Scottish Criminal Case Reports/2008/BARRY JONATHAN CAMPBELL Appellant against HER MAJESTY'S ADVOCATE Respondent - 2008 S.C.C.R. 847

BARRY JONATHAN CAMPBELL Appellant against HER MAJESTY'S ADVOCATE Respondent

2008 S.C.C.R. 847

Referral by Scottish Criminal Cases Review Commission

High Court of Justiciary, Appeal Court

23 September 2008

[2008] HCJAC 50

Evidence--Sufficiency--Fingerprints--Possession of firearm-- Accused's fingerprint found on refuse bag in which concealed firearm wrapped--Accused's girlfriend occupier of house where firearm found--Accused staying overnight in house shortly before firearm found--House frequented by other people--Whether sufficient evidence of accused's possession.

The appellant was charged with unlawful possession of a rifle. The rifle was found concealed behind a water tank in a house which was occupied by the appellant's girlfriend and in which he been present from time to time and in which he had spent the night two nights before it was found. The rifle was wrapped in two black plastic bags, on one of which there were a fingerprint and a palm print of the appellant. There were also other unidentified fingerprints on the bag. There was no evidence as to when these prints got on to the bag, and there was evidence that the house was frequented by a number of people.

The appellant was convicted and was refused leave to appeal. His conviction was subsequently referred to the High Court by the Scottish Criminal Cases Review Commission.

Held that the jury would be entitled to infer that the appellant had come into contact at some time with the bag which had been used to wrap the rifle, that such contact might be thought unsurprising given that the appellant was a visitor to the flat, but that some additional evidence would be necessary before the inference could properly be drawn beyond reasonable doubt that he was involved in handling or concealing the rifle and thus had the requisite knowledge and control over it (para 20), and that the evidence did not reach the stage or attain the level at which a jury would be entitled in law to consider competing interpretations including one of guilt (para 21); and appeal allowed and conviction quashed.

Maguire v HM Advocate 2003 SCCR 758; 2003 SLT 1307; *Langan v HM Advocate* 1989 SCCR 379; 1989 JC 132; and *Hamilton v HM Advocate* 1934 JC 1; 1933 SLT 613 (sub nom *HM Advocate v Hamilton*) distinguished.

Cases referred to in the opinion of the court:

Al Megrahi v HM Advocate 2002 SCCR 509; 2002 JC 99; 2002 SLT 1433 (both sub nom *Megrahi v HM Advocate*)

Bath v HM Advocate 1995 SCCR 323

Fox v HM Advocate 1998 SCCR 115; 1998 JC 94; 1998 SLT 335

Fulton v HM Advocate 2005 SCCR 159

Hamilton v HM Advocate 1934 JC 1; 1933 SLT 613 (sub nom *HM Advocate v Hamilton*)

Langan v HM Advocate 1989 SCCR 379; 1989 JC 132

MacDonald v HM Advocate 1997 SCCR 116; 1998 SLT 37

Maguire v HM Advocate 2003 SCCR 758; 2003 SLT 1307

Morton v HM Advocate 1938 JC 50; 1938 SLT 27

Reilly v HM Advocate 1986 SCCR 417

Slater v Vannet 1997 SCCR 578; 1997 JC 226; 1998 SLT 112

Smith v HM Advocate [2008] HCJAC 7; 2008 SCCR 255.

Barry Jonathan Campbell was charged on indictment with, inter alia, the charges set out in the opinion of the court. His trial took place between 4 February and 13 March 2003 in the High Court at Dunfermline before Lord Hardie and a jury. He was convicted of, inter alia, charge (31). He was refused leave to appeal but applied to the Scottish Criminal Cases Review Commission for review of his case and in April 2006 the Commission referred his case to the High Court. Campbell thereafter appealed to the High Court by note of appeal against conviction on the grounds referred to in the opinion of the court.

The appeal was heard on 4 June 2008 by the Lord Justice General (Hamilton), Lord Eassie and Lady Paton.

For the appellant: *Shead, Nicolson*, instructed by *Adams Whyte*, Solicitors, Edinburgh.

For the respondent: *McCallum AD*.

On 23 September 2008 Lady Paton delivered the following opinion of the court.

