was sent to flight PA103A. The coder's records bore to show that baggage from flight LH1071 from Warsaw was being coded at that station at that time. It having been agreed that no passenger from that flight transferred to flight PA103A, the trial court concluded that the records seemed to show the presence of an unaccompanied bag on that flight from that source. That passage appears to us to show that the trial court accepted, subject to any qualification it might have had regarding the records, that there was carried on flight PA103A an unaccompanied bag which had originated in Warsaw. Plainly that finding was part of the background to the reaching by the trial court of the conclusions set forth in para [82] of the judgment, on the basis of the several factors there described. In that situation, we see no substance in the criticism that, in some way, the trial court failed to deal with the evidence relating to that bag.

[176] Turning to the remaining part of this ground of appeal, it is quite evident that the submission made to the trial court and repeated before us to the effect that there were 14 unaccompanied bags on flight PA103A, apart from the Warsaw bag and the Luqa bag, depends upon the making of a comparison between the figure of 132 bags, derived in the way indicated from the 111 bags recorded in the computer printout and the 21 Berlin bags, and the figure of 118 bags said to emerge from the passenger manifest. Such a submission could be well founded only if it had a basis in evidence properly before the court. The Advocate depute was correct in submitting that the accuracy of the passenger manifest was neither established by evidence nor agreed in any joint minute. For that reason, in our opinion, the submission dependent on it had no basis in the evidence. We also agree with the Crown submission that it would have been a

misdirection in law on the part of the trial court if it had given effect to that contention. What it does in para [33] of its judgment is to narrate the submission concerned. It then observes: "Production 199 was not scrutinised in much detail in the evidence and the discrepancy in numbers was not explored." It then goes on to express, in the most tentative manner, its view concerning the possibilities. We consider that there is force in the suggestion that the trial court should not have entertained the submission made to it at all. However, it does not appear to us that, having done so, it reached any definite conclusion about this submission.

[177] In all these circumstances, we consider that there is nothing in the trial court's handling of this matter which constitutes a miscarriage of justice. Accordingly we reject this ground of appeal.

The Heathrow evidence

[178] Three grounds of appeal are advanced in connection with the broad proposition that the suitcase containing the improvised explosive device which ultimately destroyed flight PA103 was infiltrated at Heathrow airport into the baggage ultimately carried on the flight. The importance of that proposition at the trial was that, if it had been established, or if evidence tending to support it had raised a reasonable doubt as to the Crown proposition that the device was infiltrated at Luqa, the basis on which the Crown sought the appellant's conviction would have been undermined. In ground of appeal B9 it is contended that the trial court misdirected itself in certain respects in dealing with evidence led at the trial in connection with the contention that Heathrow was the place of infiltration. That evidence was given primarily by John Bedford, a loader-driver employed by PanAm. In ground of appeal B10, it is contended that the trial court failed to take account of a submission made on the appellant's behalf as to the significance of the

location of the primary suitcase within container AVE 4041 as pointing to Heathrow infiltration. In ground of appeal B11 it is contended that additional evidence, not led at the trial, would materially have supported the contention that Heathrow was the place of infiltration.

The treatment of John Bedford's evidence

[179] Ground of appeal B9 is directed at the trial court's treatment of evidence relating to baggage introduced on to flight PA103 at Heathrow airport on 21 December 1988. At the trial it was contended that this evidence pointed to Heathrow as the place at which the explosive device was infiltrated into the baggage ultimately carried on flight PA103. If Heathrow was the place of infiltration, Luqa could not have been. This evidence was therefore contradictory of the Crown case. In this ground of appeal it is maintained that the trial court rejected that evidence for reasons that involved misdirection. That misdirection undermined the trial court's reasoning and resulted in a miscarriage of justice.

[180] Mr Bedford worked in the interline shed. He was there concerned with the handling of interline baggage for PanAm flights. He set aside container AVE 4041 to receive interline baggage for flight PA103. He himself placed a number of items of interline baggage in the container. In his temporary absence from the interline shed, two further items of baggage were placed in the container. In statements which he adopted in evidence at the trial, he described one of those items as a brown or maroony-brown hardshell Samsonite-type case. Shortly before leaving work at about 1700 hours he took the container to the baggage build-up area and left it there. By then it contained eight or ten items of baggage. It was later taken to stand K16, and baggage for New York from flight PA103A was loaded into it. It was then taken to stand K14, and loaded into the hold of flight PA103.

[181] At the trial, the appellant's contention was that the trial court should infer that one of the two items of baggage placed in container AVE 4041 in Mr Bedford's absence from the interline shed contained the explosive device. The trial court did not draw that inference. In this ground of appeal, the appellant contends that in order to justify taking that course the trial court resorted to speculation, and so misdirected itself. The ground of appeal is in the following terms:

> "The court misdirected itself in para 25 by finding that the suitcase described by Bedford 'might have been placed at some more remote corner of the container'. There was no evidence that more than one case matching the description of the primary suitcase was present in container AVE 4041 or recovered at Lockerbie. The case described by Bedford was one of not more than ten. It was for the Crown to lead evidence to demonstrate the existence of a bag which matched that described by Bedford additional to the primary case. It did not do so. Without such evidence the court were not entitled to speculate. In doing so the court erred in dismissing the significance of the suitcase described by Bedford as being the primary suitcase."

[182] Before the trial court, Mr Taylor summarised in twenty points his submissions in support of the inference that the explosive device was infiltrated at Heathrow. Before us, he again advanced those points and developed them, annotating them to indicate how far they had been accepted or rejected by the trial court. It is unnecessary to reiterate all twenty points here. The starting point of the line of argument expressed in them was that, as the trial court accepted, the explosive device was contained in "a brown hardshell Samsonite suitcase of the 26" Silhouette 4000 range ('the primary suitcase')", which was in container AVE 4041. There was then placed alongside that fact the further fact, also accepted by the trial court, that in the light of Mr Bedford's evidence, "a suitcase which could fit the forensic description of the primary suitcase was in the container when it left the interline shed". Given the trial court's acceptance of that point, it is in our view unnecessary, for the purpose of this ground of appeal, to examine in more detail the possible means by which the suitcases described by Mr Bedford may have come to be introduced into the container.

[183] The two suitcases when seen by Mr Bedford were lying on the floor of the container. Given the evidence of forensic scientists that the primary suitcase was not, at the time of the explosion, on the floor of the container, and was probably resting on top of an American Tourister case which had arrived from Frankfurt on flight PA103A, the next stage of the argument was that there had been rearrangement of the suitcases in the container after it left the interline shed. In that connection Mr Taylor relied on the forensic testimony, and also on evidence given by Terence Crabtree to the effect that such rearrangement was routine practice when online transfer baggage from a feeder aircraft was added to a container holding interline baggage. The trial court accepted that such rearrangement could have occurred. At the trial, however, Mr Taylor's submission went further, and was to the effect that such rearrangement "would **probably** have placed the brown case described by Bedford in precisely the position proposed by the Crown" (point 16, emphasis added). That was not accepted by the trial court. It observed (at paragraph [25]): "… if there was such a rearrangement, the suitcase described by Mr Bedford might have been placed at some more remote corner of the container". In this ground of appeal it is claimed that this observation disclosed a misdirection on the part of the trial court.

[184] The next stage in the argument advanced to the trial court in point 16 was that, if there had been no rearrangement, the suitcases described by Mr Bedford would have remained on the base of the container, and would have been under the primary suitcase. If either of them had been in that position, it would have been explosion-damaged and, given the thoroughness of the search, the court would have heard evidence of the recovery of fragments of a second brown hardshell Samsonite-type suitcase. Despite the evidence of the recovery of even very small fragments of explosion-damaged baggage and of the institution of a systematic process of

identifying recovered baggage, and despite the onus of proof being on the Crown, there was no evidence of the existence of a hardshell case other than the primary suitcase. In these circumstances, Mr Taylor argued, it was speculation on the part of the trial court for it to suppose that such a case existed.

[185] In his submissions to us, Mr Taylor reiterated that if there had been no rearrangement of the suitcases in the container, the two suitcases introduced in the interline shed in Mr Bedford's absence would have remained on the base of the container and would have been immediately under the primary case. The absence of recovery of fragments of a second brown Samsonite-type case confirmed that there must have been rearrangement. Mr Taylor then restated the first part of point 16 of his argument before the trial court in modified form. He said that rearrangement "**might** have put the Bedford case in the position where the bomb case was said to be situated" (emphasis added). Later in his submissions, he reinforced that restatement by acknowledging: "The fact that a repositioning took place could not determine of itself that the bags spoken to by Bedford … ended up on top of the American Tourister". He submitted, however, that the inference that one of the cases described by Mr Bedford was the case which contained the explosive device was a proper inference from (i) the absence of an alternative explanation of what became of it, (ii) the fact that it matched the description of the primary suitcase, and (iii) the fact that the primary suitcase was positioned on top of the case which was moved into the position originally occupied by one of the Bedford suitcases.

[186] Mr Taylor submitted that the trial court's suggestion that the suitcase described by Mr Bedford might have been placed in some remote corner of the container would only have been a proper inference if there had been evidence of the recovery of such a suitcase which belonged to an interline passenger and which had suffered no explosive damage or a degree of such damage

which was consistent with its having been in a remote location. In the absence of such evidence the suggestion was speculation. If such a suitcase had been recovered, its existence would have been put to Mr Bedford in re-examination. That was not done. It was therefore legitimate to infer that the Crown could not account for a second brown hardshell Samsonite-type suitcase in the container. Moreover, on the evidence of practice as to how containers were packed, it was improbable that a hardshell suitcase of the relevant dimensions would have been placed in a "remote corner" of the container.

[187] The position, Mr Taylor submitted, was therefore either (1) that the brown Samsonite-type suitcase introduced into the container in the interline shed at Heathrow and seen by Mr Bedford was the case which contained the explosive device, or (2) that (a) the explosive device was in a suitcase of the same description which was transferred from the Frankfurt flight PA103A into an almost identical part of the container, which happened to be the location most advantageous for the destruction of the aircraft, and (b) a second case of that description was introduced into the container at Heathrow, but the Crown had been unable to account for the existence of that suitcase at any time since Mr Bedford first gave a statement on 9 January 1989. Mr Taylor acknowledged the possibility that the case seen by Mr Bedford simply disappeared and was never recovered, despite the minute search which recovered even tiny fragments of the explosion-damaged baggage, but suggested that that possibility might be regarded as "a bit far-fetched". Since there was no evidential basis for concluding that there was a second suitcase, the evidence pointing to infiltration of the case containing the explosive device at Heathrow was compelling material contradictory of the proposition, on which the verdict depended, that such infiltration took place at Luqa.

[188] The trial court's speculation that the suitcase seen by Mr Bedford might, as a result of rearrangement, have been placed in some remote corner of the container was therefore a material misdirection on a crucial issue. It influenced the court in reaching a conclusion adverse to the appellant, in that it led, it was submitted, to the rejection of the evidence of Heathrow infiltration. It therefore constituted a miscarriage of justice.

[189] In responding to this ground of appeal, the Advocate depute first examined the evidence said by the appellant to point to infiltration of the primary suitcase at Heathrow, and then examined the way in which that material had been treated by the trial court. He dealt with the first of those subjects under three heads, namely (i) how the suitcase (or suitcases) spoken to by Mr Bedford came to be in the container AVE 4041, (ii) the description of that suitcase, and (iii) its location in the container. As we have already indicated, it is not in our view necessary for the purpose of dealing with this ground of appeal to discuss the means by which the suitcases may have found their way into the interline shed and to the position on the base of the container in which they were seen by Mr Bedford. In his analysis of that aspect of the evidence the Advocate depute, as he acknowledged, followed paths which the trial court did not follow.

[190] The trial court took as the starting point of its treatment of this issue its finding that by the time the container left the interline shed it held a suitcase which could fit the description of the primary suitcase, and we do not consider it appropriate to go behind that finding. The Advocate depute acknowledged that the trial court made that finding. He reminded us, however, of certain aspects of the evidence on the point. At the trial, Mr Bedford had no recollection of the appearance of the suitcases, but adopted statements he had made to the police in January 1989 and at the Fatal Accident Inquiry. He did not identify the suitcases that he saw (or either of them) as being of the same make, model or size as the primary suitcase; at best his evidence was

of hardshell suitcases of similar colour. The Advocate depute further reminded us that Mr Bedford's evidence was of the introduction of two similar cases, both of the hardshell type and of the same or similar colour. That fact, the Advocate depute submitted, was significant in evaluating the appellant's contention that the absence of recovery of parts of a second hardshell suitcase supported the inference that the explosive device must have been in one of the cases described by Mr Bedford. The force of that contention was greatly diminished, the Advocate depute submitted, when it was appreciated that on Mr Bedford's evidence there were two such cases in the container (if the primary suitcase did not come from flight PA103A), or three such cases (if it did). There was thus at least one hardshell suitcase unaccounted for, irrespective of whether the primary suitcase was infiltrated at Luqa or at Heathrow. The absence of remains of a second hardshell suitcase therefore gave no very cogent support to the appellant's contention. Moreover, the trial court accepted the evidence of the forensic scientists that cases in other parts of the container might suffer little or no damage. Apart from explosion damage, there was nothing to link recovered items with container AVE 4041, and the fact that minute parts of baggage were recovered did not mean that all baggage in the container had been recovered.

[191] Turning to the evidence relating to the ultimate position in the container of the suitcases described by Mr Bedford, the Advocate depute first pointed out that the only direct evidence bearing on this was in the evidence of Mr Bedford. When he left the container in the baggage build-up area, they were lying flat on the base of the container. In that position, neither of them could be the primary suitcase, because the undisputed scientific evidence was that the primary suitcase was not on the base of the container. The appellant was therefore compelled to rely on redistribution of the baggage within the container. There was evidence, accepted by the trial court, that that could have happened when the baggage from Frankfurt was being added to the

container. In these circumstances, the Advocate depute submitted, it merely clouded the issue to examine whether there actually was rearrangement. It was necessary to proceed on the basis simply that there may have been. In that context the Advocate depute first pointed out how little certain parts of the container and baggage were actually damaged by the explosion. He also pointed to the evidence of Mr Crabtree which, he submitted, showed clearly that there was no limit to the possible extent of rearrangement within the container, and that there was no pattern in such rearrangement. It was a completely random event, involving "rejigging" to meet unpredictable demands. There was no method of identifying the ultimate position of the cases described by Mr Bedford, if the baggage in the container was rearranged to accommodate the baggage transferred from flight PA103A.

[192] Turning to the treatment of the evidence of Heathrow infiltration by the trial court, the Advocate depute accepted that, despite the points he had made, the evidence of Mr Bedford, taken in conjunction with the evidence that rearrangement may have occurred, might, if viewed in isolation from the rest of the evidence, yield a reasonable doubt as to the point at which the primary suitcase was infiltrated. He submitted, however, that these adminicles could not be viewed in isolation. They required to be weighed against what he described as the "twin anchors" of the Crown case, namely (i) the evidence which showed that an unaccompanied bag was carried on flight KM180 from Luqa to Frankfurt, and (ii) the presence in the primary suitcase of clothing purchased in Malta. To this could also be added (iii) the background evidence of JSO instigation and (iv) the evidence linking the JSO to Malta. Having carried out that weighing process, it was open to the trial court to reject the evidence pointing to infiltration at Heathrow because it was inconsistent with other accepted evidence. The trial court was correct to recognise (1) that when the container left the interline shed it contained not one

suitcase, but two suitcases, that could fit the description of the primary suitcase, and (2) that any rearrangement might have taken either (or both) of those suitcases to a remote corner of the container. The trial court was also correct to observe that many more items of luggage had been recovered than the twenty-five items which showed direct explosion damage. Many parts of the container were not affected by explosion damage, and there was as much chance of the suitcases observed by Mr Bedford ending up in one of those parts of the container as in any other, if rearrangement took place.

[193] The Advocate depute submitted that Mr Taylor's suggestion that the trial court had indulged in speculation involved a misunderstanding. In examining what the trial court said in para [25] of its judgment, it was necessary to bear in mind that Mr Taylor had submitted to it (in his point 16) that rearrangement would **probably** have placed a suitcase spoken to by Mr Bedford in precisely the position proposed by the Crown as the location of the primary suitcase. The trial court required to consider and analyse that submission. Nothing had been offered to support the probability of this being the effect of rearrangement. In pointing out that rearrangement might have resulted in a Bedford suitcase being placed in some remote corner of the container, the trial court was doing no more that testing the appellant's contention, expressed as it was at that stage, by reference to the evidence about the random nature of rearrangement, and pointing out that what was said to be probable was no more than one of a range of possibilities. The trial court expressed no conclusion as to the position of the suitcases spoken to by Mr Bedford.

[194] Nor, the Advocate depute submitted, was there speculation in the trial court's reference to the fact that the evidence concentrated on those items of recovered baggage that were explosion-damaged, and that other items of baggage had not been dealt with in evidence. If the Crown had

been able to show that the suitcases spoken to by Mr Bedford belonged to a particular interline passenger or passengers, that would have destroyed the appellant's contention about Heathrow infiltration entirely. It did not follow, however, from the fact that they had not done so that that contention required to be accepted. It remained for the trial court to analyse the contention and evaluate its proper weight. On a proper understanding of para [25] of the judgment, it could not be said that the trial court had misdirected itself in the way suggested in the ground of appeal. On the contrary, it had evaluated the contention and accorded it the weight it thought appropriate in the light of the other evidence in the case.

[195] In our opinion the appellant's submissions in support of this ground of appeal were not well founded. The trial court accepted that the evidence of Mr Bedford demonstrated that a suitcase which answered the description of the primary suitcase was placed in container AVE 4041 in the interline shed at Heathrow, and thus found its way onto flight PA103. The appellant contended that there must have been rearrangement of the baggage in the container, to the effect of placing the suitcase seen by Mr Bedford in the position found to have been occupied by the primary suitcase, and that it was thus established that the suitcase seen by Mr Bedford contained the explosive device. The trial court accepted that rearrangement of the baggage could easily have taken place when the transfer baggage from flight PA103A was being loaded into the container. It did not, however, go further than that towards reaching a positive conclusion about the effect of such rearrangement if it took place.

[196] As we have noted above, part of the appellant's reasoning in support of the conclusion that there positively had been rearrangement was the contention that, if the suitcase spoken to by Mr Bedford had remained in the position in the container which it occupied when he last saw it, it would have immediately underlain the primary suitcase at the time of the explosion, and would

therefore have suffered damage of the order of that found to have been suffered by the American Tourister case, and there would have been recovery of fragments of two brown hardshell Samsonite-type suitcases (the primary suitcase and the one seen by Mr Bedford). The absence of evidence of the recovery of fragments of a second such case precluded the possibility that the suitcase seen by Mr Bedford remained in its original position in the container. It was, we think, by way of comment on that submission that the trial court made the observation contained in the last four lines of para [25] of its judgment. At all events, that observation is, in our view, accurate, and discloses no speculation or misdirection.