Lady Paton

Introduction

[1]

The appellant was born on 17 April 1981. In 2003 he stood trial along with six co-accused, charged with, inter alia, assault, attempted murder, abduction, drugs and firearms offences. The Crown withdrew some charges. The trial judge sustained defence submissions and acquitted the appellant of other charges. Of the remaining charges, the jury acquitted the appellant of some, and found him guilty of others, namely:

> '(30) On 11 July 2002, in Broomhouse Road, Edinburgh, you.. .did abduct Stephen Ogilvie. . .seize hold of him, compel him to enter motor vehicle registered number L784 TSR and convey him therein against his will to 27/5 Murrayburn Place, Edinburgh... and place him in a state of fear and alarm for his safety....
>
> (31) On 11 July 2002, at 27/5 Murrayburn Place, Edinburgh, you.. .did have in your possession a firearm to which section 1 of the Act aftermentioned applies, namely a rifle, without holding a firearm certificate in force at the time: contrary to the Firearms Act 1968, section 1(1)(a)....
>
> (33) On 11 July 2002, in the car park of the Hilton Edinburgh Airport Hotel.. .whilst being interviewed by.. .Lothian and Borders Police, you.. .did pretend that your name was James Campbell.. .with intent to conceal your true identity.. .and did thus attempt to pervert the course of justice.'

[2]

The trial judge imposed a cumulo sentence of four years in respect of the common law offences libelled in charges (30) and (33), and a consecutive sentence of two years in respect of the firearms offence libelled in charge (31). Accordingly the total sentence was one of six years' imprisonment, backdated to 12 July 2002.

Application for leave to appeal against conviction

[3]

The appellant sought leave to appeal against conviction and sentence. His appeal against conviction related solely to charge (31), as set out in his note of appeal:

> 'Charge (31): The appellant was convicted of possession of a firearm (charge (31)). At the close of the Crown case, the appellant made a submission in terms of section 97 of the Criminal Procedure (Scotland) Act 1995 that there was insufficient evidence to support this charge. The firearm was found concealed in a cupboard in a house to which the appellant had access (and in which house he had been the day before the firearm was found), but to which others also had access, and of which the appellant was not the householder. The evidence in support of this charge consisted of a single finger and palm print of the accused on a plastic bag in which the firearm was wrapped. There was no evidence as to the time that the fingerprint was affixed, nor of the location of the bag when it was so affixed. Other fingerprints were found on the bag, although these could not be identified. The bag was a domestic rubbish bag. Accordingly, there was insufficient evidence to permit the jury to infer that the appellant had had knowledge and control of the firearm. The judge erred in repelling the submission.'

[4]

In his report, the trial judge outlined the evidence relating to charge (31) as follows:

> 'The evidence, so far as relevant to this charge, disclosed that at about 5.45 pm on 11 July 2002 police officers attended at 27/5 Murrayburn Place, Edinburgh in connection with the abduction of Stephen Ogilvie. They discovered Ogilvie there along with three of the appellant's co-accused, including Louise Susan Denny, who was the girlfriend of the appellant. Later that evening at about 9.50 pm other police officers went to that address along with the co-accused Louise Susan Denny, who was then in custody in connection with the alleged abduction. She had been identified as the occupier of the flat and prior to leaving the police station in the company of police officers had given her consent to a

search of the flat. The flat was thoroughly searched and a number of items were recovered from different parts of it. In the hallway there were three cupboards, one of which stored the water tank. Detective Constable Stephen Rafferty (Crown witness No 112) searched this cupboard. Within the cupboard the water tank was positioned on a plinth. Standing in the hallway and looking into the cupboard Detective Constable Rafferty could only see the plinth and the water tank. However when he stood on the plinth and looked behind the water tank he could see a black bag. He took hold of the bag and pulled it out. When he did so he noted that the black bag was in fact two black polythene bags, commonly used for refuse disposal, which were wrapped round a rifle (Label No 104). The finding by DC Rafferty of the rifle wrapped in black bags and its concealment behind the water tank were corroborated by DS Alan Goar (Crown witness No 111). The search also revealed various items, including body armour [some contained in a black plastic rubbish bag, Label No 102], stun guns, diamorphine, letters addressed to Gordon Fyfe (Crown witness No 3) and a receipt in the name of the first accused, McLeave. Fingerprint examination of the plastic bags which had been wrapped round the rifle disclosed a number of unidentified fingerprints but also disclosed the right thumb print and the right forefinger and right palm print of the appellant.

'Gordon Fyfe (Crown witness No 3) testified that he obtained the tenancy of 27/5 Murrayburn Place, Edinburgh from the local authority in November 2000. In October 2001 he met his present girlfriend and went to live with her at that time. He retained the tenancy of his flat at 27/5 Murrayburn Place but he had never resided there since October 2001 although he went there occasionally to collect mail which was delivered there. He allowed others to use his flat including someone called Tony, Craig Wilson and the first accused. Each of them had keys for his flat. He realised that the appellant was living there with the co-accused, Louise Denny, in or about April 2002

when he went there to collect a giro. At the date of the arrest of the appellant and his co-accused on 11 July 2002 Louise Denny told the police that she was the occupier of the flat.

'DC Keith McGowan (Crown witness No 110) testified that on 10 July 2002 he was trying to locate Mr Fyfe and went to the address at 27/5 Murrayburn Place, Edinburgh. The door was answered by the appellant who was in a state of undress, suggesting that he had stayed overnight. The appellant was joined by his brother, the third accused.

'Apart from the two black bags which were wrapped round the rifle there was evidence that another black bag was recovered containing certain items. There was no other evidence of such bags in use within the house. I dealt with the absence of evidence about other black bags in my charge to the jury at p 9, line 5 to p 10, line 14 in the context of the address to them by senior counsel for the appellant.

'From the evidence it appeared to me that the jury could infer that the appellant was living with the householder, Louise Denny, and had been living with her at the address where the rifle was found since April 2002. In any event the jury could infer that he stayed overnight at the address as recently as 9/10 July 2002. Having regard to the concealed location of the rifle, the appellant's fingerprints on the bag covering the rifle, the absence of any evidence about the general availability of such bags within the house, the absence of any explanation for the appellant's fingerprints on the bags containing the rifle and the fact that the householder was the appellant's girlfriend with whom he was known to reside, the jury were entitled to conclude that the appellant had the necessary knowledge and control for him to be in possession of the rifle.'

[5]

The appeal against conviction did not pass the first or second sift procedure. Accordingly no appeal hearing relating to the conviction took place. The appeal against sentence was duly heard, and was refused.

Application to the Scottish Criminal Cases Review Commission

[6]

The appellant lodged an application relating to charge (31) with the Scottish Criminal Cases Review Commission. The Commission carried out investigations, and ultimately referred the case to the High Court of Justiciary in terms of section 194B of the Criminal Procedure (Scotland) Act 1995. The appellant then lodged a further note of appeal in the following terms:

'The above-named convicted person appeals against conviction on the following grounds:

1 The appellant was convicted of possession of a firearm (charge (31) on the indictment). The learned trial judge erred in rejecting a submission in terms of section 97 of the Criminal Procedure (Scotland) Act 1995 that there was insufficient evidence to support this charge. The firearm was found concealed behind a water tank in a cupboard in a flat. The appellant was not the householder. There was evidence [that] the appellant had stayed overnight at the said flat the day before the firearm was found. A number of others also had access to the flat, including at least three others who had keys to access it. The appellant's girlfriend at that time, Louise Susan Denny, was identified as the occupier of the flat. The evidence in support of this charge consisted of a single finger and partial palm print of the appellant on a plastic bag in which the firearm was wrapped. There was no evidence as to the time that the finger and partial palm print were affixed. There was no evidence to link the affixing of the prints at the time the firearm was placed in the bag. There was no evidence to establish that the appellant's fingerprints were deposited on the bag at a time when the firearm was in it. There was no evidence as to where the bag was when the prints were affixed. Seven other unidentified impressions were found on the bag. Accordingly,

there was insufficient evidence to permit the jury to infer that the appellant had had knowledge and control of the firearm. The learned trial judge erred in repelling the submission of no case to answer.

2 Esto there was sufficient evidence to establish the charge, the learned trial judge erred in directing the jury that senior counsel for the appellant had advanced a "theory" concerning possible affixing of the appellant's prints on the bag (charge to the jury p 9, line 5 to p 10, line 14)....' [The note of appeal went on to elaborate this ground of appeal, with which this report is not concerned.]