[197] On the basis that rearrangement had taken place, the appellant went on to argue before the trial court that it was **probable** that its effect was to place the suitcase spoken to by Mr Bedford in the position found to have been occupied by the primary suitcase. In our opinion the Advocate depute was right in his submission that there was no adequate foundation in the evidence for the suggestion that that effect was probable, rather than merely one possibility among many. Mr Taylor conceded as much in his submissions to us. It seems to us to be clear from the evidence of Mr Crabtree that no conclusion could properly be drawn from the mere fact of rearrangement as to the rearranged position of any particular piece of baggage. Clearly this was the only point being made by the trial court in its observation that, "if there was such a rearrangement, the suitcase described by Mr Bedford might have been placed at some more remote corner of the container." There was no intrinsic importance in the reference to a "more remote corner". The point was merely that there was no proper basis for asserting that the probable, as distinct from a possible, result of rearrangement was to place a suitcase introduced at Heathrow in the position occupied by the primary suitcase. Viewed in that light, the observation in question in our opinion discloses no speculation on the part of the trial court. As

the Advocate depute said, it was no more than a comment made in the course of the necessary exercise of evaluating the strength of a proposition advanced at the trial on the appellant's behalf. It cannot, in our view, be read as a finding that one of the suitcases seen by Bedford did in fact end up in a remote corner of the container. A finding to that effect would have involved speculation in exactly the same way as would a finding accepting the appellant's contention that the effect of rearrangement was that the Bedford suitcase probably reached the position of the primary suitcase.

[198] Part of this ground of appeal relies on the absence of evidence of the existence in the container, or the recovery at Lockerbie, of a second suitcase matching the description of the primary suitcase. It is, in our opinion, necessary to bear in mind that the absence of evidence of recovery is said to be significant in two respects. The first is as a factor tending to support the inference that the Bedford suitcase was repositioned elsewhere than on the base of the container. That is the respect which was touched upon at the trial as part of point 16. There it was the absence of explosion-damaged fragments, like those recovered in respect of the American Tourister case, that was relied upon. The second respect is as ground for concluding that the Bedford suitcase was the primary suitcase. That use of the evidence does not appear to have been made before the trial court. It appears in the ground of appeal as the basis for suggesting that the trial court speculated in rejecting the inference that the Bedford suitcase was the primary suitcase.

[199] It seems to us that the latter point is ill-founded for a number of reasons. In the first place, while, as the Advocate depute pointed out, proof of the existence of a second suitcase belonging to an interline passenger and matching the primary suitcase would have destroyed the appellant's argument that the Bedford suitcase was the primary suitcase, the absence of proof of

such a suitcase, more or less damaged, is not conclusive in favour of that argument. As Mr Taylor recognised (although he suggested that it should be regarded as far fetched), it is possible that a second suitcase matching the relevant description simply disappeared and was never recovered, damaged or undamaged. Moreover, the strength of the submission about the significance of the non-recovery of remains of a second suitcase is greatly diminished when it is recognised that, on Mr Bedford's evidence, there were two such suitcases introduced at Heathrow. That being so, if there was complete recovery, there should have been evidence of one other suitcase of the relevant type, even if one of the Bedford suitcases was the primary suitcase.

[200] In the second place, however, this aspect of the ground of appeal in our view discloses a misunderstanding on the appellant's part of how far the trial court went in para [25] of its judgment. It did not "dismiss the significance" of the Bedford suitcase. It did not at that stage make a finding that the Bedford suitcase was not the primary suitcase. It merely rejected the proposition that the fact of rearrangement showed that the Bedford suitcase was probably in the position of the primary suitcase by pointing out that rearrangement could have had other effects, including the removal of the Bedford suitcase to a more remote corner of the container. In our view, by the end of para [25] of its judgment, the trial court had evaluated the Heathrow evidence and the strength of the submissions made in relation to it. The possibility that a suitcase infiltrated at Heathrow was the primary suitcase was not at that stage rejected outright. The trial court went on to discuss other aspects of the evidence, before returning to its overall conclusion.

[201] As the Advocate depute pointed out, the evidence bearing on the possibility of infiltration of the primary suitcase at Heathrow had to be weighed along with the evidence bearing on what

he described as the "twin anchors" of the Crown case, the evidence supporting the carriage of an unaccompanied bag from Luqa to Frankfurt on flight KM180 and thence to London on flight PA103A, and the evidence of the presence of clothing of Maltese origin in the primary suitcase, as well as all the other evidence bearing on the whole issue. The outcome of that weighing exercise was expressed by the trial court in para [82] of its judgment. It was only then that the possibility of Heathrow infiltration was finally rejected.

[202] For these reasons we hold that the trial court did not speculate or otherwise misdirect itself in the ways suggested in this ground of appeal. It follows that there was in that respect no miscarriage of justice. We therefore reject ground of appeal B9.

The significance of the location of the primary suitcase

[203] In ground of appeal B10 the appellant maintains that the trial court "failed to take account of the defence submission that the fact that the primary suitcase was located at or near to the optimum position to achieve its destructive purpose gave rise to an inference that the device was ingested at Heathrow airport."

[204] The submissions made in this connection to the trial court were threefold. First, if a terrorist were able to introduce the suitcase containing the explosive device at Heathrow, that would offer the highest chance of achieving destruction of flight PA103. Heathrow infiltration offered the "minimal" possibility of the suitcase being intercepted or misrouted. These were real possibilities which could not be excluded if the explosive device were introduced at Frankfurt, Luqa or anywhere else. Secondly, a terrorist with no scientific knowledge would be likely to think that the device would cause the greatest damage if positioned as close as possible to the skin of the aircraft. The scientific evidence actually showed that the centre of the blast was in

the perfect position to destroy the aircraft. Thirdly, given the random nature of baggage handling and all the variables involved, it would be impossible for a terrorist in Malta to exercise any control over the position in flight PA103 of a suitcase first infiltrated at Luqa. The only place where such control could be exercised was Heathrow. In the light of these considerations, the fact that the explosive device ended up in the optimum position to destroy the aircraft was the result either of infiltration at Heathrow or of extraordinary chance.

[205] Before us, Mr Taylor submitted that examination of the trial court's judgment confirmed that that submission was not addressed by it. He submitted that it followed from the terms of the trial court's report that it had not regarded the submission as material.

[206] If, contrary to that primary submission, the passage in para [24] of the judgment was intended to deal with the point, Mr Taylor submitted that it disclosed "an unevenness in the court's approach". In para [24] the trial court said: "The person placing the suitcase would also have required to know where to put it to achieve the objective". Mr Taylor interpreted this as suggesting that the infiltrator might have difficulty in identifying the right container. He submitted that that consideration applied all the more to Luqa infiltration, but was not considered in that context.

[207] Mr Taylor submitted that the cogency of the point was reinforced by the fact that the suitcase answering the description of the primary suitcase appeared on the base of the container in uncertain circumstances, occupying a position in which it would have been brought close to the aircraft skin. According to Mr Bedford, this was a normal position for a case of that type. Redistribution involved only a limited chance that it would interfere with the initial effective positioning. Given the relatively small quantity of explosives used, and the fact that such

effective positioning could not be assumed if infiltration took place at Luqa, this point was quite strongly contradictory of the Crown theory of Luqa infiltration.

[208] The Advocate depute's response in relation to this ground of appeal was brief. In the first place, he argued that the submission to the trial court had been without merit. He pointed out that it was the appellant's case that there had been rearrangement of the baggage in the container. However, as soon as that began, the infiltrator had no control over where a particular suitcase might end up (unless he or an accomplice was involved as a loader, and there had been no suggestion of that). The inference that infiltration took place at Heathrow because there the positioning of the suitcase containing the explosive device could be controlled therefore did not arise.

[209] Secondly, the Advocate depute pointed out that the submission with which this ground of appeal was concerned was simply a part of the whole submission about Heathrow infiltration. It was therefore not necessary for the trial court to deal with it separately and explicitly. The baggage handling procedures at Heathrow were dealt with in detail, and it was acknowledged that an extraneous suitcase could be introduced into the system at a number of locations.

[210] In our opinion this ground of appeal is without merit. We do not consider that it can be maintained, simply on the basis that there is no express mention of the submission in the trial court's treatment of Heathrow infiltration, that no account was taken of it. What can be taken from the trial court's judgment is that it did not regard the point as lending such support to the theory of Heathrow infiltration as to merit specific mention. But that is not the same as failing to take the submission into account. As we have already said, the trial court was not obliged to go into such detail in its reasons as to review every fact and argument on either side. The fact that

no express mention is made of the submission in the judgment is in our view an insufficient basis for a submission that the point was not taken into account.

[211] In any event, we are of opinion that the submission made to the trial court was one which it was entitled to regard, at best, as weak. The first aspect of it, that there would be less risk of interception or misrouting if the primary suitcase was introduced at Heathrow rather than Luqa or Frankfurt, has some force, but that is a point which bears generally on the likelihood of Heathrow infiltration rather than on any inference to be drawn from the fact that the primary suitcase was in the optimum position. The second aspect, that a scientifically uninformed terrorist might think that location as close as possible to the aircraft skin was best, involves speculation as to the extent of the technical knowledge possessed by the hypothetical terrorist. But the main difficulty for the submission, in our view, lies in its third aspect. The appellant's primary argument in favour of Heathrow infiltration depended on the contents of the container having been rearranged when the transfer baggage from flight PA103A was added to it. The uncertainty as to the final position of any item of baggage introduced by rearrangement greatly diminished, in our view, the force of the submission. It may be, of course, that the hypothetical terrorist would not have known that rearrangement routinely took place, but that is a matter of speculation.

[212] We do not consider that Mr Taylor was right in his secondary submission that the last sentence of para [24] of the judgment was concerned with this point, and that it disclosed an "unevenness of approach". In our view, when observing that the person placing the suitcase would have had to know where to put it to achieve the objective, the trial court was dealing with the broader question of where a suitcase might be introduced into the baggage handling system in order to achieve the objective of having it loaded onto flight PA103. It was an observation

made by way of a rider to the trial court's acceptance that it was possible for an extraneous suitcase to be introduced at Heathrow.

[213] In our opinion it cannot be said that the trial court ignored the submission referred to in this ground of appeal. The cogency of the submission was a matter for the trial court to assess. It was a matter for the trial court to decide whether the point was of sufficient importance to require to be specifically mentioned in the statement of its reasons for the conviction. Having regard to our own view of the point, we do not find it surprising that the trial court did not find it necessary to deal with it expressly. For these reasons we reject ground of appeal B10.

Additional evidence

[214] The third ground of appeal concerning the question of infiltration of the primary suitcase at Heathrow airport is ground of appeal B11, which is in the following terms:

> "There exists significant evidence which was not heard at the trial. … Said evidence is significant as it demonstrates that at some time in the 2 hours before 12.35 a.m. on 21 December 1988 a padlock had been forced on a secure door giving access to airside in Terminal 3 of Heathrow airport, near to the area referred to in the trial as 'the baggage build-up area'. Had said evidence been available at the trial it would have supported the body of evidence suggestive of the bomb having been infiltrated at Heathrow on which the defence founded.
> There is a reasonable explanation as to why said evidence was not heard at the trial. The existence of said witnesses and evidence was unknown to the appellant's advisers who had no reason to think that this evidence might exist."

[215] The ground of appeal contains reference to a number of affidavits, witness statements and other documents. In the event, Mr Taylor's motion was that we should grant the appellant leave to lead the evidence of two additional witnesses, Raymond Walter Manly and Philip Gordon Radley, and to lodge certain additional productions. The Crown, although opposing that motion, sought leave, in the event of its being granted, to lead three additional witnesses, recall one witness who gave evidence at the trial, and lodge a number of additional productions.

[216] Section 106 of the 1995 Act provides *inter alia* as follows:

> "(3) By an appeal under subsection (1) above a person may bring under review of the High Court any alleged miscarriage of justice, which may include such a miscarriage of justice based on –
>
> (a) subject to subsections (3A) to (3D) 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."

[217] Mr Taylor addressed first the test set by section 106(3A). He referred to *Campbell v HM Advocate* 1998 JC 130 where the Lord Justice-Clerk (Cullen) said at page 147 B-C:

> "… if the explanation were merely that the appellant was not aware of the existence of the witness … this would hardly provide 'a reasonable explanation'. But it might be different if the appellant also could show that at the time of the trial he had no good reason for thinking that the witness existed … Thus much might depend on the steps which the appellant could reasonably have been expected to have taken in the light of what was known at the time."

(See also *Barr v HM Advocate* 1999 SCCR 13).

[218] Mr Taylor submitted that in the course of preparation for the trial no production or statement had been made available to, or discovered by, those representing the appellant that gave any notice of the existence of Mr Manly or the evidence which he was able to give. There was in those circumstances no basis on which they might have anticipated that it would turn out that there had been a breach of security in the baggage build-up area at Heathrow. The circumstances of the case were special. The Crown informed the defence that 14,000 witness statements had been taken. The police had fully investigated matters at Heathrow in the immediate aftermath of the Lockerbie disaster. The Fatal Accident Inquiry had taken place in 1990. Defence preparation began more than ten years after the event. The defence was unusually dependent on Crown assistance in preparing for the trial. The Crown had indicated that it would approach disclosure of evidence in accordance with the principles laid down in *McLeod v HM Advocate* 1998 JC 67. Since the Crown had not uncovered the evidence now

sought to be led in the course of preparation for the trial, the defence could not reasonably be expected to have done so. In these circumstances, a reasonable explanation for the evidence not having been led at the trial had been made out. The Advocate depute did not dispute that in the circumstances outlined the appellant had satisfied the test set by section 106(3A). We have no difficulty in accepting that it has been satisfied.

[219] That being so, the next question that requires to be addressed is the content of the proposed additional evidence, and whether its significance is such that the fact that it was not heard by the trial court could be regarded as having resulted in a miscarriage of justice. In that context, Mr Taylor referred to *Cameron v HM Advocate* 1991 JC 251 and *Kidd v HM Advocate* 2000 JC 509. In the former case the approach which the court should take in an appeal relating to additional evidence was set out in the Opinion of the Court delivered by the Lord Justice-General (Emslie) at pages 261-262. In the latter case, part of what the Lord Justice-General said in *Cameron* was somewhat modified. We summarise the approach adopted in those cases in the following propositions:

(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.

[220] In advancing his submission that the additional evidence should be heard, Mr Taylor referred in detail to the affidavits and other material mentioned in the ground of appeal. He submitted that leave should be granted to the appellant to lead the additional evidence. The Advocate depute submitted that we could and should decide, without hearing the evidence, that its significance was not such that leave to lead it should be granted. We shall require to return to the question of significance in due course, but it is unnecessary to deal with that question in detail at this stage. It is sufficient for us to say that we took the view that in the particular circumstances of this case the appropriate course for us to follow was to allow the additional evidence to be led, reserving our opinion on its significance. It seemed clear to us that if the existence of the evidence in question had been known to the Crown at the time of the trial, its existence would have been disclosed to the defence in accordance with the principles set out in

McLeod v HM Advocate. If that had happened, the evidence would have been placed before the trial court, led either by the Crown itself or, if the Crown chose not to lead it, by the defence.

[221] Leave to lead the additional evidence having been granted, Mr Taylor led as witnesses Mr Radley and Mr Manly. In the course of their evidence reference was made to a number of additional productions, including contemporary records. Two matters were the subject of agreement by joint minute. In addition, the Crown led the evidence of Geoffrey Myers, Richard Maxwell Harris and Keith Willis, and recalled Nicola Claire Milne.

[222] The additional evidence concerned an event which happened in the departures area of Terminal 3 at Heathrow late on 20 or early on 21 December 1988. In essence the event was that a padlock securing a set of doors through which access could be gained from the landside area of the airport to the airside area was forcibly removed. There was no dispute that that occurred.

[223] It was agreed by joint minute that the padlock was secure at 2205 hours on 20 December. The evidence showed that at about 0030 hours on 21 December it was found to have been forced. There was no dispute that the damage to the padlock was caused within that period, but the evidence did not permit the time at which the damage was done to be more precisely identified.

[224] The doors were located at a point designated T3-2A. On the ground floor of the departures area of Terminal 3 the boundary between the landside area and the airside area lay between the check-in area (landside) and the baggage build-up area (airside). In December 1988 there were five sections in the check-in area, designated (from east to west) A to E. There were at that time two sets of doors by which access might be gained from the check-in area to the baggage build-up area. One set was situated at the east end of the check-in area in section A and was designated T3-2A. The other was situated at the west end of the check-in area in section E and was designated T3-2B. Mr Radley, Mr Myers, Mr Harris and Mr Willis were agreed that

such was the arrangement of doors in December 1988. There was also evidence that at an earlier date there had been only one set of doors, situated about the middle of the check-in area and designated T3-2, but that this set of doors was closed up when the doors at T3-2A and T3-2B were installed. The doors designated T3-2A were situated at the airside end of a corridor which was separated from the main body of the check-in area by another set of doors.

[225] Mr Manly maintained in his evidence that there was at the time of the incident only one set of doors, designated T3-2. At the time when he was swearing his affidavits, he marked certain plans to show the location of the doors which he found forced open. The location which he marked was in section E of the check-in area. In evidence, however, he said that he could not read plans, and stated that T3-2 was in the middle of the check-in area. However, in an incident report at the time (production 4004) he gave the location of the incident as T3-2A. When that document was put to him in the course of his examination he affirmed that this was the location of the incident, while maintaining his denial that there was a second set of doors called T3-2B. In re-examination he adopted a passage from a statement he had made on 31 January 1989 to the effect that the doors T3-2A were situated at the east end of Terminal 3 departures. We are quite satisfied that Mr Manly was mistaken in his recollection that there was only one set of doors in December 1988, and in those parts of his evidence that might be taken as suggesting that the incident occurred elsewhere than at T3-2A, situated in section A at the east end of the check-in area.

[226] In December 1988 the doors at T3-2A were kept open during the day. While they were open they were manned by a security guard. Only persons showing an airport identification card would be permitted to pass from landside to airside. Such persons would not, however, at that date be searched. There was no evidence about how the security guard would deal with a person

with such a card if that person was carrying a suitcase. During the night, the doors were closed and padlocked. They were normally locked by 2230 hours. The time of locking might, however, be affected by the delayed departure of a flight. Mr Willis indicated that the doors would be kept open and manned until baggage handling for a delayed flight was complete. A Nigerian Airways flight, WT 801, was scheduled to depart at 2030 hours on 20 December, but was delayed and finally departed at 0215 hours on 21 December. As we have already mentioned it was matter of agreement that on 20 December the doors at T3-2A were locked by 2205 hours. There was no evidence that baggage handling for flight WT 801 was continuing at that time.

[227] Mr Radley and Mr Manly gave evidence to broadly the same effect, which was also recorded in contemporary documents, that at about 0030 hours on 21 December the padlock which had been securing the doors in question was found to have been forcibly removed, leaving unrestricted access between landside and airside. Mr Radley's impression was that the hasp of the padlock had been broken or snapped off by the application of great force. Mr Manly said in evidence that "it was as if it had been cut like butter; very professional". He said that it would have required a very good pair of bolt cutters to cut through it. Mr Manly's contemporary records, however, make no reference to the hasp of the padlock having been cut. His entry in the log book (production 4006) records his finding that the padlock had been "broken off". His incident report (production 4004) refers to the padlock being "forced and broken". Mr Radley's evidence was that Mr Manly called him to inform him that the padlock had been broken. Had the matter been one for us to determine, we would not have regarded Mr Manly's evidence that the padlock had been cut as reliable, and would have preferred the view that it had been broken by the application of force. In light of the apparent conviction with which Mr Manly maintained that the padlock had been cut, however, we do not consider that it can be said that no reasonable

jury or trial court could have accepted his evidence on that point. In any event, we do not consider that the distinction between cutting and breaking is of critical importance. Whether the padlock was cut or forced open, it is clear that a reasonable jury or trial court would have been entitled to hold that what was done was a deliberate act.