In response, the trial judge prepared a second report, which contained the following passage:

'In his submissions [in terms of section 97 of the Criminal Procedure (Scotland) Act 1995], senior counsel for the appellant referred me to *Reilly v HM Advocate*; *Slater v Vannet*; and *MacDonald v HM Advocate*. I considered that each case depended upon its particular circumstances. The cases referred to could be distinguished upon their facts. In *Reilly* the fingerprint was found on the back of false number plates and the court considered that the nature of false number plates was such that they had been in someone's possession for some time prior to the theft of the vehicle to which the false number plate was subsequently attached. It was not possible in those circumstances to establish whether the fingerprints had been placed on the number plate before or after the theft of the vehicle. In *Slater* the appellant's fingerprints were found on a bag within a market where there had been a break-in but there was no evidence directed to the bag being associated with the unit at which the break-in had occurred, nor was there evidence as to where the bag had actually been found. In *MacDonald* the advocate depute acknowledged that he could not establish that the appellant's fingerprint had been deposited on the car after it had been stolen. In that regard the case was not dissimilar to *Reilly v HM Advocate*. By contrast in the present case there was no evidence of other plastic bags within the house apart from the plastic bag containing body armour which was found under the settee. The appellant was living at the house at or about the date of the search. The rifle was concealed behind the water tank. It respectfully seemed to me that in the circumstances of this case the finding of the appellant's fingerprints on the bags containing the rifle called for an explanation.

'The second ground of appeal relates to my direction to the jury at p 9, line 5 to p 10, line 14....' [His Lordship then responded to this ground of appeal, with which this report is not concerned.]

The appeal hearing took place on 4 June 2008.

Submissions for the appellant

[7]

Ground 1: Counsel for the appellant contended that there was insufficient evidence in relation to charge (31). A number of people had access to the flat at 27/5 Murrayburn Place, all as set out in the judge's report (quoted in para 4 above). The tenancy was in the name of Gordon Fyfe, but he used the flat only as a mail drop. Other people had keys to the flat, and there were many people coming and going. The possibility that one or more of those people had concealed the rifle had not been excluded. The appellant did not have a set

of keys. His girlfriend Louise Denny lived in the flat, and to that extent he was connected with the flat. On 10 July 2002, when police called at the flat, the appellant had answered the door in a state of undress. The inference could be drawn that he had stayed in the flat during the night of 9/10 July 2002. The rifle had been found during a police search of the flat the following day, 11 July 2002. The evidence of Fyfe and of the appellant's girlfriend also gave rise to the

inference that the appellant had been living in the flat from time to time during the period April to July 2002.

[8]

Counsel submitted that this was not a case where there was evidence from an eyewitness claiming to have seen the appellant with the rifle, supported by evidence of a fingerprint. It was not a case where a fingerprint had been found on the gun itself. The appellant's prints were found on one of the plastic bags wrapped round the rifle, but there had been no evidence demonstrating the significance of the position of the prints, as one might have in a case of uttering where the position of prints gave rise to an inference that the accused had torn out the cheque. It was not therefore possible to draw the necessary inferences of knowledge and control of the rifle. The prints could not be dated. They did not have the significance which a print might have in a housebreaking case, where an individual's print was found inside a house where he should not have been. The concealment of the rifle behind a water tank in the hall cupboard was a factor favourable to the appellant. It might be easy to infer knowledge on the part of occupants in a situation where drugs had been left in open view in a house: but it was not easy to infer knowledge of the presence of the rifle in the appellant's case. All that the Crown had been able to prove was contact by the appellant with the plastic rubbish bag at some unspecified time. That, taken with the surrounding circumstances, was insufficient to allow the jury to draw the inference of knowledge and control of the rifle. Reference was made to *Slater v Vannet*; *Maguire v HM Advocate*; *Fulton v HM Advocate*; *Al Megrahi v HM Advocate*; and *Smith v HM Advocate*.

[9]

Ground 2: .... [Counsel then made submissions on this ground of appeal.]

Submissions for the Crown

[11]

Ground 1: The advocate depute submitted that the trial judge had been entitled to hold that there was a case to answer in respect of charge (31). The circumstances, taken together, were capable of supporting an inference beyond reasonable doubt that the appellant was in possession of the rifle.

[12]

The trial judge had prepared two reports. In those reports he had identified the following facts and circumstances:

1 There was evidence that the co-accused Louise Denny was a de facto occupier of the flat.

2 There was evidence that the appellant had been living with Louise since April 2002.

3 More particularly, there was evidence that on 10 July 2002 (the day before the date on which the rifle was found), the appellant was present in the flat, and answered the door in a

state of undress. The inference was that he had stayed in the flat overnight during 9/10 July 2002, a matter he had admitted at police interview. That was a fact upon which the trial depute had relied when answering the submission of no case to answer.