[228] The doors at T3-2A were double doors made of rubber with a transparent upper section. The evidence as to the manner in which they were secured by the padlock was not clear. There was no dispute that the means of securing the doors were attached to their landside face. The weight of the evidence, in our opinion, was that the doors were in some way secured by a metal bar which passed across much of the width of the doors and was in some way locked in place by means of the padlock. Mr Radley had a recollection of seeing the bar resting against the wall after the incident. There was evidence that before the bar was installed, the doors were fastened together by passing the padlock through flanges at the adjoining edges of the doors. One witness, Mr Willis, recollected that that was the fastening mechanism in use at the time of the incident, with the bar being introduced as an improvement thereafter, although he ultimately accepted that he might be mistaken on that point. Notwithstanding Mr Willis's evidence, it would in our view clearly be open to a reasonable jury or trial court to prefer the body of evidence to the effect that the bar was in use at the time of the incident. If that was so, the evidence left it unclear precisely where the padlock was situated when used to secure the metal bar. We do not consider that the precise location of the padlock, or the means used in conjunction with it to secure the doors, are matters of critical importance. What is significant is the clear evidence that the padlock and the means of securing the doors were on the landside of the doors.

[229] There was a body of evidence, elicited by the Crown, which was said to support the inference that the padlock had been broken by airport staff seeking to pass from airside to landside after the doors were locked rather than by someone seeking unauthorised access from landside to airside. There was evidence which would have entitled a jury to find that on occasions baggage handlers or other airport employees might still be working airside when the doors were secured for the night. If that occurred, they would not be "locked in", because there was airside to landside access at first floor level which was kept open and attended by security guards throughout the night. There was, however, evidence which suggested that airport staff resented the need to take that slightly longer route. The witnesses differed as to the extent to which they were aware of vocal or practical expression of that resentment.

[230] Mr Radley said that he was aware of complaints from baggage handlers about having to take the longer route. He also expressed the view, however, that staff coming out from airside could not have broken the padlock, because they were on airside and it was on landside. He could not recall any previous occasion on which staff had forced open a door at night. Mr Manly indicated that he was aware of a couple of occasions when damage was done to padlocks or doors by members of staff trying to take a shortcut, although moments later he said that he did not know if they sometimes tried to force open locked doors. In re-examination he said that although there was a lot of hearsay about shortcuts being taken, he had never himself seen evidence of damage to padlocks or doors so caused. Mr Myers said that on at least one occasion he had seen damage to the padlock on a similar type of door. The padlock remained in place, but would not operate effectively. On that occasion, however, the attack on the padlock had been from landside. His "supposition" had been that the damage had been caused by staff trying to take a shortcut. He also spoke of there being other occasions on which damage was done to

locked doors. Mr Harris associated his recollection that the flange fastening of the doors was replaced with bar fastening because of frequent problems with staff trying to force their way through doors. Damage was caused on odd occasions. He had been aware of such damage prior to December 1988, and his personal view was that the forcing had been done from airside. After the introduction of the metal bar, it was on one occasion bent. Mr Willis was aware of the complaints by staff about having to take the long way round, but the only instances he mentioned of damage to doors related to plant room doors. He indicated that at the time of the incident on 21 December 1988 the thought was that someone had been trapped and had forced an exit from airside, but he could not remember whether that thought had been his alone, or emerged in discussion with colleagues.

[231] This body of evidence is in our view capable of supporting the conclusions that some members of airport staff resented the need to follow a longer route to return from airside after doors such as those at T3-2A were closed for the night, and that on occasion attempts were made to force various doors. It discloses, however, no previous example of successful forcing of a set of doors on the boundary between airside and landside. It requires to be weighed against Mr Radley's evidence that he saw no damage to the doors themselves, and the absence of any evidence that the doors or the metal bar had been damaged in a way that suggested an assault on them from airside. In our view the body of evidence which we have dicussed above is not of such cogency as to compel any reasonable jury or trial court to conclude that the breaking of the padlock on the doors at T3-2A on 20 or 21 December 1988 was carried out from airside by airport staff, and thus to preclude such a jury or court from accepting that the padlock had been forced from landside to gain access to airside.

[232] It was accepted by the witnesses that if the doors at T3-2A were forced from landside in order to gain access to the airside area, that was a very serious breach of security indeed. Conversely, of course, as Mr Manly was at pains to point out in his incident report (production 4004), from whichever side the forcing was undertaken, the result was to leave available open access from landside to airside so long as the breach of security remained undetected. Mr Manly did everything appropriate for him to do in the event of a serious breach of security achieved from landside. It was suggested that the reaction of the airport authorities to the incident was such as to suggest that they were proceeding on the basis that it was of the less serious sort, i.e. where the padlock had been forced from airside, not from landside. Whatever view may be taken of the cogency of that contention, we do not consider that it precludes a reasonable jury or trial court from reaching the contrary conclusion.

[233] One other aspect of the additional evidence was that Mr Radley said that although airline baggage tags were supposed to be kept secure, this was not always achieved. On occasions security patrols brought in rolls of baggage tags, which were then passed to the terminal security manager, who would take the matter up with the airline concerned.

[234] Mr Taylor began his submissions on the additional evidence by summarising it, and making a number of comments on the detail of it. We do not consider it necessary to record that aspect of his submissions in detail. He went on to submit that the additional evidence contained evidence which was capable of being regarded by a reasonable jury or trial court as credible and reliable, and as demonstrating that late on 20 or early on 21 December 1988 a padlock securing doors which allowed access from landside to airside at Terminal 3 at Heathrow airport was broken. There was evidence which a reasonable jury or trial court might regard as credible and reliable and as demonstrating that the damage to the padlock was done deliberately in order to

gain access from landside to airside. Although it was less certain, there was also evidence, capable of being regarded as credible and reliable, that the damage done to the padlock had been done by cutting it. The damage was done at night when few people were about. It was done within eighteen hours of the scheduled departure of flight PA103 on 21 December. It was done in Terminal 3, where the baggage handling activities for flight PA103 were to take place.

[235] Mr Taylor then, before continuing with his submissions on the significance of the additional evidence, made four points which he submitted weakened the Crown case that the primary suitcase had been infiltrated at Luqa. First, he said, the case for infiltration at Luqa depended, in large part, on an inference, drawn from the Frankfurt documents, that a bag was transferred from flight KM180 to flight PA103A. The trial court acknowledged that there were some difficulties with the documents and the way they were compiled. Secondly, the procedures at Luqa were such that a method of infiltration there could not be identified. The trial court described that as a major difficulty for the Crown case. Thirdly, the existence of x-ray procedures at Frankfurt airport ought to be taken into account, whether as a deterrent to sending the primary suitcase as interline baggage through Frankfurt, or on the basis that Mr Maier's evidence undermined the likelihood of the explosive device being in a suitcase which was x-rayed. Finally, infiltration at Luqa would have involved many difficulties and uncertainties which would not have pertained to infiltration at Heathrow.

[236] Mr Taylor recognised that, if the forcing open of the doors at T3-2A provided the route for infiltration of the primary suitcase, the primary suitcase then required to be secreted for a substantial period of time before it was introduced into container AVE 4041. An "insider" at Heathrow would be required. None had been identified, but in that respect the appellant's position in relation to Heathrow was no worse than that of the Crown in relation to Luqa. The

secreting of a suitcase on the airside of a busy airport would not be difficult. At the trial there had been evidence that building works were going on at Heathrow at the material time, and these would have increased the opportunities for secreting a suitcase. It was not impossible for a case to be secreted pending its introduction into the container. It need not have been in the same place for the whole period. Even if not concealed, it might not have attracted attention. There had been evidence at the trial that on occasions bags were moved around singly.

[237] There were, Mr Taylor submitted, a number of ways in which a suitcase, brought to airside by means of the breaking open of the doors at T3-2A, might have been introduced into container AVE 4041. The two cases introduced during Mr Bedford's absence from the interline shed need not have been introduced together. As Mr Bedford said in evidence, anyone who worked airside at the airport could have placed the suitcases in the container. If the suitcase had been introduced directly into the container, no tag would have been necessary. The way in which the two cases were arranged, with their handles inward, would have obscured the absence of a tag. A tag would nevertheless have been useful in that it would have afforded an appearance of normality as the case was moved around the airport. It would probably have been essential if the case was simply put on the conveyor outside the interline shed, or left lying inside the shed. The tag would probably have required to be an interline tag. The availability of tags was supported by the unchallenged evidence of Mr Radley to the effect that they were not always kept secure. A tag would not necessarily have had to be procured immediately before the incident. Given that workers from other airlines frequented the interline shed, and the evidence that it was not kept secure at night, there would thus have been little impediment to introducing a case into the interline shed. Given that the external conveyor was not guarded, there would have been no impediment at all to leaving a case on it. If that (rather than direct introduction into the

container) happened, the case would have been x-rayed, but that would have been even less likely to detect an explosive device than x-ray examination at Frankfurt, since Mr Kamboj, the x-ray operator, was not aware of the Toshiba warning.

[238] In dealing with the significance of the additional evidence at the time of making his motion for leave to lead it, Mr Taylor submitted in light of the authorities (*Cameron v HM Advocate* and *Kidd v HM Advocate*) that the real issue for us to determine was whether the additional evidence was important and would have been likely to have played a material part in or had a material bearing on the trial court's determination of a critical issue. Its importance was as an element in a circumstantial case pointing to infiltration of the primary suitcase at Heathrow. The forcing of access to the airside area of Heathrow on the eve of the departure of flight PA103, when taken in conjunction with the evidence that a suitcase matching the description of the primary suitcase was loaded on board flight PA103 at Heathrow, was to be contrasted with the absence of any equivalent circumstantial evidence relating to infiltration at Luqa. The additional evidence transformed what was seen by the trial court as a theoretical possibility that an extraneous case had been infiltrated at Heathrow into something more substantial. Had the trial court known not only that a case matching the description of the primary suitcase was introduced into flight PA103 at Heathrow in uncertain circumstances, but also that someone had taken the trouble to force a padlock securing doors which gave access from landside to airside at Terminal 3 during the night of 20-21 December 1988, that would have been a material consideration in determining whether the explosive device was infiltrated at Heathrow, or whether the evidence suggestive of such infiltration at least raised a reasonable doubt as to infiltration at Luqa. It was not for the appellant to prove that infiltration had taken place at Heathrow. The Crown case depended on proof of infiltration at Luqa. It was therefore sufficient if the evidence pointing to

Heathrow infiltration gave rise to a reasonable doubt as to infiltration at Luqa. Evidence which contributed to that process plainly bore on a critical issue in the case. In these circumstances it could not be said that the additional evidence would not be likely to have a material bearing on or a material part to play in a reasonable trial court's determination of a critical issue in the case. The verdict returned in ignorance of that evidence therefore constituted a miscarriage of justice.

[239] The Advocate depute accepted that the additional evidence showed that between 2205 hours on 20 December and 0030 hours on 21 December 1988 the padlock securing the doors at the access point T3-2A was damaged, with the consequence that access from landside to airside through those doors was left open. He invited us to reject Mr Manly's evidence that the padlock had been cut. He submitted that Mr Manly was an almost totally unreliable witness, and that his evidence of the padlock having been cut gained no support from Mr Radley or the contemporary records. Moreover, he submitted that the likeliest cause of the damage to the padlock was interference by baggage handlers or other airport employees seeking a shortcut through the locked doors in preference to taking the longer route at first floor level. In that connection he relied on the evidence of complaints, and on the evidence of previous instances of damage to locks and doors. He also relied on the general tenor of the treatment of the incident by the airport authorities, although Mr Radley and Mr Manly had done all that it was appropriate for them to do in the event of a serious breach of security. Further in that connection, the Advocate depute submitted that the balance of the evidence was that at the material time the doors were secured by the padlock being passed through flanges where the doors came together. The system of fastening using an iron bar was introduced later, particularly in view of the evidence of Mr Willis. The point of that submission, as we understood it, was that it was easier to understand

how the door could be forced from airside if the padlock simply fastened flanges at the point where the doors came together.

[240] The Advocate depute made two further points about the content of the additional evidence. First, it showed that a person with appropriate identification could pass through access points such as T3-2A during the day without being subject to search, and that this fact was well known. Secondly, it established that PanAm had three flights from Heathrow to New York on 21 December, scheduled to depart at 1100, 1330 and 1800 hours.

[241] The Advocate depute did not dispute the soundness or the applicability of the approach to an appeal under section 106(3)(a) set out in the authorities (*Cameron v HM Advocate* and *Kidd v HM Advocate*). He pointed out that the appellant did not maintain that if the trial court had heard the additional evidence it would have been bound to acquit. This court therefore required to assess the significance of the additional evidence, so far as it was capable of being regarded as credible and reliable. We required to consider whether it was important, and would have had a material bearing on, or a material part to play in, the trial court's determination of a critical issue in the case.

[242] The Advocate depute suggested that there were three stages at which the *Cameron* test might be applied. He submitted that the first stage arose in this way. It would not be right to embark on the examination of the additional evidence on the footing that the admitted fact of damage to the lock at T3-2A led to a choice between baggage handlers forcing their way out or an intruder infiltrating a bomb. Nevertheless, the additional evidence would only have been likely to have had a material bearing on a reasonable jury's determination of a critical issue if it had tended to suggest infiltration of a bomb at Heathrow. In so far as the appellant sought to link the damage to the padlock with the Bedford suitcases, if this court took the view that it was

likely that the damage to the padlock was caused by airport workers taking a shortcut, that would be contradictory of, or at least would lend no support to, the infiltration of the explosive device at Heathrow. Thus if that view were taken of the effect of the additional evidence, it could not have had a material bearing on the determination of a critical issue.

[243] If, however, this court took the view that the damage to the padlock could not be unequivocally attributed to baggage handlers forcing a way out from airside, the second stage for possible application of the *Cameron* test required to be considered. For that purpose it was necessary to examine the additional evidence to see whether there were any means by which the damage found, viewed on this hypothesis as damage caused from landside in order to force access to the airside area, could be linked to the arrival in the interline shed of the two suitcases described by Mr Bedford. The test of significance could then be applied in the light of that link. For that purpose, however, it was not enough for the appellant to point to a theoretical possibility of infiltration. This had always existed in various forms, and was referred to by the trial court in paras [24] and [82] of its judgment. That theoretical possibility had been regarded by the trial court as insufficient to raise a reasonable doubt about infiltration at Luqa, when set against the other evidence which was accepted. It followed that the identification of another example of how in theory a bag containing an explosive device might have been introduced at Heathrow, namely by way of the doors forced open at T3-2A, would not be sufficient to pass the significance test.

[244] In assessing whether the additional evidence supported the hypothesis that the break-in at T3-2A provided the route by which one of the Bedford suitcases was infiltrated, the Advocate depute made a number of points. First, he submitted that an individual carrying a suitcase and, presumably, lock-breaking equipment would be rather conspicuous in Terminal 3 between 2200

and 0030 hours, since normally no members of the public would be around at that time. Secondly, setting aside speculation, for a suitcase brought airside through the forced door at T3-2A to be one of the Bedford suitcases, it required to be infiltrated into the baggage handling system at the interline shed. For that purpose it would require an interline tag. That was particularly so if it was accepted, as the Advocate depute submitted it should be, that the Bedford suitcases were probably placed in the container by Mr Kamboj. He would not have placed them in the container if they had not been bearing appropriate interline tags. In this connection the Advocate depute relied on a submission which he had originally advanced in connection with ground of appeal B9, but which we did not find it necessary to discuss in that context. This was that, despite the fact that the trial court's preference of Mr Bedford over Mr Kamboj (on the question of whether Mr Kamboj told Mr Bedford that he had placed the suitcases in the container) did not constitute evidence that Mr Kamboj had in fact so placed them, the natural inference was that the cases were put into the container by Mr Kamboj, whose job it was to x-ray PanAm interline baggage, rather than by some interloper. Why would an intruder through T3-2A choose to introduce a case containing an explosive device at the interline shed? He had, on the hypothesis under examination, broken in to airside at a point adjacent to the very area (the baggage build-up area) where most bags were handled. Yet he had spurned the opportunity of introducing the case into the baggage handling system there, and had opted for the interline route which introduced the additional risk of detection when the interline baggage was x-rayed. Moreover, although readily discoverable evidence of the break-in had been left behind in the form of the damaged padlock, the hypothesis involved that the case was not introduced into the interline shed until some fifteen hours later. Unless the risk of opening the case airside to set the timer was to be undertaken, the timer would have had to be set before the break-in. No method

of arranging for the bag to pass through the system to the interline shed had been identified. The intruder would have required either to wait for fifteen hours himself, or to have the assistance of an accomplice. No place of concealment for the intruder or the suitcase had been identified. There was nothing in the evidence to explain why a suitcase, brought through T3-2A between 2205 and 0030 hours, would not be placed in the interline shed in time for either of the two earlier PanAm flights. On the hypothesis under examination, the suitcase had been tagged for flight PA103, although there were two earlier flights that would have involved a shorter period of concealment of a suitcase containing an armed explosive device. Yet there was no evidence that there was anything about flight PA103 or its passengers that singled it out as the target. Moreover, if an accomplice with airport identification, genuine or false, was involved, there was no need to break in to airside. All that was required was to smuggle the components of the explosive device through an access point, such as T3-2A, where persons with appropriate identification were not searched. The effect of all these points, the Advocate depute submitted, was to show that the hypothesis that the break-in at T3-2A was the means of infiltrating one of the Bedford suitcases was so weak and flawed that the additional evidence could not pass the *Cameron* test.

[245] The third stage at which the Advocate depute suggested the significance of the additional evidence might be tested was in the context of all the other evidence led at the trial, not merely the other evidence bearing on events at Heathrow airport. The critical issue at the trial was not a simple competition between infiltration at Heathrow and infiltration at Luqa. It was in any event wrong to say, as Mr Taylor did, that the evidence of Heathrow infiltration was no worse than the evidence of Luqa infiltration. There was evidence, which the trial court had accepted, that an unaccompanied and unaccounted for bag had travelled from Malta on flight KM180, had

transferred at Frankfurt to flight PA103A, and had thence been loaded on flight PA103. There was evidence associating the bag containing the explosive device with Malta. On the other hand, in respect of Heathrow there was evidence that a door from landside to airside was forced, and evidence that a suitcase matching the description of the primary suitcase was placed in container AVE 4041. There was no evidence that the explosive device was in that suitcase.

[246] There were nine components in the evidence before the trial court, the Advocate depute submitted, which were unaffected by the additional evidence. They were:

(1) The clothing in the primary suitcase was purchased by a Libyan, and the timer was supplied to the Libyan secret service. The trial court concluded that the plot was promoted by the Libyan secret service.

(2) The clothes were purchased in Malta, showing that a Libyan had gone to Malta in furtherance of the plot.

(3) The records of Frankfurt airport were shown to be capable of allowing the origin of baggage transferred there to be tracked.

(4) Those records demonstrated the carriage of an unaccompanied bag from Malta on flight KM180. The evidence of Mr Borg did not rule out the possibility of that happening. It was to be remembered that the Crown case was that the security measures at Luqa had been deliberately circumvented by a criminal act.

(5) The clothing in the primary suitcase suggested that it had been sent from Malta.

(6) The promoters of the plot, the Libyan secret service, had a presence at Luqa airport.

(7) The appellant, a member of the JSO and the purchaser of the clothing, flew into Malta the evening before the carriage of the unaccompanied bag on flight KM180. He did so using a false identity obtained for him by that organisation.

(8) The appellant was again present at Luqa airport the following morning, during some of the time when flight KM180 was loading. He then left on the first available flight for the safety of Tripoli, and never again used the false identity.

(9) Malta, because of its proximity, provided an airport to and from which Libyans could easily travel.

None of those nine features of the evidence was affected by the additional evidence. They all supported the Crown case. No feature of the additional evidence was consistent with the promotion of the plot by the Libyan secret service.

[247] In all these circumstances, the Advocate depute submitted, the additional evidence should be seen as not in any way undermining the Crown case. It was no more than another speculative and hypothetical explanation for infiltration at Heathrow. It would not have had a material bearing on a critical issue at the trial or a material part to play in the trial court's determination of a critical issue.

[248] In our opinion, although it is not all of equal reliability, there is material within the additional evidence which a reasonable jury or trial court could regard as credible and reliable, and as establishing that between 2205 hours on 20 December and 0030 hours on 21 December 1988 the padlock securing the doors at T3-2A in Terminal 3 at Heathrow airport was deliberately forced open, giving access from landside to airside. We would not ourselves be inclined to draw the inference, argued for by the Crown, that the lock was forced from airside by airport employees seeking to take a shortcut to landside from their place of work in the airside area. In any event, we are clearly of opinion that it cannot be said that the evidence relied upon as supporting that inference is so cogent as to preclude a reasonable jury or trial court from taking the view that the padlock was forced from landside in order to gain access to airside. It follows,

in our opinion, that the additional evidence cannot be held to be of no significance on the first basis argued for by the Advocate depute.

[249] We remind ourselves once more that the Crown case against the appellant before the trial court was a circumstantial one. The critical issue in the case was whether the trial court was satisfied beyond reasonable doubt by the circumstances proved by the evidence that the appellant was criminally responsible for the explosion which destroyed flight PA103. The assessment of the significance of the additional evidence must, therefore, in our view, be conducted in the context of the whole circumstantial evidence laid before the trial court.

[250] It is nevertheless convenient to concentrate first on examining what the additional evidence adds to the body of evidence pointing to infiltration of the primary suitcase at Heathrow airport. In doing so we bear in mind that the trial court accepted, in para [24] of its judgment, that it was possible that an extraneous suitcase could have been introduced in a variety of ways. Its ultimate rejection of the possibility of the primary suitcase having been infiltrated into container AVE 4041 did not depend to any extent on the absence of evidence identifying how an extraneous suitcase might have been introduced into Heathrow airport. It therefore seems to us that if the additional evidence merely demonstrates one way in which infiltration might have taken place, without linking one of the Bedford suitcases to that means of infiltration, it adds nothing of materiality to the evidence that was before the trial court. It does not transform a mere possibility into anything more substantial. It merely confirms that that which was regarded as a possibility was indeed a possibility.

[251] In our view the Advocate depute was right in submitting that the additional evidence did not demonstrate any link between the break-in at T3-2A and the Bedford suitcases. It might be said that there was a temporal link, in the sense that the break-in occurred some fifteen hours

before the Bedford suitcases appeared in the interline shed. It seems to us, however, that that interval of time, so far from pointing to a connection between the two events, casts considerable doubt on whether they can have been connected. The lapse of time after a readily detectable break-in, creating a period during which the infiltrator and the case (or, if there was an accomplice, the unaccompanied case) would require to be concealed in the airside area, points away from a connection. The difficulty of explaining the lapse of time is compounded by the fact that there were two earlier PanAm flights between the time of the break-in and the time when the Bedford suitcases appeared in the interline shed. Moreover, any attempt to link the Bedford suitcases with the break-in raises unanswered questions as to why the infiltrator ignored the baggage build-up area, and introduced the cases into the considerably more remote interline shed. In addition, given the evidence as to the ability of a person with airport identification to pass through T3-2A during the day without being subjected to search, and given the evidence led at the trial and mentioned by the trial court in para [24] about the substantial number of such passes unaccounted for, it is not clear why a break-in would have been seen as necessary, since the components of the explosive device could have been smuggled through an access point. In our view, at best for the appellant the additional evidence establishes no link between the break-in and the Bedford suitcases; at worst, it renders the existence of any such link improbable.

[252] In reaching its conclusion on the critical issue in the case, the trial court weighed the evidence bearing on the possibility of infiltration of the primary suitcase at Heathrow against other circumstances that tended to support infiltration at Luqa. Despite the major difficulty of the absence of an explanation of how infiltration at Luqa was achieved, it held that that had happened. It did so in reliance not only on the evidence of the passage of an unaccompanied and unaccounted-for suitcase through Frankfurt from Luqa to Heathrow, but also on a number of

other strands of circumstantial evidence linking the contents of the primary suitcase with Malta and the Libyan secret service, and the appellant with the Libyan secret service, with the contents of the primary suitcase and with Luqa airport at the material time. When the additional evidence, assessed as we have assessed it above, is viewed in that broader context, we are of opinion that it cannot be regarded as possessing such importance as to have been likely to have had a material bearing on the trial court's determination of the critical issue in the trial. We are therefore satisfied that it cannot be said that the verdict falls to be regarded as a miscarriage of justice on account of having been reached in ignorance of the additional evidence. We accordingly reject ground of appeal B11.

Malta as the origin

[253] It was, as we have already noted, critical to the Crown case that the trial court accepted that the primary suitcase had been carried on Air Malta flight KM180 from Luqa airport, as opposed to being infiltrated at Frankfurt or Heathrow airports. In this part of our opinion we will consider a number of grounds of appeal by which the appellant challenged the trial court's treatment of evidence in regard to Malta as the place of origin of the primary suitcase. We will first consider certain particular points before coming to a discussion of the general treatment of the evidence relating to Malta as the place of origin.

"Collateral issues"

[254] It is clear from para [82] of the trial court's judgment that, in concluding that it was proved that the primary suitcase containing the explosive device was despatched from Luqa, passed through Frankfurt and was loaded on to flight PA103 at Heathrow, it took into account,

first, that on Mr Gauci's evidence the purchaser of the clothing at his shop was a Libyan; and, secondly, that the trigger for the explosion was an MST-13 timer of the single solder mask variety, a substantial quantity of which had been supplied to Libya. In ground B5 it is maintained that these two matters were "collateral issues", that is to say that they were of no relevance to the question whether the primary suitcase was despatched from Malta.

[255] Mr Taylor pointed out that before the trial court the Crown had concentrated on the Maltese origin of the clothing and the evidence from Frankfurt airport. While the two matters to which this ground of appeal related might well be relevant as evidence countering the defence submission that the PFLP-GC or the PPSF might have been responsible, they were not relevant to the provenance of the primary suitcase and the trial court had not explained their relevance.

[256] In reply the Advocate depute pointed out that in earlier passages of its judgment the trial court had stated that it accepted evidence given by Abdul Majid, a former employee of the JSO, as to the personnel involved in that organisation. According to that evidence the post of assistant to the station manager of LAA at Luqa airport was normally held by a member of the JSO; and Said Rashid and Ezzadin Hinshiri had been the head of its operation section and the director of its central security section respectively (paras [42]-[43]). The trial court accepted evidence that one of them had placed an order for the supply of MST-13 timers and that a number of such timers had been delivered (para [49]). Thus there was a link between the JSO and Luqa airport; and between the JSO and the type of device used to cause the explosion. The trial court also accepted that in Malta, which clearly featured in the plot, the purchaser of the clothing had been a Libyan. The trial court also stated that the evidence which it had heard about the activities of other organisations such as the PFLP-GC and the PPSF was not such as to cast doubt on the Libyan origin of the crime.

[257] We are fully satisfied that the trial court was entitled to regard evidence that the purchaser was a Libyan and that the trigger for the explosion was an MST timer as part of the circumstantial evidence relevant to the proof of a Maltese origin of the primary suitcase. As we have already indicated, it is not necessary in a circumstantial case that every piece of evidence which is material should be indicative of criminal conduct. We could only have regarded the two matters as "collateral issues" if they could not on any view have been relevant to the proof of the provenance of the primary suitcase. This was clearly not so.

Deterrent factors

[258] Mr Taylor also submitted that the trial court had failed to deal with defence submissions that the x-ray procedure at Frankfurt airport would have deterred a terrorist from sending a bomb from Malta to London. More generally, he submitted, the trial court had failed properly to take account of defence submissions as to a number of factors which would have had a similar deterrent effect. These criticisms are the subject of part of ground of appeal B6, and ground of appeal B8.

[259] As regards the x-ray procedure, it was said that the trial court had not dealt with the submission that a terrorist could not have known that the improvised explosive device would not be intercepted at Frankfurt, especially in view of a warning which had been issued by Interpol about the use of a type of Toshiba radio to conceal an explosive device. The behaviour of the person who purchased the clothing in the shop of Mr Gauci and the fact that the labels had not been removed from the clothing in order to conceal its Maltese origin were inconsistent with a desire to avoid detection.

[260] As to the more general criticism, there was complete silence on the part of the trial court in regard to what the defence had submitted about the risk of detection or failure. It had been submitted that a terrorist considering Luqa as the point of infiltration would have been aware that there were systems there for the reconciling of baggage and the detection of vapour associated with many explosives. There was a risk of detection through x-ray procedure; of flights being delayed by weather or air traffic control; and of luggage being mishandled at Frankfurt and Heathrow airports. There was also a risk of the wrong aircraft being destroyed. These were material considerations which the trial court should have weighed up. They pointed to the conclusion that ingestion at Heathrow was more likely.

[261] In reply the Advocate depute pointed out that little had been said to the trial court about the deterrent effect of the x-ray procedure at Frankfurt. The Toshiba warning might actually assist someone who was associated with the airline industry to identify the best way of avoiding x-ray detection. The warning stated that it would be very difficult for the presence of a device to be detected by means of normal x-ray examination. A terrorist who was seeking to avoid detection might well regard the removal of labels as exciting suspicion. However, the main point was that the appellant's submission begged the question as to whether a terrorist would have anticipated that the purchase of the clothing would be traced to the shop in Malta through the interception of the primary suitcase, let alone through the examination of fragments from the site of the crash. It was difficult to know what sort of test should be applied in considering what a terrorist would regard as acceptable risks. An act of terrorism implied the ability and desire to take risks.

[262] In our view there is no substance in these complaints. It is important to note, first, that the defence submissions were not based on any evidence as to the type of attitude which a

terrorist would or would not be expected to adopt. They were mere assertions. Secondly, we note that the general complaint takes the now-familiar form of stating that the trial court "failed properly to take account of" certain matters. This, in effect, is a complaint that the trial court did not attach the weight to defence submissions which it should have done. However, the weight, if any, to be given to them was a matter for the trial court alone. It was plainly alive to the difficulties associated with the Crown case that ingestion took place at Luqa. We are satisfied that there was no misdirection on its part.

The Luqa evidence

[263] We now turn to consider the most fundamental issue raised in the grounds of appeal relating to the trial court's treatment of the evidence about Luqa airport and flight KM180. Ground of appeal B4 is in these terms:

> "The documents and other evidence from Frankfurt, properly construed, were not of sufficient strength, quality or character to enable the court to conclude that an unaccompanied bag from KM180 was transferred to and loaded onto PA103A standing the finding that it was 'extremely difficult' for such a bag to be shipped on a flight from Luqa, the fact that the documentation from KM180 discounted any unaccompanied bag on that flight and the Crown's failure to advance a method of infiltration of such a bag at Luqa."

Although in the course of his submissions in support of this ground of appeal Mr Taylor made some reference to evidence relating to the matters raised in it, the main thrust of his submissions was that the trial court had erred in its reasoning by failing to appreciate or take account of the consequences of certain findings in fact which it made. For an account of these findings it is sufficient for us to summarise paras [36]-[39] of the judgment as follows.

[264] Luqa airport was relatively small in 1988. There were not very many check-in desks. Behind these there was a conveyor belt and behind it a solid wall, separating the check-in area

from the airside area. Three doors behind the check-in desks, between the public area and airside, were kept locked. Other doors between the airside and the open area were guarded by military personnel, who also dealt with security at other entrances to the airside area. The conveyor belt carried items of baggage along behind the check-in desks and passed through a small hatch into the airside baggage area. The hatch was also under observation by military personnel, and there were Customs officers present in the baggage area, which was restricted in size. Items of baggage passing along the conveyor belt were checked for the presence of explosives by military personnel using a sniffer device which could detect the presence of many explosives, but not normally Semtex, although it might detect one of its constituents under certain circumstances. The only access from the check-in area to the sniffer area was through the hatch or a separate guarded door.

[265] Air Malta acted as handling agents for all airlines flying out of Luqa. The check-in desks for all flights were manned by Air Malta staff. Station managers and other staff of other airlines were present at the airport. Some airlines insisted on the use of their own baggage tags, but Air Malta tags could be used for flights of other airlines, in certain circumstances. Air Malta tags were kept in a store and supplies were issued to the check-in agents when a flight was due to start check-in. The same applied to interline tags. All remaining tags were returned to the supervisor after the check-in was completed.

[266] As the trial court put it, "Luqa airport had a relatively elaborate security system." All items of baggage checked-in were entered into the airport computer and noted on the passenger's ticket. After passing the sniffer check, baggage was placed on a trolley in the baggage area to wait until the flight was ready for loading. It was then taken out and loaded. The head loader was required to count the items placed on board. The ramp dispatcher, the airport official on the

tarmac who was responsible for the departure of the flight, was in touch by radiotelephone with the load control office. The load control had access to the computer and after the flight was closed would notify the ramp dispatcher of the number of items checked-in. The ramp dispatcher would also be told by the head loader how many items had been loaded and if there was a discrepancy would take various steps to resolve it. Interline bags would be included in the total known to load control, as would any rush items. The trial court rejected a submission by the Crown that there might at one time have been a practice of allowing the aircraft to leave in spite of a discrepancy. In addition to the baggage reconciliation procedure, there was a triple count of the number of passengers boarding a departing flight, that is there were a count of the boarding cards, a count by immigration officers of the number of immigration cards handed in, and a head count by the crew. As the trial court stated:

> "On the face of them, these arrangements seem to make it extremely difficult for an unaccompanied and unidentified bag to be shipped on a flight out of Luqa."

[267] The trial court considered evidence about certain informal practices relating to baggage, but concluded that none of it went further than suggesting that a case might have been placed on the conveyor belt, from where it would have gone to the explosives check and the baggage area, but not escaping the baggage reconciliation system. It went on to say:

> "The evidence of the responsible officials at the airport, particularly Wilfred Borg, the Air Malta general manager for ground operations at the time, was that it was impossible or highly unlikely that a bag could be introduced undetected at the check-in desks or in the baggage area, or by approaching the loaders, in view of the restricted areas in which the operations proceeded and the presence of Air Malta, Customs and military personnel. Mr Borg conceded that it might not be impossible that a bag could be introduced undetected but said that whether it was probable was another matter."

We have already referred in para [53] to the trial court's reference in para [39] of the judgment to documentary evidence which showed that there was no discrepancy in respect of baggage loaded on to flight KM180, the flight log and the load plan each showing that 55 items of baggage were

loaded, and the statement in the same paragraph that if the unaccompanied bag was launched from Luqa, the method by which that was done was not established.

[268] The principal submissions advanced by Mr Taylor in support of this ground of appeal were these. Any possible inference which could be drawn from the documents and other evidence from Frankfurt ought to have been measured against the evidence from Luqa which undermined the very possibility that an unaccompanied and unidentified bag left Luqa at all. The trial court ignored or in any event gave insufficient weight to its own finding that the Luqa documentation demonstrated that no unaccompanied bag was shown to have been placed on board at Luqa. In according undue weight to the Frankfurt inference and too little weight to the inference to be drawn from the KM180 documents, the trial court materially misdirected itself on a crucial issue, and that misdirection influenced the court to make a material judgment adverse to the appellant. This constituted a miscarriage of justice. Before proceeding to consider these submissions, we should record that, notwithstanding the terms of ground of appeal B4, Mr Taylor did not advance any submission about the "strength, quality or character" of the documents and other evidence from Frankfurt, so we need say no more about this as a possible test of that evidence.

[269] We would accept that, if the trial court reached a conclusion about a body of evidence without taking any account of a competing body of evidence, or failed to reach a conclusion about a body of evidence which it was necessary to do in order to follow through a process of reasoning, that would be capable of constituting a misdirection. It is therefore necessary to consider the proper interpretation to be placed on certain passages in the judgment, in order to see whether any such defect is disclosed. For this purpose it is appropriate to consider the

reasoning which underlay the trial court's approach to the evidence relating to all three airports, Heathrow and Frankfurt as well as Luqa.

[270] The pattern which appears throughout the judgment is that the trial court discussed the evidence, and then from time to time set out what conclusions were reached about it and what facts were found to be proved. This was done incrementally. Examples may be seen in some of the paragraphs we have previously quoted. Para [16] starts by saying:

> "We now turn to consider the evidence relating to the provenance of the primary suitcase and to the possible ways in which it could have found its way into [container] AVE 4041."

In our opinion, on a proper construction of the judgment, no conclusion is reached about this until para [82]. Mr Taylor founded on passages in paras [31] and [35] in support of an argument that the trial court formed a concluded view about the Frankfurt evidence before considering the Luqa evidence. In paras [26]-[31] the trial court considered the documentary and other evidence relating to Frankfurt airport. Para [31] starts with the sentence:

> "The documentary evidence as a whole therefore clearly gives rise to the inference that an item which came in on KM180 was transferred to and left on PA103A."

After further discussion of the evidence, the paragraph concludes with the sentence:

> "It follows that there is a plain inference from the documentary record that an unidentified and unaccompanied bag travelled on KM180 from Luqa airport to Frankfurt and there was loaded on PA103A."

In following paragraphs the trial court considered defence submissions that for a number of reasons that inference could not, or not safely, be drawn. Para [35] is in these terms:

> "The evidence in regard to what happened at Frankfurt airport, although of crucial importance, is only part of the evidence in the case and has to be considered along with all the other evidence before a conclusion can be reached as to where the primary suitcase originated and how it reached PA103. It can, however, be said at this stage that if the Frankfurt evidence is considered entirely by itself and without reference to any other evidence, none of the points made by the defence seems to us to cast doubt on the

> inference from the documents and other evidence that an unaccompanied bag from KM180 was transferred to and loaded onto PA103A."

In our opinion, having regard to the context of these paragraphs in the judgment as a whole, and having regard to the opening sentence of para [35], the proper construction of the sentences we have quoted from para [31] and the second sentence of para [35] is that the trial court was doing no more than accepting that the inference was available to be drawn from the evidence.

[271] Our reasons for reaching this view are as follows. The state of the evidence required the trial court to engage in a step-by-step process of reasoning. In the absence of any direct evidence that the primary suitcase travelled on flight KM180 from Luqa, the trial court chose to consider the evidence in reverse chronological order, starting with the certainty that the primary suitcase must have been loaded onto flight PA103 at Heathrow. There was no dispute that the baggage loaded there included baggage which had travelled from Frankfurt on flight PA103A, so it was possible that the primary suitcase travelled from Frankfurt on that flight. It was also possible that it was infiltrated at Heathrow, and the evidence of Mr Bedford made this a real possibility, which required to be considered and rejected if the flight PA103A route was to be preferred. While this possibility was considered, in particular in paras [24] and [25], no conclusion was reached about it at that stage. So far as Frankfurt was concerned, there was evidence which the trial court accepted was capable of yielding the inference that an item which had travelled from Luqa on flight KM180 was coded for transfer to flight PA103A, and that this item was unaccompanied and unidentified. It was also possible that, if the primary suitcase travelled from Frankfurt on flight PA103A, it was infiltrated there, but in the state of the evidence this, by contrast with the position at Heathrow, was a theoretical rather than a real possibility. This possibility, however, required to be considered and rejected if the flight KM180 route was to be preferred. In addition, as we have said, there was evidence about the difficulty, but not

impossibility, of infiltration at Luqa. Account required to be taken of this difficulty before it could be finally concluded that the primary suitcase began its journey at Luqa. Failure to consider and reach a conclusion about each of these issues might properly be regarded as a misdirection, because a step in the process of reasoning would in that event have been omitted.

[272] In our opinion, on a proper construction of the judgment, a number of important points were brought to a conclusion in para [82], and not sooner. In para [56] we quoted the paragraph in full. It started with the conclusion:

> "From the evidence which we have discussed so far, we are satisfied that it has been proved that the primary suitcase containing the explosive device was dispatched from Malta, passed through Frankfurt and was loaded onto PA103 at Heathrow."

It then went on to refer to findings in fact which had already been made:

> "[W]ith one exception the clothing in the primary suitcase was the clothing purchased in Mr Gauci's shop on 7 December 1988. The purchaser was, on Mr Gauci's evidence, a Libyan. The trigger for the explosion was an MST-13 timer of the single solder mask variety. A substantial quantity of such timers had been supplied to Libya."

The next sentence referred to the possibility of infiltration at Frankfurt or Heathrow (including, by necessary implication, the possibility that the suitcase seen by Mr Bedford was the primary suitcase), but the following sentence rejected these possibilities at the same time as accepting the inference that an unaccompanied bag was taken from flight KM180 to flight PA103A, because of the strength of the other circumstantial evidence relating to the clothing, the purchaser and the timer. The difficulty of infiltration at Luqa was also addressed, but the strength of the other evidence was regarded as sufficient to overcome this. The remainder of the paragraph was concerned with the evidence which led the trial court to draw the inference that the conception, planning and execution of the plot which led to the planting of the explosive device was of Libyan origin, and that evidence relating to the activities of other organisations such as the PFLP-GC and the PPSF did not create a reasonable doubt about the Libyan origin of the crime.

[273] While, therefore, it may be accepted that para [82] of the judgment does not set out the various issues which required to be addressed in the best order or as fully as might have been desired, and it would have been better had the conclusion been stated after the findings in fact, rather than before them, nevertheless the paragraph does in our opinion contain everything that is needed to satisfy us that the trial court did dispose of the outstanding issues and did so in that rather than in any earlier paragraph. It related the various possibilities to the strength of the circumstantial evidence pointing to the Malta connection and hence Luqa infiltration; it mentioned, and rejected, the possibility of infiltration at Frankfurt or Heathrow; by implication it rejected the bag which Mr Bedford saw, with no other evidence to link it with the explosive device, as a possible candidate for the primary suitcase; and it took account of the difficulty of infiltration at Luqa before concluding that the primary suitcase began its journey there.

[274] In our opinion, therefore, a proper analysis of the judgment from para [16] to para [82] does not disclose any underlying defect in reasoning such as to amount to a misdirection. What the trial court can be seen to have undertaken was the task of deciding what weight to attach to any particular piece of evidence or body of evidence which it accepted, which was precisely its function as a trial court. Once it had done that, it was open to it to decide that the primary suitcase began its journey on flight KM180 at Luqa, notwithstanding the difficulty of infiltration there and the absence of any evidence about how this was achieved, because of the view it formed about the strength of the inference which it drew from the documents and other evidence relating to Frankfurt airport, and the other circumstances which it regarded as criminative and which pointed to infiltration at Luqa.

The identification evidence of Tony Gauci

[275] Ground of appeal A2 relates to the trial court's conclusion (para [69]) that Mr Gauci's identification of the appellant as the purchaser, so far as it went, was reliable. It is alleged that the trial court failed to have proper regard, or to give proper weight, to the considerations set out in sub-paras (i)-(v) of the ground of appeal. These considerations are:

(i) the aspects of Mr Gauci's initial description of the purchaser and his identification of photographs of Abo Talb and Mohamed Salem as resembling the purchaser which were inconsistent with the appellant being that person;

(ii) the features in Mr Gauci's evidence and previous statements which were consistent with the purchaser being substantially older than the appellant in 1988;

(iii) that in picking out a photograph of the appellant in February 1991 he was doing so 26 months after the purchase and that he qualified the identification by saying that the man in the photograph would have to be 10 years or more older to look like the purchaser;

(iv) the difference in quality of that photograph from that of the other photographs; and

(v) that in picking out the appellant in court no explanation was advanced as to whether Mr Gauci was making any allowances for the passage of 12 years since the purchase of clothes or whether the appellant, then aged 48, resembled the clothes buyer as he was in 1988.

[276] The trial court deals with the identification evidence in considerable detail in paras [55]-[63] and [67]-[69] inclusive. Mr Gauci was asked in court if he could see the man who bought the clothing in his shop in 1988 and he pointed to the appellant, and said:

> "He is the man on this side. He resembles him a lot."

He also said of the appellant:

> "That is the man I see resembles the man who came."

Mr Gauci had previously picked out the appellant at an identification parade in April 1999 and had observed of him:

> "Not exactly the man I saw in the shop. Ten years ago I saw him, but the man who look a little bit like exactly is the number 5."

Number 5 in the parade was the appellant. Over the years Mr Gauci had been shown numerous photographs by the police. On 15 February 1991 at police headquarters in Malta he was shown a card containing 12 photographs. He picked out the man shown in photograph number 8, and observed:

> "Number 8 is similar to the man who bought the clothing. The hair is perhaps a bit long. The eyebrows are the same. The nose is the same. And his chin and shape of face are the same. The man in the photograph number 8 is in my opinion in his 30 years. He would perhaps have to look about 10 years or more older, and he would look like the man who bought the clothes. It's been a long time now, and I can only say that this photograph 8 resembles the man who bought the clothing, but it is younger."

He went on to say:

> "I can only say that of all the photographs I have been shown, this photograph number 8 is the only one really similar to the man who bought the clothing, if he was a bit older, other than the one my brother showed me."

This last observation was a reference to a newspaper article concerning the Lockerbie disaster which he had been shown by his brother at about the end of 1989 or the beginning of 1990 and to which we will return later. The man shown in photograph number 8 was the appellant.

[277] The trial court found that Mr Gauci was an entirely credible witness in the sense that he was doing his best to tell the truth to the best of his recollection, and that finding was not challenged by Mr Taylor. The trial court had regard to Mr Gauci's general demeanour and his

approach to the difficult problem of identification, and formed the view that he was a careful witness and that, when he had picked out the appellant at the identification parade and in court, he had done so, not just because it had been comparatively easy, but because he genuinely felt that he was correct in picking him out as having a close resemblance to the purchaser.

[278] The trial court's finding that Mr Gauci's identification of the appellant as the purchaser, so far as it went, was reliable was attacked by Mr Taylor on a number of different grounds. Perhaps the strongest criticism of the trial court's finding in relation to identification related to descriptions of the purchaser which Mr Gauci had given to the police in September 1989. In a statement made on 1 September 1989, when he was interviewed by the police for the first time, he had described the purchaser to Detective Chief Inspector Bell as being six feet or more in height, and in a subsequent statement made on 13 September 1989 he said that the purchaser was about 50 years of age. He gave evidence in court to the effect that things would have been fresher in his mind at that time and that he would be more likely to have been accurate then. At the identification parade the height of the appellant was measured at 5'8" and in December 1988 he was 36 years of age. The trial court acknowledged that there was thus a substantial discrepancy.

[279] The appellant also sought to found on Mr Gauci's identification of photographs of two other men as resembling the purchaser. On 14 September 1989 he was taken to police headquarters and shown 19 photographs. He picked out one of the photographs and said that the man in the photograph was similar to the man who had bought the clothing. The photograph looked like the purchaser's features at the eyes, nose, mouth and shape of face, but the man in the photograph was too young to be the purchaser. If he had been about 20 years older, then he would have looked like the purchaser. The man in the photograph was later identified as

Mohammed Salem, a man whom the Maltese Security Branch had considered to be similar to the artist's and photo-fit impressions which had been prepared as a result of the description of the purchaser which had been given by Mr Gauci when he was interviewed by the police.

[280] The appellant also founded on Mr Gauci's reaction when, around the end of 1989 or the beginning of 1990, his brother had shown him a newspaper article about the Lockerbie disaster. The article contained photographs of two men with the word "bomber" written across each photograph. Mr Gauci gave evidence that when he saw one of the photographs he thought that this was the man who had bought the articles from him. He thought that the man in the photograph resembled the purchaser. Asked in what way he resembled him, he replied: "His face and his hair was the way it appeared to me." In cross-examination he stated that the man in the photograph resembled the purchaser a lot. The man in the photograph was Abo Talb, who was referred to in the special defence of incrimination. However, on 6 December 1989 Mr Gauci had been shown a selection of photographs, including one of Abo Talb, but he had not identified anyone from those photographs. By the time he was interviewed on 10 September 1990 Mr Gauci had been shown a large number of photographs but stated that he had never seen a photograph of the man who had bought the clothing.

[281] Mr Taylor submitted that evidence of identification is a difficult area, especially when the witness did not know the person. In this case there was no evidence that Mr Gauci had seen the purchaser of the clothes on other than the one occasion. He had picked out a photograph of the appellant in February 1991, which was more than two years after the transaction, but that identification had been qualified. He had said that the man in the photograph was similar to the purchaser of the clothes, but that he would have to look 10 years or more older to look like the purchaser. The trial court had not properly appreciated that qualification. Further, prior to that

he had picked out photographs of Mohammed Salem and Abo Talb on the basis of resemblance. By the time of the identification parade in April 1999, more than 11 years had elapsed since the purchase of the clothing. Mr Gauci's initial description of the purchaser given to the police in September 1989 was wholly inconsistent with his later identification of the appellant as resembling the purchaser in terms of height, skin colour and age. While Mr Gauci stated that he was not expert at judging height and age, it had to be borne in mind that he was engaged in selling clothes to customers and it was difficult to accept his assertion that he had difficulty in judging height. The identification of the appellant in court took place more than 12 years after the purchase of the clothing. The trial court had recognised that the evidence of Mr Gauci did not amount to an unequivocal identification but stated that it could be inferred from his evidence that the appellant was the person who bought the clothing. The trial court could only have reached that conclusion if it had used the finding, also based on Mr Gauci's evidence, that the date of the purchase was 7 December to support the evidence of identification by resemblance and thus enable the inference to be drawn that the appellant had been the purchaser.

[282] Mr Taylor further submitted that the trial court had been wrong to reject the defence submission that the photograph of the appellant which Mr Gauci had picked out in February 1991 was of a markedly different quality, compared with the other photographs. It was submitted that DCI Bell's attempts to make the quality of all the photographs similar had failed, and that the photograph of the appellant was less clear than the other photographs.

[283] In relation to sub-para (v), Mr Taylor presented the further submission that, when Mr Gauci picked out the appellant in court, no explanation was advanced as to whether he was making an allowance for the passage of 12 years, or whether the appellant, then aged 48, resembled the clothes buyer as he was in 1988. It was not explained whether, at the trial, he was

making the necessary allowance for the 12 years which had elapsed since the purchase, thereby, in effect, contradicting his earlier assessment of age, or whether he considered that the appellant in July 2000 looked the same as the purchaser had looked in 1988, in which case he would have looked too young in 1988. Mr Taylor submitted that the trial court had erred in its approach to the admittedly difficult question of identification.

[284] In reply, the Advocate depute began by submitting that it had not been suggested that the trial court had left out of account evidence relating to Mr Gauci's identification of the appellant. The ground of appeal appeared to be directed expressly to the weight of the evidence in relation to the assessment of Mr Gauci's reliability, and the trial court's assessment of weight would not constitute a misdirection. If such matters could be the subject of appeal at all, it would only be by means of an appeal under section 106 (3) (b) of the 1995 Act, but Mr Taylor had expressly disclaimed reliance on that provision. In any event, the assessment of the weight of the identification evidence was a matter for the trial court, even when serious criticism of one kind or another could be directed at the evidence of identification. Reference was made to *Slater v HM Advocate* 1928 JC 94; *Kerr v HM Advocate*, unreported, 30 January 2002; and *Adams v HM Advocate* 1999 SCCR 188.

[285] The Advocate depute stressed that this had not been a case where the witness had only had a fleeting glimpse of the purchaser of the clothing, and that it was clear that the transaction had stood out in Mr Gauci's mind. A significant number of items of clothing had been purchased, and the transaction had taken some time to complete. Indeed, the purchaser had gone for a taxi and had returned to the shop, so that Mr Gauci had seen him twice. Further, the occasion had not been a stressful or traumatic experience for the witness. Mr Gauci had picked out the appellant at the identification parade and in court, and the trial court had set out those

identifications in the context of the history of Mr Gauci's involvement, beginning with the descriptions of the purchaser which he had given to the police when interviewed in September 1989. The trial court had had regard to his demeanour and had taken the view that he was a careful witness. Only the trial court could have regard to his demeanour in the witness box, and demeanour was of great significance. The trial court had recognised that Mr Gauci's identification of the appellant was not an absolutely positive identification. However, it was not necessary for a witness to be 100% certain of his identification before the court could rely on it (*Gracie v Allan* 1987 SCCR 364). In the circumstances Mr Gauci's evidence could be regarded as a positive identification. Alternatively, the trial court was entitled to take Mr Gauci's identification by resemblance as far as it went, and add to it the evidence as to the date of purchase and the evidence that the appellant was in Malta on that particular date.

[286] In relation to the fact that certain aspects of Mr Gauci's initial description of the purchaser were inconsistent with the appellant being the purchaser, it had to be noted that on 1 September 1989 Mr Gauci had described to the police a significant number of the purchaser's features. No exception had been taken by the appellant to the accuracy of the other features contained in the descriptions. The inconsistencies founded on by the appellant, relating to height, age and skin colour, were all placed before, and considered by, the trial court. The issue of skin colour was subjective and the trial court had considered and faced up to the discrepancies relating to height and age. In the circumstances the trial court was entitled to accept Mr Gauci's evidence of identification notwithstanding the prior inconsistent description (*Wingate v Lees*, Crown Office Circular, A 24 of 1990, 13 June 1990). The trial court had taken into account the circumstances in which Mr Gauci had picked out photographs of Mohammed Salem and Abo Talb.

[287] The Advocate depute then turned to sub-para (iii), which related to the photograph of the appellant which Mr Gauci picked out in February 1991. While that identification had been qualified by Mr Gauci's comment that the man in the photograph would need to be 10 years or more older to look like the purchaser, that qualification lost its significance once it was appreciated that there was no evidence as to the age of the appellant at the time when the photograph was taken. With regard to sub-para (iv), relating to the alleged difference in the quality of the photograph of the appellant, the trial court had an opportunity of seeing all the photographs and they were clearly entitled to take the view that the criticism advanced on behalf of the appellant, to the effect that DCI Bell's attempts to make the quality of all the photographs similar had failed, had no validity. With regard to sub-para (v), the Advocate depute submitted that it had been clear throughout the trial that the trial court had been dealing with a transaction which had taken place about 12 years earlier. There had been no challenge of Mr Gauci's identification by resemblance in court; and the issue of lapse of time, as affecting his evidence, had not been put to him in cross-examination. In the circumstances it could be taken that the identification was of the appellant allowing for 12 years in the ageing process.

[288] With regard to the trial court's conclusion that Mr Gauci's evidence of identification by resemblance, as far as it went, was reliable, the appellant contends that the trial court "failed to have proper regard or to give proper weight" to the considerations listed in the ground of appeal. As we have already indicated, this wording demonstrates a misconception as to the nature and extent of the role of the appeal court in considering an appeal against conviction, whether or not reasons for the conviction have been given. While the trial court must have regard to the evidence which was led before it, the weight which is to be given to evidence which it has decided to accept must be a matter for it to assess. Further, the trial court is not bound to set out

in detail every step in its process of reasoning, nor is it required to deal with every submission made to it and refer to every disputed question of fact. The fact that a particular piece of evidence is not expressly referred to in the judgment of the trial court does not mean that the trial court must be taken to have failed to take it into account. When it is alleged, not that there was in law an insufficiency of evidence, but that there had been a failure by the decision-making body to have proper regard to, or give proper weight to, or to take proper account of, certain evidence, all of which relate to questions of weight, then it seems to us that the only ground which could be put forward for quashing the verdict would be that the jury or trial court had returned a verdict which no reasonable jury or trial court could have returned: see section 106 (3) (b) of the 1995 Act. In that connection Mr Taylor made it clear that he was not seeking to rely on section 106 (3) (b).

[289] In the present case the trial court took the view that Mr Gauci was entirely credible in the sense that he was doing his best to tell the truth to the best of his recollection, and no suggestion was made to the contrary, either before the trial court or in the course of the hearing of the appeal. However, the trial court recognised that, while a witness may be credible, his or her evidence may be unreliable or plainly wrong, and it was in those circumstances that it examined at length the evidence bearing on identification give by Mr Gauci. In the course of that examination it considered the evidence of identification of the appellant by resemblance in February 1991, at the identification parade in April 1999 and at the trial, as well as his reactions to the numerous photographs which had been shown to him on other occasions. In particular, it considered his general demeanour and his approach to the difficult problem of identification. It regarded him as a careful witness. In the event, the trial court concluded that Mr Gauci's evidence so far as it went of the appellant as the purchaser was reliable.

[290] We have considered all the criticisms which were made by Mr Taylor in relation to the trial court's finding that Mr Gauci's evidence of identification was reliable. In the first place, we are satisfied that the trial court had regard to all the considerations listed in sub-paras (i)-(v) and, indeed, it seems to us that this is plain from a reading of those parts of the judgment which deal with the issue of identification. As we have said, the weight to be given to the evidence accepted by the trial court is a matter for the trial court but, in order to do justice to the arguments submitted by Mr Taylor on behalf of the appellant, we will consider the approach which was adopted by the trial court on this issue.

[291] There is no doubt that Mr Gauci's initial descriptions of the purchaser of the clothes included references to his height being six feet or more and his age being about 50. There was evidence that the appellant was 5'8" in height and that in December 1988 he was 36 years of age. The trial court recognised in para [68] that there was "a substantial discrepancy". In this connection it is worth noting that in September 1989 Mr Gauci included in his description of the purchaser references to his chest, head, build, stomach and hair, but it was not suggested that what he said on those aspects would not have applied to the appellant. At the trial Mr Gauci gave evidence that he thought that the purchaser was below six feet, but he was "not an expert on these things". Mr Gauci did not give positive evidence that he had recognised the appellant as having been the purchaser of the clothing, and the trial court treated his evidence as going no further than that the appellant closely resembled the purchaser (the witness having stated that "he resembles him a lot"). The trial court accepted Mr Gauci's identification of the appellant so far as it went, and stated that it had not overlooked the difficulties in relation to his description of height and age. It follows that the discrepancies on which the appellant sought to found were considered by the trial court which did not find them to be of sufficient weight to lead it to reject

the witness's evidence of identification by resemblance. On this matter we cannot say that the conclusion of the trial court was one which it was not entitled to reach.

[292] Mr Taylor founded on the fact that Mr Gauci had also identified photographs of Mohammed Salem and Abo Talb in terms similar to the identification which he made of the appellant's photograph in February 1991. Mr Gauci had seen the photographs of these two men by the beginning of 1990 but in September 1990, by which time he had been shown a large number of photographs, he had stated that he had never seen a photograph of the man who had bought the clothing. In any event, the fact that the witness had stated that two other men, in addition to the appellant, resembled the purchaser does not, in our opinion, detract from the evidence relating to the appellant. The evidence that the appellant resembled the purchaser was simply one of the circumstances founded on by the Crown as forming part of the circumstantial case against the appellant and, of course, all the other circumstances had to be taken into account as well.

[293] In para [88] the trial court, while recognising that there had been no unequivocal identification of the appellant by Mr Gauci, states: "From his evidence it could be inferred that the first accused was the person who bought the clothing which surrounded the explosive device." Mr Taylor submitted that an identification by resemblance could not, on its own, justify the inference that the appellant was the purchaser. The Advocate depute sought to justify the statement by suggesting that, while Mr Gauci's identification was not absolutely positive, it could nevertheless be regarded as a positive identification (*Gracie v Allan*, *supra*). In our opinion, that submission is misconceived. It is clear, and the trial court recognises, that Mr Gauci did not make a positive identification of the appellant. However, the trial court refers, in the next sentence of para [88], to the fact that it has already accepted that the date of purchase

was 7 December 1988 when the appellant was shown to have been in Malta. The evidence of the date of the purchase was based primarily on Mr Gauci's evidence. In the circumstances it seems to us that the trial court was simply saying that Mr Gauci's evidence of identification by resemblance taken along with evidence as to the date of the purchase, when the appellant was proved to have been staying in Sliema, enabled the inference to be drawn that he was the purchaser.

[294] It was not until February 1991 that Mr Gauci picked out a photograph of the appellant, more than two years after the transaction, and he qualified that identification by saying that the man in the photograph would have to be 10 years or more older to look like the purchaser. He also said that the photograph was the only one similar to the man who bought the clothing, "if he was a bit older", other than the one his brother had shown him. There was evidence that the photograph was the same as the photograph in the appellant's 1986 passport. In the circumstances, the weight to be given to those qualifications was a matter for the trial court, but in our opinion the submission which Mr Taylor made to us on this matter lost a great deal of its force, standing the fact that there was no evidence as to when the photograph of the appellant had been taken.

[295] Mr Taylor founded on the alleged difference in the quality of the photograph of the appellant which was picked out by Mr Gauci in February 1991, compared with the other 11 photographs which he was shown at that time. It was suggested that the rest of the photographs were brighter and sharper than that of the appellant. In the course of the hearing we were shown all 12 photographs. The difference in quality is marginal and in our opinion the trial court was fully justified in taking the view that that criticism had no validity.

[296] With regard to the suggestion by Mr Taylor that Mr Gauci's identification of the appellant by resemblance was flawed because there was no explanation as to whether or not he had made allowance for the fact that 12 years had elapsed since the purchase of the clothes, we consider that the submissions made by the Advocate depute were well founded.

[297] On the whole matter, if ground of appeal A2 is treated as setting out a relevant ground of appeal, we are satisfied that there is no merit in it. The trial court dealt with the evidence relating to identification in considerable detail. It recognised that on the matter of identification of the appellant there were "undoubtedly problems". However, having considered the criticisms of the way in which the trial court dealt with the issue of identification, we are satisfied that it was entitled to treat Mr Gauci's evidence of identification, so far as it went, as being reliable and as being a highly important element in the case.

[298] Ground of appeal A3 is in the following terms:

> "While the court noted at para 55 the defence submissions on the prejudicial effect of pre-trial publicity, it failed to deal with those submissions and, in particular, failed to indicate whether those considerations affected the value to be attached to the identifications at Identification Parade and in court."

[299] In para [55] of the judgment, the trial court, having referred to the fact that Mr Gauci had picked out the appellant at the identification parade in April 1999 and in court, observes that these identifications had been criticised, *inter alia*, on the ground that photographs of the appellant had appeared many times over the years in the media and accordingly purported identifications more than 10 years after the event were of little, if any, value. The trial court states that before assessing the quality and value of these identifications it was important to look at the history. The trial court deals with that history in considerable detail in paras [56]-[63] inclusive. In particular, the trial court notes in para [63] that Mr Gauci went to the police towards the end of 1998 or the beginning of 1999 after another shopkeeper had shown him a

magazine containing an article about the Lockerbie disaster. Towards the bottom of the page there was a photograph of a man wearing glasses. Mr Gauci thought that the man in the photograph looked like the man who had bought the clothing, but his hair was much shorter and he did not wear glasses. There was evidence that the photograph was of the appellant. Having considered the history, the trial court accepted Mr Gauci's evidence of identification, so far as it went, as reliable.

[300] On behalf of the appellant it was contended that the trial court had failed to deal with the defence submissions on the prejudicial effect of pre-trial publicity. It had been submitted to the trial court that the appellant had been shown on television and in newspapers and magazines across the world since 1991, and Mr Gauci had gone to the police after being shown by another shopkeeper the article in a magazine which contained the appellant's photograph, and named him as a suspect, and that was not very long before the date of the identification parade. In its report the trial court stated that it had only commented on matters of "material importance" and therefore, as it had not dealt with the defence submissions relating to pre-trial publicity, it must have considered this issue to be immaterial. The trial court had been referred to *HM Advocate v Caledonian Newspapers Ltd* 1995 SCCR 330 and *Stirling v Associated Newspapers Ltd* 1960 JC 5. In the present case the issue of identification was clearly crucial and Mr Gauci might have been influenced in his identification of the appellant by seeing his photograph in a magazine a short time before the identification parade was held. While the trial court had set out the defence submissions, it had not come to any express judgment on the question as to whether or not Mr Gauci's evidence had been affected. The trial court had erred in failing to deal with the defence submissions and that constituted a misdirection.

[301] In reply, the Advocate depute submitted that, while Mr Gauci had gone to the police with the magazine article which he had been shown, there had been no evidence that any other photographs of the appellant had been published, nor was there evidence that, even if other photographs of him had been published, Mr Gauci had seen any of them. The trial court had dealt fully with the history of his examination of photographs and had noted that in February 1991 he had picked out a photograph of the appellant from 12 photographs which he had been shown. Mr Gauci had not been challenged in cross-examination about his identification of the appellant in court or at the identification parade and, in particular, it had not been suggested to him that his identification had been in any way affected by his having seen the photograph in the magazine or any other published photograph. Reference was made to *Atkins v London Weekend Television* 1978 JC 48. The question as to whether the identification made by a witness had been affected by pre-trial publicity had to be examined in light of the evidence in each case. In this case the trial court noted the criticisms which had been made based on pre-trial publicity and then considered the history relevant to Mr Gauci's evidence of identification, including the fact that he had been shown the magazine article and had gone to the police with it, saying that he thought that the man in the photograph looked like the man who had bought the clothes. The trial court stated in para [89] that it had considered all the evidence and the submissions of counsel, and in para [69] had come to a conclusion about the history of Mr Gauci's examination of photographs. In the circumstances it was submitted that there had been no misdirection by the trial court.

[302] We have considered all the submissions made to us in relation to this ground of appeal and we have reached the conclusion that the submissions made by the Advocate depute were well founded. In the first place, the trial court noted what had been said on behalf of the

appellant in relation to pre-trial publicity. Mr Taylor's argument was based particularly on the fact that the appellant had seen the magazine article containing the appellant's photograph not long before the identification parade in April 1999. The trial court stated that before assessing the quality and value of the identifications it was important to look at the history, and then proceeded to do that. It noted that Mr Gauci had picked out a photograph of the appellant in February 1991. Having considered the history in very considerable detail the trial court concluded that Mr Gauci's identification by resemblance was reliable. Mr Taylor submitted that Mr Gauci might have been influenced in his identification by having seen the appellant's photograph in the magazine not long before the identification parade was held. However, 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 at the identification parade and in court had been influenced by seeing the photograph of the appellant in the magazine, then that should have been put to Mr Gauci in cross-examination so that consideration could have been given to his response. Not only was that matter not put to Mr Gauci in cross-examination, but it does not appear that the defence sought directly to challenge his evidence that the appellant resembled the purchaser of the clothes. As we have already said, the trial court did not need to set out every single detail of its reasoning process. It noted the criticism relating to pre-trial publicity and, in our opinion, dealt with it in its judgment as far as was required, standing the fact that it was never suggested to Mr Gauci in cross-examination that his evidence of identification had, in fact, been influenced by any pre-trial publicity. While it was alleged by Mr Taylor before us that photographs of the appellant had previously been published in the media across the world, there was no evidence that, even if that had happened, Mr Gauci had

seen any of them, other than the photograph contained in the magazine shown to him by another shopkeeper. In the circumstances we consider that there is no substance in this ground of appeal.

[303] Ground of appeal A4 is in the following terms:

> "The court failed to advance adequate reasons for preferring Gauci's identification of the appellant by resemblance of a photo, at identification parade and in court to earlier descriptions of the purchaser which did not match the appellant."

This ground of appeal was based on the fact that Mr Gauci had stated that his memory of the events relating to the purchase of the clothes had been better when he had first given statements to the police, and the fact that he had then given descriptions of the purchaser which did not match the appellant. The trial court had accepted that there was a substantial discrepancy but, it was said, had given no adequate reasons as to how this could be overcome to enable it to be satisfied that the later identifications at the identification parade and in the dock were reliable. However, Mr Taylor, in presenting this ground of appeal, indicated that the issues which it raised had been dealt with in his earlier submissions in support of ground of appeal A2, and for that reason he did not seek to expand on the submissions which had already been made. In these circumstances we do not require to give separate consideration to this particular ground of appeal.

[304] Ground of appeal A5 is in the following terms:

> "The court failed to deal with and resolve the contradictions and inconsistencies in the evidence of Gauci regarding the date of the purchase and the identity of the purchaser."

On behalf of the appellant Mr Taylor submitted that there had been a number of important contradictions and inconsistencies in the evidence of Mr Gauci, which he summarised as follows:

(1) Those regarding whether, at the date of purchase, the Christmas decorations were not up, were being put up or were up and on.

(2) Those regarding the question whether the evidence of Christmas decorations related to the date of purchase of the clothing or to visits by the Scottish police. The trial court had ignored his evidence that what he said about the Christmas decorations related to visits by the police.

(3) Those regarding his previous statement to the police as to the date of purchase being in November 1988.

(4) Those regarding the age of the purchaser as being about 50 years of age, whereas the appellant in 1988 was 36.

(5) His statement that the purchaser was six feet or more in height, whereas the appellant was 5'8" in height.

(6) The question of whether Mr Gauci, in identifying the appellant in the dock, was thereby making any allowance for the 12 years which had passed since the purchase of the clothing.

(7) The contradiction in his evidence that his brother may have been watching football on television at the time of the sale and that he was always alone in the shop.

[305] In the circumstances it was submitted that the trial court should have given some explanation as to how these contradictions and inconsistencies were capable of reconciliation to enable it to conclude that the date of the sale was 7 December, and that Mr Gauci's evidence of identification was reliable. Reference was made to *R v Dillon* [1984] NI 292 and *R v Wilson*, *supra*. The trial court had not given any reasoned explanation as to how it had been able to overcome the difficulties relating to the prior statements about height and age. It was submitted that the failure to deal with and resolve these contradictions and inconsistencies in Mr Gauci's evidence represented a material misdirection on a crucial issue.

[306] In reply, the Advocate depute pointed out that Mr Taylor had conceded in the course of his submissions to this court that the contradictions and inconsistencies on which the appellant sought to found in relation to this particular ground of appeal had all featured in one way or another in earlier grounds of appeal. What appeared to be under attack was the process of giving reasons itself. However, the scope of the appeal was determined by the terms of the 1995 Act, and the reasons stated by the trial court could not in themselves constitute a basis for appeal. They merely constituted a means by which it might be assessed whether any ground of appeal generally available was made out. In this case there was no challenge to the sufficiency of the evidence. While the trial court had a duty to state reasons, detailed reasons were not required and the trial court was not under an obligation to review every fact and argument or set out every step of the decision-making process. The trial court was entitled to reject evidence because it was inconsistent with evidence which it had decided to accept (*King v HM Advocate* 1999 JC 226).

[307] As the Advocate depute observed, the contradictions and inconsistencies founded on by Mr Taylor in this ground of appeal had been referred to in submissions made in relation to grounds of appeal A1 and A2. The alleged contradictions and inconsistencies related to the evidence of Mr Gauci and, in particular, to the contents of statements which he had made to the police at an early stage of the investigations. It was for the trial court in this case, where the Crown relied on circumstantial evidence, to set out the evidence which it accepted. So far as Mr Gauci was concerned, the trial court had set out the evidence given by him on which it relied, having found him to be a credible and reliable witness. There is nothing in the judgment of the trial court to persuade us that it did not take proper advantage of having seen and heard Mr Gauci giving evidence. As we have said, numerous criticisms of his evidence were advanced on behalf

of the appellant. The trial court has set out the evidence which it decided to accept, and it is not required to deal with every single criticism or to set out in detail each and every step of the decision-making process. On the whole matter, and under reference to our observations in relation to grounds of appeal A1 and A2, we have not been persuaded that there is merit in this ground of appeal.

[308] Ground of appeal A6 is in the following terms:

> "The evidence of identification was not of such character, quality or strength to justify a finding that the appellant was the clothes buyer. The court failed properly to take account of the significant body of evidence referred to above which pointed away from 7th December 1988 as the date of purchase. It failed to have proper regard to the factors which undermined evidence consistent with that date. The misinterpretation of the Joint Minute led the court into error on the issue of identification."

The submission made by Mr Taylor in support of this ground of appeal was that there was a significant body of evidence which pointed away from 7 December 1988 as the date of the purchase of the clothing. Properly construed, the evidence of Major Joseph Mifsud (which is referred to in para [322]) did not describe rain of the nature described by Mr Gauci. However, the weather on 23 November was found to be wholly consistent with Mr Gauci's description of the weather on the date of purchase. In an earlier statement Mr Gauci had indicated that the purchase had taken place at the end of November 1988, and his previous statement that the Christmas decorations were not up at the time of the purchase pointed away from 7 December, as did the evidence that it had been a public holiday on 8 December. All that evidence positively supported 23 November as the date of purchase, but the trial court had failed to examine the cumulative effect of these factors and weigh them against the evidence which supported 7 December. The trial court was only able to reach the conclusion that the appellant had been the clothes buyer by linking the evidence of identification and its finding as to the date of purchase which was the only relevant date on which it was proved that the appellant was in Sliema. The

most important factor in the trial court's determination of the date of purchase was its misinterpretation of the joint minute to which reference had previously been made. The date of the purchase was a crucial issue and by its failure properly to assess the foregoing factors the trial court had erred.

[309] The Advocate depute pointed out that, while Mr Taylor had never expressly departed from the first part of this ground of appeal, namely that relating to the character, quality and strength of the evidence of identification, he had made no submission in support of it. Submissions were advanced in relation to the second part of the ground of appeal but they related to matters which were the subject of submissions in respect to other grounds of appeal, and in these circumstances he had no further comments to make with reference to ground of appeal A6.

[310] We have narrated the submissions made in relation to this ground of appeal on behalf of the appellant, but we consider that the Advocate depute was right when he said that the matters contained in the submissions were raised and dealt with in relation to other grounds of appeal, and we do not consider that it is necessary to refer to them again.

The date of purchase of the clothing

[311] In ground of appeal A1 it is alleged that the trial court erred in finding that the date of the purchase of the clothes from the shop at Mary's House, 63 Tower Road, Sliema, Malta was 7 December 1988. The evidence which had a bearing on the trial court's finding that the date of purchase was 7 December is set out in paras [56], [57] and [64]-[67] inclusive of the judgment.

[312] At the outset it is important to note that what was challenged in the ground of appeal was the approach of the trial court in considering the evidence which related to the date of purchase. There was no dispute that the clothing in question had been purchased at Mr Gauci's shop and

that the transaction must have taken place after 18 November, which was the date of delivery of the Yorkie trousers sold by Mr Gauci to the purchaser, and before 21 December. The Crown case was that the date of purchase was Wednesday 7 December whereas the defence contended that this case had not been made out and that there was evidence which positively supported 23 November.

Mr Gauci's evidence as to date

[313] In his evidence in chief, Mr Gauci said that the date of purchase was slightly before Christmas, and that it must have been about a fortnight before Christmas. The sale was made after 1830 hours, the shop normally closing at 1900 hours. He had told the police in September 1989 that he was sure that it had been midweek when the man called. In cross-examination Mr Taylor explored what the witness meant by "midweek". Mr Gauci then stated that he thought that Wednesday was midweek. He also stated that his brother, Paul Gauci, who was in the business with him, was not in the shop at the time of the purchase although he had come in after the purchaser had gone to get a taxi. Mr Gauci was asked where his brother had been that afternoon and he replied that "he must have been watching football, and when he comes late that is what usually happens, so I think that was what happened that day." Paul Gauci was not called as a witness. A joint minute was lodged and in terms thereof it was agreed, *inter alia* –

(1) that Radio Televisione Italiana was the state owned broadcasting authority for Italy which in 1988 broadcast television pictures on three channels, namely RAI 1, RAI 2 and RAI 3;

(2) that on 23 November 1988 Radio Televisione Italiana broadcast four soccer matches. One of these matches was between Dresden and Roma. The broadcast was in two parts

starting at 16.55.45 hours local time, finishing at 17.44.45 hours local time and between 17.58.00 hours and 18.44.00 hours local time;

(3) that on 7 December 1988 Radio Televisione Italiana broadcast four soccer matches. One of these matches was between Juventus and Liege. The broadcast was in two parts starting at 16.40.15 hours local time, finishing at 17.32.15 hours local time and between 17.47.30 hours and 18.34.00 hours local time.

(4) Maltese local time was the same as Italian local time.

[314] In para [64] of its judgment the trial court makes the following statement:

> "It was agreed by Joint Minute that whichever football match or matches Paul Gauci had watched would have been broadcast by Italian Radio Television either on 23 November 1988 or 7 December 1988."

[315] In terms of ground of appeal A1 (a), (b) and (c), it is alleged that the trial court misconstrued the terms of the joint minute in respect that it agreed only that football was broadcast by Italian Radio Television at certain times on those dates. There was no basis on the evidence for inferring that these were the only matches broadcast on television in Malta between the relevant dates of 18 November and 20 December 1988. There was no evidence from which it could be inferred that Paul Gauci had watched football on television only on one or other of those dates. Paul Gauci, who was on the Crown list of witnesses, did not give evidence and the only evidence that he might have been watching football on the day of the purchase came as hearsay from his brother Tony Gauci. There was no proper basis on the evidence for the finding at para [67] of the judgment that the date of purchase of the clothes was either 23 November or 7 December 1988. The trial court accordingly erred in approaching the question of the date of purchase as a choice between only 23 November and 7 December 1988.

[316] Mr Taylor did not seek to challenge the finding of the trial court that Mr Gauci was a credible witness, but he criticised strongly the finding that his evidence was reliable. The date of the purchase of the clothing was important as there was evidence that the appellant had been staying in Sliema on 7 December. However, if the transaction had not taken place on 7 December, then the purchaser could not have been the appellant. Mr Taylor submitted that the trial court's finding that the appellant was the purchaser was based on (1) Mr Gauci's evidence of identification so far as it went, (2) the finding that the purchase took place on 7 December, and (3) the fact that the appellant was in Malta on that date and had stayed in a nearby hotel. However, without the finding as to the date of purchase, the trial court would not have been able to conclude that the appellant had been the purchaser. Mr Gauci had stated that his brother, Paul Gauci, must have been watching football on television because that was what usually happened but Paul Gauci, although he was on the Crown list of witnesses, was not called to give evidence so that there was no first-hand evidence that he had actually been watching football on television on 7 December or on any other date. Mr Taylor stated that the appellant had not introduced 23 November as an alternative date. The defence position had been that there was no reliable evidence that the purchase had taken place on 7 December, the only date on which the purchaser could have been the appellant. The defence did not treat 23 November as the only alternative but, as there was a body of evidence supporting 23 November, that had been pointed out at the trial. Indeed, the defence submission was that the evidence demonstrated that 23 November was more likely to have been the date when the purchase took place.

[317] Mr Taylor referred to the terms of the joint minute and submitted that the trial court's statement, in para [64], that it had been agreed by joint minute that whichever football match or matches Paul Gauci had watched would have been broadcast either on 23 November or 7

December, demonstrated that the trial court had misinterpreted the terms of the joint minute, particularly as it had gone on to state, in para [67], that Mr Gauci's recollection that his brother had been watching football on television on the material date narrowed the field to 23 November or 7 December. The joint minute had not contained any agreement that Paul Gauci had watched football on television, or that he had watched football on either of those dates. The only evidence that he might have been watching football on television on the day of the purchase came indirectly from Mr Gauci. There was no basis for inferring that the football matches listed in the joint minute were the only matches broadcast on television in Malta between 18 November and 21 December. There might have been football on television on other days. There was certainly no evidence from which it could be inferred that Paul Gauci had watched football on television only on one or other of the two dates referred to in the joint minute. Mr Taylor referred to ground of appeal C which states, *inter alia*, that the trial court erred in failing to deal with defence submissions as to the effect on the Crown case of the Crown's failure to call Paul Gauci as a witness. It was submitted on behalf of the appellant that Paul Gauci, who had been at the shop before the purchaser left with his purchases, could have told the trial court whether he had been watching football on television on the day of the purchase and, if so, which match he had been watching. The failure to call Paul Gauci as a witness had impaired the secondary evidence of Mr Gauci as to where his brother was at the time of the sale, leaving it without any real evidential value. The failure of the trial court to deal with the defence submissions relating to the failure to call Paul Gauci constituted an error in law and a misdirection. Mr Taylor recognised that the trial court was not obliged to deal in its judgment with every single submission made to it and to comment on every single part of the evidence. However, this was an important part of the Crown case and the trial court should have expressed an opinion on the

matter. Reference was made to *Dickson on Evidence*, third edition, para 108 (7) and *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123. The most that the trial court would have been entitled to draw from the joint minute was that both dates were consistent with Mr Gauci's evidence that his brother might have been watching football on television. However, other dates had not been ruled out. The trial court's misconstruction of the terms of the joint minute constituted a misdirection.

[318] In reply, the Advocate depute stated that it was important, in relation to ground of appeal A1 (a), (b) and (c), to understand how the evidence relating to the date of purchase emerged and how it was put in issue by the Crown and by the appellant. The Crown's case was that the date of purchase was 7 December. The competition which developed between that date and 23 November emerged because the appellant introduced 23 November as an alternative date. One of the evidential aspects on which the Crown relied was that on 7 December there was football broadcast on television at a time consistent with Mr Gauci's evidence that his brother had gone home to watch football. The position of the appellant was that, on the evidence, 23 November was to be preferred; and the appellant led evidence as to the weather conditions on both dates in an attempt to show that 23 November was a better candidate for the type of weather spoken to by Mr Gauci. The dates put in issue by the parties were thus 23 November and 7 December, and the whole tenor of the defence submission was to place before the trial court a choice between those two dates. The Advocate depute stated that at first sight it might appear that the trial court had misunderstood the terms of the joint minute, but he submitted that there had been no misdirection. In any event, if there was a misdirection, it was of no materiality. The Advocate depute referred to the evidence given by Mr Gauci and noted that Mr Taylor had not challenged in cross-examination his evidence that his brother had been watching football on television on

the day of the purchase. Indeed, by referring to one of Mr Gauci's prior statements, he sought to bolster his evidence to that effect. The fact that Paul Gauci was watching football on television could be inferred from Mr Gauci's evidence together with the terms of the joint minute. With regard to ground of appeal C, in so far as it related to the Crown's failure to call Paul Gauci as a witness, the Advocate depute stated that the Crown's position was that when Mr Gauci's evidence about his brother watching football on the day of the purchase was not challenged, but was actually firmed up in the course of cross-examination, there was no need to call Paul Gauci. The defence had had the opportunity to precognose him and they could have called him as a witness if they had thought that he could advance the defence case that the sale had taken place on 23 November.

[319] Having considered the submissions of the parties in light of the evidence which was led, we are satisfied that the trial court did misinterpret the terms of the joint minute. The joint minute simply related to football broadcasts on 23 November and 7 December. It did not contain any agreement that whichever football match or matches Paul Gauci had watched would have been broadcast on either of those dates. In our opinion, however, the trial court's misinterpretation of the terms of the joint minute was, in the particular circumstances of this case, of no real materiality. In that connection it is important to see how the two dates were introduced. The Crown case was that the date of purchase was 7 December. Mr Gauci had stated that the purchase had taken place on a Wednesday, and 7 December was the only Wednesday (between 18 November and 21 December) when the purchaser could have been the appellant. The appellant clearly put in issue 23 November as a competing date and led evidence as to the weather conditions on both dates, submitting that this evidence, having regard to Mr Gauci's evidence as to the weather on the day of the purchase, favoured 23 November.

Accordingly, the Crown's position was that there was evidence that the correct date was 7 December, and the defence position was that there was evidence showing that 23 November was a better candidate, although it was clear that any other date of purchase would be sufficient for its purposes. It does not appear that there was any evidence which was directed to showing that the date of purchase was Wednesday 30 November or Wednesday 14 December. The critical issue was whether the trial court was satisfied that the date of purchase was 7 December. If it had not been so satisfied, then one of the important circumstances relied upon by the Crown would not have been established. However, having regard to the way in which the case was presented to the trial court it seems to us that, in effect, the only real competing date was 23 November. In our opinion, the trial court did not err in approaching the case on that basis. If, however, it did err in its approach on this matter we are not satisfied that the error was of such materiality as to constitute a misdirection nor are we satisfied that its misinterpretation of the terms of the joint minute was material.

Weather conditions

[320] Ground of appeal A1 (d) relates to evidence of the weather conditions at the time the clothes were purchased and the significance of that evidence in relation to the date of the purchase.

[321] Mr Gauci was asked if he remembered what the weather had been like when the man came to the shop and he replied:

> "When he came by the first time, it wasn't raining, but then it started dripping. Not very… it was not raining heavily. It was simply – simply dripping, but as a matter of fact he did take an umbrella, didn't he. He bought an umbrella."

In an earlier statement to the police he said that the purchaser had put up the umbrella outside the door of the shop because it was raining. When he returned to the shop the umbrella was down because it had almost stopped raining, and it was just drops coming down. In another statement he said that it had almost stopped raining when the man came back, and there were a few drops still coming down. He said in evidence that it wasn't raining, it was just drizzling. In a statement dated 10 September 1990 he said that just before the man left the shop there was a light shower of rain just beginning. There was very little rain on the ground, no running water, just damp.

[322] On behalf of the appellant evidence was led from Major Joseph Mifsud who was the chief meteorologist at the Meteorological Office at Luqa airport between 1979 and 1988, and the trial court referred to his evidence in para [65] of the judgment. He was shown the meteorological records kept by his department for two periods, 7/8 December 1988 and 23/24 November 1988. He said that on 7 December 1988 at Luqa there was a trace of rain which fell at 0900 hours but that no rain was recorded later in the day. Sliema is about five kilometres from Luqa. When asked whether rain might have fallen at Sliema between 1800 and 1900 on the evening of 7 December, he explained that, although there was cloud cover at the time, he would say "that 90% was no rain" but that there was always a possibility that there could be some drops of rain, about 10% probability, in other places. He thought that a few drops of rain might have fallen but he wouldn't have thought that the ground would have been made damp. To wet the ground the rain had to last for quite some time. However, the position so far as 23 November was concerned was different. At Luqa there was light intermittent rain from noon onwards which by 1800 GMT had produced 0.6 of a millimetre of rain, and he thought that the situation in the Sliema area would have been very much the same.

[323] The trial court, in para [67], states that it had no doubt that the weather on 23 November would be wholly consistent with a light shower between 1830 and 1900. However, the possibility that there was a light shower on 7 December was not ruled out by the evidence of Major Mifsud. The trial court also observes that it was perhaps unfortunate that Mr Gauci was never asked if he had any recollection of the weather at any other time on that day, as evidence that this was the first rain of the day would have tended to favour 7 December over 23 November.

[324] Ground of appeal A1 (d) alleges that the trial court (i) failed to take proper account of the nature of the rainfall about which Major Mifsud gave evidence when he said there was a 10% chance of rain at Sliema between 1830 and 1900 on 7 December 1988, such evidence being inconsistent with Mr Gauci's description of rainfall on the date of purchase which, he said, made the ground damp, and (ii) failed to have proper regard to the finding that the weather on 23 November would have been wholly consistent with a light shower between 1830 and 1900.

[325] Mr Taylor submitted that the trial court's treatment of the evidence relating to weather conditions was erroneous. In particular, the trial court had misdirected itself as to the nature of this evidence at para [67] of the judgment. While Major Mifsud had not ruled out the possibility of a light shower in Sliema on 7 December, that possibility was only to the extent of 10%. However, the nature of the rainfall within that 10% possibility was inconsistent with the evidence of Mr Gauci as to the rain which actually fell on the day of purchase. The two types of rainfall spoken to by Mr Gauci on the one hand and Major Mifsud on the other were quite incompatible. It was significant that the rainfall had been sufficient to cause the purchaser to buy an umbrella. Major Mifsud's description of the weather on 23 November matched precisely the evidence of Mr Gauci relating to the weather on the day of the purchase. This contradicted the

Crown case that the date of purchase had been 7 December, but it was simply dismissed by the trial court without a reasoned explanation. The trial court had ignored the obvious inconsistencies between the evidence of Mr Gauci and that of Major Mifsud. It had erred in failing to give proper weight to the evidence led about the weather on 23 November which supported an inference that the purchase had taken place on that date.

[326] In reply, the Advocate depute stated that there was no suggestion that the trial court left out of account evidence relating to the weather. There were records kept at the police station in Sliema which were explored by Mr Taylor in his examination of Major Mifsud. During the period of 24 hours ending with noon on 8 December, the rain collected at Sliema police station was 3.3 millimetres, although it was not possible to say exactly when that rain fell. While Major Mifsud expressed the opinion that rain was more likely to have fallen on the morning of 8 December, he could not rule out the possibility that it could have fallen during the evening of 7 December. It was submitted that the evidence relating to the weather was neutral because the prospect of the kind of rain which Mr Gauci described was present on 7 December. However, the trial court had not opted for 7 December rather than 23 November simply on account of the evidence about the weather.

[327] It is clear to us that the evidence about the weather conditions was only one of the factors which the trial court took into account in reaching its conclusion that the date of the purchase of the clothing had been 7 December. Ground of appeal A1 (d) alleges that the trial court "failed to take proper account" of Major Mifsud's evidence that there had been a 10% chance of rain at Sliema on 7 December and "failed to have proper regard" to the finding that the weather on 23 November would have been wholly consistent with a light shower between 1830 and 1900 hours. It is not suggested that the trial court ignored those factors and, indeed, they are expressly set out

in paras [65] and [67] of the judgment. The criticisms relate to the weight which the trial court placed on the evidence in question. However, the weight to be placed on it, in considering what inferences fell to be drawn, was a matter for the trial court. The trial court found that the rainfall evidence was wholly consistent with the purchase having taken place on 23 November but that the possibility of a brief, light shower of rain on 7 December could not be excluded. In our opinion, those were factors which the trial court was entitled to take into account when considering what inference, if any, should be drawn as to the date of purchase, and we do not consider that there is any valid criticism of the approach of the trial court on this matter.

Christmas decorations

[328] Ground of appeal A1 (e) is in the following terms:

> "In relying on Gauci's evidence that the purchase was about the time that the Christmas decorations went up in Sliema, the court ignored or failed to have proper regard to the following factors:
> (i) that Gauci gave conflicting evidence as to whether the decorations were up or being put up at the time of the purchase.
> (ii) that in statements given to the police in September 1989 and September 1990 he had said that the decorations were not up at the date of purchase.
> (iii) that there was no evidence apart from a prior statement from Gauci as to when Christmas decorations were put up in Sliema.
> (iv) the confusion in Gauci's evidence as to whether the Christmas decorations related to the date of purchase or to occasions when he had been interviewed by the police."

[329] There is no doubt that Mr Gauci gave conflicting evidence as to whether the Christmas decorations were up, or being put up, at the time of the purchase. He initially stated that the Christmas lights were on, but he then said that they were putting them up. In a statement to the police in September 1989 he had said that decorations were not up before the man bought the clothes, and in September 1990 he had told them that there were no Christmas decorations up. In a statement to the police on 19 September 1989 he had said that the Christmas decorations went

up about 15 days before Christmas. Further, there were confusing passages in his evidence when he was being asked about the date of the purchase, and he said:

> "I remember that they were already starting to put up the Christmas decorations, because when the police used to come and get me at 7pm there used to be these Christmas decorations up. … I remember a policeman used to come and get me and wait for me and take me to the police headquarters, and there used to be Christmas lights. I don't know whether it was a week or two weeks before Christmas, but I can't remember."

[330] Mr Taylor submitted that the trial court, having taken the view that it would seem consistent with Mr Gauci's rather confused recollection that the purchase was about the time when the decorations would be going up, had ignored the difficulty created by the witness having told the police in September 1989 and in September 1990 that there were no Christmas decorations up at the time of the purchase. The trial court had a duty to record that contradictory version and, in general, to give reasons for preferring his later account that the decorations had been going up. The trial court had ignored the earlier statements. The trial court's failure to recognise the materiality of inconsistent prior statements by a witness giving evidence 11 years after the event amounted to a material misdirection. The trial court had erred in this matter by trying to reach a conclusion, in the face of contradictory evidence, when it failed to explain how it resolved the inconsistencies.

[331] The Advocate depute, in reply, reminded us that the trial court had set out in paras [12] and [56] different accounts which Mr Gauci had given in evidence and to the police at an early stage. Mr Gauci tentatively agreed that when he was interviewed by the police on 19 September 1989 he believed that there had been no decorations up, but that was in the context of his statement that the Christmas decorations went up about 15 days before Christmas. Although not expressly referred to in the judgment, the trial court was conscious of the confusion in Mr Gauci's evidence between what the position was on the date of the purchase and at the times

when the police came to collect him. In any event, the trial court's conclusion on the issue of Christmas decorations was expressed in a very tentative manner.

[332] We have no doubt that the trial court was fully justified in taking the view that the position about the Christmas decorations was unclear, and that Mr Gauci's recollection on this matter was confused. We are not satisfied that the trial court has been shown to have ignored material factors relating to the situation regarding Christmas decorations at the time of the purchase, and it does not seem to us that the trial court placed much weight on Mr Gauci's evidence about the Christmas decorations. In evidence, he initially said that the Christmas lights were on at the time of the transaction, but he was then asked to think carefully about whether the lights were on or not. He then said: "Yes, they were putting them up." The trial court recognised that his recollection on the matter was rather confused but in the circumstances it was entitled to say that it would seem to be consistent with his recollection that the purchase was about the time when the decorations would be going up and that this in turn was consistent with his recollection in evidence that it was about two weeks before Christmas. This was, however, but one of the factors taken into account by the trial court in determining what was the date of purchase and it appears to have been a factor to which the trial court understandably did not give a great deal of weight.

[333] Ground of appeal A1 (f) states that in narrating the evidence of Mr Gauci in para [12] of the judgment, the trial court failed to take account of the fact that the terms of his prior statements demonstrated that he had not told the police in September 1989 that the sale had occurred about a fortnight before Christmas or that the Christmas lights were just being put up.

[334] Mr Taylor submitted that nowhere did the trial court acknowledge that Mr Gauci had never told the police, at any of the early interviews, that the sale had taken place about a fortnight

before Christmas, or that the lights were just being put up, as he said in evidence 12 years after the event. The trial court was, however, prepared to pray in aid his prior statements when they demonstrated a consistency in his approach. In para [67] the trial court simply ignored those aspects of his prior statements which were inconsistent with crucial areas of his evidence in the witness box.

[335] In reply, the Advocate depute pointed out that in para [12] the trial court was simply giving a brief introductory account of Mr Gauci's evidence, and indicated that it would return to deal with his evidence in more detail with reference to the date of the transaction and the issue of identification. Mr Gauci gave evidence that the police came to see him at the beginning of September 1989. He could not remember the date of the sale but, on being asked if he was able to tell them that it was towards the end of 1988, he replied:

> "Yes, slightly before Christmas it was. I don't remember the exact date, but it must have been about a fortnight before Christmas but I can't remember the date."

Accordingly, it appeared to be his recollection that he had told the police that it was about a fortnight before Christmas. The question as to whether he had in fact said that to the police was not specifically brought out in evidence or made the subject of submission.

[336] In our opinion there is no substance in this ground of appeal. The trial court referred to statements which Mr Gauci had made to police officers in September 1989 in none of which was there stated to be any reference to the purchase having taken place a fortnight before Christmas or to the fact that the Christmas lights were just being put up. In the circumstances we do not consider that it was necessary for the trial court in its judgment to draw attention expressly to the fact that these statements had not been made at an earlier stage. The fact that such statements had not been made at an earlier stage must have been quite apparent to the trial court.

Other aspects of the evidence as to date

[337] Ground of appeal A1 (g) is in the following terms:

> "In relying on Gauci's evidence that the purchase was about two weeks before Christmas, the court ignored or failed to have proper regard to the following facts:
> (i) Gauci's evidence that he had no recollection of the day or date of purchase.
> (ii) his evidence that his recollection had been better when he had given statements to the police.
> (iii) the terms of those statements when he said on 1st September 1989 that the purchase had taken place in the winter of 1988, and 10th September 1990 when he said 'at the end of November' 1988.
> (iv) the evidence of the weather on 23rd November and 7th December 1988 which clearly favoured the former date."

[338] Mr Taylor submitted that in reaching the conclusion that the sale had taken place on 7 December, the trial court had relied in part on Mr Gauci's evidence that it had taken place about a fortnight before Christmas, but had ignored other material parts of Mr Gauci's evidence which undermined that part of his evidence. In evidence in chief, Mr Gauci had originally stated that he could not remember the date of the sale, and he had also stated in evidence that his memory of the sale had been better when he was interviewed by the police. In his first statement to the police he had been much less specific about the date. He had referred to the sale having taken place one day during the winter of 1988. On 10 September 1989 he had told the police that he believed that he had sold the man the clothing at the end of November. The trial court should have taken into account the contradictory statements which he had made to the police shortly after the transaction, and explained how the contradictions could be explained. Even if Mr Gauci had not adopted these statements as his evidence, they were on any view prior inconsistent statements which undermined the value and reliability of his evidence in the witness box. If the trial court did not have regard to the earlier statements, this must have been because, in terms of its report, it considered them to be immaterial. If, when his recollection was better in 1989, he thought that the sale had taken place at the end of November, that undermined his ability, 11 or

12 years later, to make a judgment that the sale took place about two weeks before Christmas. In the circumstances there had been a misdirection by the trial court.

[339] The Advocate depute submitted that the fact that Mr Gauci had all along been unable to recall the date of the sale was in no way inconsistent with his evidence that it was about a fortnight before Christmas. Mr Gauci's evidence on that matter was one of a number of pieces of evidence which contributed to the inference as to date. On 1 September 1989 he had referred to "one day during the winter", and on 10 September he said that he believed it had been at the end of November. In another early statement he had referred to "November, December 1988". While there is no reference in the judgment to the fact that he had said that the sale took place in the winter, or at the end of November, those were pieces of evidence which did not require to be addressed in detail in the course of the judgment, once it had been accepted that the sale had taken place about two weeks before Christmas.

[340] It is plain to us that Mr Gauci was not at any stage able to put an exact date on the sale of the clothes. When interviewed by the police he referred, *inter alia*, to "one day during the winter" and "the end of November 1988". In evidence he said that it must have been about a fortnight before Christmas. The trial court saw and heard the evidence which he gave and it was, in our opinion, open to it to accept the evidence given by Mr Gauci in court that it was about a fortnight before Christmas, and there was no need for it to refer in its judgment to previous statements which could be regarded as being contrary to the evidence which it chose to accept. On this matter we do not consider that there was any misdirection by the trial court.

[341] Ground of appeal A1 (h) is in the following terms:

> "The court erred in dismissing a defence submission (at paras 64 and 67) that it should have regard to evidence that Thursday 8th December 1988 was a public holiday when all shops in Sliema would have been closed. That evidence whether viewed in isolation or together with the evidence of Mr Gauci that the purchase occurred midweek, by which he

> meant that his shop would have been open the day after, was available for consideration and should not have been ignored."

[342] The defence elicited from Mr Gauci in cross-examination that by "midweek" he meant a Wednesday. It was suggested to him that midweek meant a day which was separate from the weekend, in that the shop would be open the day before and the day after. It was not put to him that Thursday 8 December 1988 was a public holiday, being the day of the Feast of the Immaculate Conception. Evidence to that effect was later given by Major Mifsud who was called as a witness on behalf of the appellant. The trial court stated in para [67] that it was unimpressed by the suggestion that, because Thursday 8 December was a public holiday, Mr Gauci should have been able to fix the date by reference to that. The trial court took the view that even if there was some validity in that suggestion, it lost any value when it was never put to him for his comments.

[343] Mr Taylor stated that Major Mifsud had given evidence that Thursday 8 December was a public holiday when all the shops in Sliema were closed. Mr Gauci had agreed that his shop would have been open the day before and the day after the clothes buying incident and that, by clear implication, excluded Wednesday 7 December. The police who questioned Mr Gauci at an early stage must have known that 8 December was a public holiday but that had never been put to Mr Gauci by the police. That was the time when it should have been put to him. Mr Taylor had submitted to the trial court that a sale the day before a public holiday would stick in a shopkeeper's mind and that he would remember if the day following the sale had been a public holiday. However, Mr Gauci had never mentioned to the police that the day of the sale had preceded a public holiday. It would have been pointless to have put to him at the trial, 12 years after the event, that the sale had taken place the day before a public holiday. The fact that 8

December had been a public holiday was a material factor which the trial court had ignored, and that had constituted a misdirection.

[344] The Advocate depute submitted that it was clear that the decision not to put to Mr Gauci in cross-examination the fact that 8 December had been a public holiday was a deliberate tactic. It was difficult to understand the submission that it would have been pointless to put it to the witness, particularly in the context of evidence from Mr Gauci that by midweek he meant a Wednesday, the shop being open on the Tuesday and the Thursday. The failure to cross-examine Mr Gauci on this issue was a factor which the trial court was entitled to take into account in rejecting the criticism of Mr Gauci's evidence (*Mailley v HM Advocate* 1993 JC 138).

[345] In our opinion, the submissions of the Advocate depute were well founded. Mr Taylor submitted to the trial court that the fact that the day after a sale had been a public holiday would stick in the shopkeeper's mind. That, in our view, would have been all the more reason for putting the point to Mr Gauci in cross-examination if anything was going to be made of it with a view to rebutting the Crown's case that the sale had taken place on 7 December. The defence led evidence from Major Mifsud that Thursday 8 December was a public holiday but failed to put that to Mr Gauci. That being so, we are of the opinion that the trial court was correct in taking the view that the failure to cross-examine Mr Gauci on the matter resulted in the point losing any value which it might otherwise have had.

[346] Ground of appeal A1 (i) states as follows:

> "The court erred in dismissing a defence submission that it should have regard to the fact that eight pairs of pyjamas were ordered by Gauci on 25th November 1988 as raising an inference that the purchase of clothing, including pyjamas, had taken place prior to that date (para 66). That evidence was available for consideration by the court and the ability of the court to draw inferences from it did not depend on Gauci being asked about the sequence of events or the state of his stock on 7th December 1988."

[347] With regard to the dispute relating to the date of the sale of the clothing, the defence sought to found on evidence which had been given by Mr Gauci to the effect that, according to an invoice which he had received dated 25 November 1988, he had purchased eight pairs of pyjamas about that time. Pyjamas sold well in winter and he used to buy stock "when it finished". According to a previous invoice dated 31 October 1988 he had at that time bought 16 pairs of pyjamas. The trial court observed (in para [66]) that since the purchaser of the clothing had bought two pairs of pyjamas from Mr Gauci, who had renewed his stock around 25 November 1988, counsel for the appellant had asked it to infer that the purchase of the two pairs must have been made on 23 November 1988. The trial court refused to draw this inference, observing that it had not been put to Mr Gauci in evidence that this might have been the sequence of events, and that he was not asked what the state of his stock of pyjamas was on or about 7 December 1988.

[348] Mr Taylor stated that the defence submission to the trial court had been to the effect that it could be inferred that the sale of the two pairs of pyjamas had taken place prior to 25 November, thereby triggering the re-ordering of pyjamas on that date. There was no evidence as to when any re-ordering took place after 7 December, so that the evidence of re-ordering was consistent with the sale of the two pairs of pyjamas having taken place prior to 25 November. There was evidence from which the inference suggested by the defence could be drawn, and the strength of the inference was a matter for the trial court. The Crown had not led any evidence to negate that inference. By dismissing the defence submission the trial court had erred and that error had amounted to a misdirection.

[349] In reply, the Advocate depute submitted that had the matter been canvassed with Mr Gauci in evidence the Crown could have led evidence as to a further order for 21 pairs of

pyjamas dated 20 December 1988 which was lodged as a production but not put to Mr Gauci in evidence. This would have demonstrated that frequent and regular ordering of pyjamas meant that no inference, such as that proposed by the defence, could be drawn. The defence must have been aware of the contents of this order. In any event, in the absence of any information about the state of Mr Gauci's stock of pyjamas on 7 December, the trial court was simply being asked to engage in speculation.

[350] As we have said before, it is for the trial court to decide what inferences to draw from evidence which it accepts. The suggestion by the defence that Mr Gauci's re-ordering of eight pairs of pyjamas on 25 November was related to his sale of two pairs of pyjamas appears to us to have been no more than a matter of speculation. In any event, even if it was a possible inference, it was certainly not one which the trial court was bound to draw, particularly in view of the matters referred to in the last two sentences of para [66] which were not put to Mr Gauci. In the circumstances we have no doubt that the trial court was perfectly entitled to refuse to draw the inference which was suggested by the defence.

[351] For the reasons which we have given, we have not been persuaded by the submissions advanced in support of any of the sub-paragraphs of ground of appeal A1 that there was a misdirection on the part of the trial court. It was not submitted to us that there had been insufficient evidence to entitle the trial court to conclude that the date of the purchase of the clothing was 7 December 1988. It was for the trial court, having considered all the evidence, to decide what, if any, inference should be drawn as to the date of the purchase of the clothing. It is clear that the trial court placed reliance, as it was entitled to do, on Mr Gauci's evidence that the sale had taken place about two weeks before Christmas. The sale was made after 1830 hours and the shop closed at 1900 hours. When he was first interviewed by the police on 1 September

1989 Mr Gauci said that he thought that the sale had been on a weekday. On 19 September 1989 he told the police: "I am sure it was midweek when he called." At the trial the defence elicited from him that when he used the word "midweek" he meant a Wednesday. So his evidence was to the effect that the transaction had taken place on a Wednesday about two weeks before Christmas. The trial court considered the other evidence having a possible bearing on the date of the purchase. Mr Gauci's recollection was that at the time of the transaction his brother had been watching football on television, but he said that he had appeared at the shop when the purchaser was away getting a taxi. It was agreed in the joint minute that on 7 December a football match was being shown on television which began at about 1640 hours and finished at 1834 hours local time, which was consistent with the sale having taken place on 7 December, although it was agreed that football was also on television on the afternoon of 23 November. The evidence about the weather was wholly consistent with the transaction having taken place on 23 November but the possibility of a light shower in Sliema between 1830 and 1900 hours on 7 December was not ruled out. The evidence of Mr Gauci about the Christmas decorations was confused but could be regarded as being consistent with 7 December being the date of purchase. The trial court stated that it had considered all the relevant factors and concluded that the date of purchase was Wednesday 7 December. In our opinion that was an inference which it was entitled to draw on the basis of the evidence before it.

Other circumstantial evidence and explanations

[352] We turn finally to discuss three remaining grounds of appeal which are concerned with other circumstantial evidence taken into account by the trial court and its treatment of the explanation of the appellant's visit to Malta on 20-21 December 1988.

The appellant's association with Mr Bollier

[353] In para [88] the trial court states that it accepted evidence that the appellant was a member of the JSO, occupying posts of fairly high rank. One of these was head of airline security, from which, it says, it could be inferred that he would be aware at least in general terms of the nature of security precautions at airports from or to which LAA operated. It then states:

> "He also appears to have been involved in military procurement. He was involved with Mr Bollier, albeit not specifically in connection with MST timers, and had along with Badri Hassan formed a company which leased premises from MEBO and intended to do business with MEBO. In his interview with Mr Salinger he denied any connection with MEBO, but we do not accept his denial."

[354] This passage may be taken along with earlier passages in which the trial court says that MEBO supplied electrical, electronic and surveillance equipment (para [44]), and that in 1988 it leased an office in its Zurich premises to a firm ABH in which the appellant and Badri Hassan were principals. They explained to him that they might be interested in taking a share in MEBO or in having business dealings with MEBO (para [54]).

[355] In ground of appeal E the appellant states that the trial court erred in treating evidence of his association with Mr Bollier and his apparent involvement in military procurement as supportive of guilt. The argument for the appellant was, in outline, that these matters were not relevant in respect that they did not have a reasonably direct bearing on proof of the Crown case. In support of this argument it was maintained that there was nothing significant in the evidence of the appellant's association with Mr Bollier. At an earlier stage in its judgment the trial court declined to infer that Mr Bollier's visit to the appellant's office in Tripoli provided additional evidence against the appellant (para [46]). It was also significant that such evidence as there was in regard to the appellant's involvement with Mr Bollier was not in connection with MST timers.

This showed that there was no evidence from which it could be inferred that he knew anything about the operation or use of timers. This had never been put or suggested to Mr Bollier when he was giving evidence. Since this court had before it the reasons for conviction it knew what evidence had been rejected and what evidence had been taken into account in support of the Crown case. As regards the appellant's involvement in military procurement there was nothing beyond what Mr Taylor described as "anodyne articles".

[356] We do not consider that in either respect the trial court took into account irrelevant matters. It is clear, as was pointed out, that neither of them was founded on by the Crown as demonstrating criminal conduct on the part of the appellant. It has to be borne in mind that circumstantial evidence may well not be of itself of such a character. Thus the evidence of association or involvement could not of itself show the appellant's guilt. However, it could show that the appellant was no stranger to Mr Bollier and that, at least to some extent, he was involved with the obtaining of military equipment. We are satisfied that neither of these matters should be regarded as having no conceivable bearing on the proof of the circumstantial case against the appellant.

The use of the Abdusamad passport

[357] In para [44] above we have quoted what the trial court states in para [87] of its judgment. In ground of appeal F it is claimed that, in stating that "[t]here was no evidence as to why this passport was issued to him", the trial court failed to take account of the defence submission that there was an inference to be drawn from the evidence of a witness Moloud Mohamed El Gharour which offered an explanation. Mr Gharour gave evidence as the interim director of the General Passport and Nationality Department in Libya.

[358] On an examination of the defence submissions, it can be seen that they were founded on evidence that, despite the imposition of sanctions, LAA had continued to operate, the inference being, it was said, that it had found a way round them. It was also suggested that it could be inferred that someone associated with LAA might have a use for a coded passport. Mr Gharour gave evidence that, whatever department wanted to have a coded passport issued to a member of its staff, applications for such a passport were directed through the JSO, later named the ESO. The implication, according to Mr Taylor when addressing this court, was that the appellant required such a passport in connection with the obtaining of aviation parts for the airline company in face of sanctions.

[359] We can well understand why the trial court did not specifically deal with this suggestion, as it was entirely based on speculation. There was no evidence before the trial court that the appellant was involved in obtaining aviation parts for LAA, let alone had reason to use a passport with a false name in this connection. It may be noted, as was pointed out by the Advocate depute, that at the trial counsel for the appellant departed from a line of evidence which was directed to showing that the issue of coded passports was designed to circumvent sanctions. There was no explanation as to what the appellant had been doing on his previous trips in which he had used the Abdusamad passport. As for Mr Gharour, all that he said was that his department did not know why a coded passport was to be issued to a member of the staff of another department. He could not give an example of a purpose for which one might be requested as he was not a specialist.

[360] In our view this ground of appeal is without substance. The trial court was entitled to say that there was no evidence as to why this passport was issued.

Alternative explanations for the appellant's visit to Malta on 20-21 December 1988

[361] In para [88] the trial court states:

> "On 20 December 1988 he entered Malta using his passport in the name of Abdusamad. There is no apparent reason for this visit, so far as the evidence discloses. All that was revealed by acceptable evidence was that the [appellant] and the second accused together paid a brief visit to the house of Mr Vassallo at some time in the evening, and that the [appellant] made or attempted to make a phone call to the second accused at 7.11am the following morning. It is possible to infer that this visit under a false name the night before the explosive device was planted at Luqa, followed by his departure for Tripoli the following morning at or about the time the device must have been planted, was a visit connected with the planting of the device. Had there been any innocent explanation for this visit, obviously the inference could not be drawn. The only explanation that appeared in the evidence was contained in his interview with Mr Salinger, when he denied visiting Malta at that time and denied using the name Abdusamad or having had a passport in that name. Again, we do not accept his denial."

[362] Ground of appeal D maintains, in regard to para [88], that the trial court erred in "ignoring the explanation advanced for the appellant's visit to Malta" and "the evidence of the behaviour of the appellant inconsistent with terrorist activity at that time".

[363] The first observation which we make is that it is plain that the trial court considered what evidence about the appellant's visit should be accepted, and expressed its view in the course of para [88]. It is not for this court to review what it decided to accept. Secondly, it is clear that there was no evidence before the trial court as to the actual purpose of the appellant's visit to Malta on 20-21 December 1988. It can be seen from his submissions that Mr Taylor sought to rely on a number of pieces of evidence. However, none of them purported to provide an actual explanation for the visit.

[364] Thus, first, the trial court was reminded that at that time arrangements must have been made for the managing director and an employee of a Maltese company to go to Tripoli to see if that company could build a staircase in the appellant's house and provide him with a quotation for the purpose. According to that evidence they went to Tripoli on 29 December 1988.

Secondly, reference was made to evidence that the appellant was taking an interest in a company Medtours, which was being set up by the co-accused and Mr Vassallo, and that it was hoped that the appellant could use a contact with an oil company to provide Medtours with a business opportunity. Thirdly, the defence founded on evidence that it was not unusual for persons to come to Malta from Libya for a short period of time, for example to do shopping.

[365] The trial court was well entitled to regard none of these pieces of evidence, even if they had been accepted, as providing an alternative explanation. None of them in any event could provide an explanation for the appellant travelling under a false name, let alone doing so on this occasion, and that for the last time.

[366] As regards the behaviour of the appellant which was said to be inconsistent with terrorist activity, the trial court was asked to consider whether it would be consistent with such an activity for the appellant, for example, to stay in a hotel where he had stayed two weeks previously under his real name (and to which he had had to return when his flight was cancelled), and where he claimed discount as an airline official. On arrival at Malta he had stated that he would be staying in the hotel, although he had been under no obligation to do so. He had made himself identifiable by Mr Vassallo and his wife. When leaving at Luqa airport he had, in effect, drawn attention to himself by being checked-out alone at an Air Malta desk.

[367] These were matters for the trial court to consider. In particular, as was observed by the Advocate depute, it was for the trial court to consider whether these points really addressed the undisputed fact that the appellant was travelling under a false name. In our view this ground of appeal is without merit.

Conclusion

[368] The Crown case against the appellant was based on circumstantial evidence. This made it necessary for the trial court to consider all the circumstances founded on by the Crown. In reaching its decision to convict the appellant the trial court found that the evidence fitted together to form a real and convincing pattern.

[369] When opening the case for the appellant before this court Mr Taylor stated that the appeal was not about sufficiency of evidence: he accepted that there was a sufficiency of evidence. He also stated that he was not seeking to found on section 106(3)(b) of the 1995 Act. His position was that the trial court had misdirected itself in various respects. Accordingly in this appeal we have not required to consider whether the evidence before the trial court, apart from the evidence which it rejected, was sufficient as a matter of law to entitle it to convict the appellant on the basis set out in its judgment. We have not had to consider whether the verdict of guilty was one which no reasonable trial court, properly directing itself, could have returned in the light of that evidence. As can be seen from this Opinion, the grounds of appeal before us have been concerned, for the most part, with complaints about the treatment by the trial court of the material which was before it and the submissions which were made to it by the defence.

[370] For the reasons which we have given in the course of this Opinion, we have reached the conclusion that none of the grounds of appeal is well founded. The appeal will accordingly be refused.