4 The Crown witness Fyfe gave evidence that a number of people had access to the flat, and that some had keys, including Craig Wilson, David McLeave (the first accused), and someone called Tony. It was accepted that the appellant did not have keys.

5 There was evidence that the rifle was found on 11 July 2002, concealed behind a water tank in a cupboard in the hallway. The rifle was wrapped in two refuse bags.

6 There was evidence that the rifle was not visible from the hallway. The advocate depute conceded that such evidence was open to a number of interpretations. But it was a circumstance which might tell against the appellant, whose prints had been found on one of the bags wrapping the rifle.

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7 On one bag had been found the finger and palm prints of the appellant. It was accepted that a further seven unidentified prints had been found. It was not possible to say whether those were the prints of seven other persons, but what was clear was that the prints were not referable to the appellant or to the co-accused.

8 There was evidence that a third binbag was found concealed under the settee in the living room. The bag contained a number of items, including body armour.

[13]

While reference to authorities might assist, each case had to be determined on its own facts. The judge in his second report had been entitled to distinguish previous decisions. In *Reilly v HM Advocate*, the only evidence against the appellant had been fingerprints on the false number plate of a stolen car, whereas in the present case the prints were not the only evidence. The evidence about the prints should be viewed in the context of the appellant's association with the flat, and his presence there at a time relevant to the finding of the weapon. *Slater v Vannet* was also distinguishable. In that case, prints were found on a bag within a shop unit which had been broken into. By contrast in the present case not only were prints found on a bag wrapped round the rifle, but also there was the additional evidence of the appellant's association with the flat at the relevant time. Similarly *Bath v HM Advocate* was distinguishable. In that case, two men had access to the vehicle in which the drugs were found, and it was held that some other evidence would be required from which the inference could be drawn that the accused was aware of the presence of the item. In the present case, there was such additional evidence, namely the prints on the bag wrapped around the rifle.

[14]

Each case had to be decided on its particular facts and circumstances. In *Maguire v HM Advocate*, the only evidence was the accused's DNA on the inside of the jersey-sleeve mask dropped to the ground by the unidentified raider. In the present case there was other evidence available beyond the prints. In *Fulton v HM Advocate*, there had been some eyewitness evidence. *Smith v HM Advocate* was of limited assistance in the present circumstances. In that case it was held that it was not possible in the circumstances for the Crown to bring home knowledge of participation in an enterprise which had as its objective the supplying of a material or substance to another or others. In the present case, there were three bags of the type in question: two bags wrapped around the gun concealed behind the water tank, and a third bag containing the body armour underneath the settee. There were therefore several facts and circumstances (listed in para 12) which called for an explanation and which were capable of giving rise to an inference. The first ground of appeal should be refused.

[15]

Ground 2: .... [The advocate depute then dealt with this ground of appeal.]

Discussion

Ground 1

[16]

Counsel for the appellant and the advocate depute accepted, correctly in our view, that the sufficiency of circumstantial evidence must be decided on the basis of the particular facts and circumstances of each case. While precedent may give assistance, it will not necessarily be determinative.

[17]

In the present case, two matters are in our view of particular significance when assessing whether a jury would be entitled to draw an inference beyond reasonable doubt that the appellant had knowledge of, and control over, the rifle.

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[18]

First, the evidence established that the appellant was not the sole occupant or user of the flat at 27/5 Murrayburn Place. It is true that he was proved to have a connection with the flat, because his girlfriend Louise Denny was an occupant. On the evidence, he had during the period April to July 2002 visited the flat and on occasions stayed overnight. In particular an inference could be drawn that he had stayed overnight on 9/10 July 2002, ie shortly before the rifle was found during the police search on 11 July 2002. But the evidence also disclosed that many other people used the flat during what might be the relevant period, either as a home, or as a place to visit, or as a mail drop. Thus, for example, there was evidence that the tenancy was in the name of Gordon Fyfe, who used the flat as a mail drop; that Louise Denny lived there; and that several other people (excluding the appellant) had keys to the flat, namely Gordon Fyfe, Craig Wilson, David McLeave (the first accused) and someone called Tony. The hall cupboard was accessible to all of those people: cf the circumstances in *Fulton v HM Advocate*.

[19]

Secondly, the evidence established that the rifle was well concealed behind a water tank in that hall cupboard. The rifle could not be seen from the hallway. There was no evidence that the appellant had ever been seen with the rifle: contrast with the circumstances in *Fulton v HM Advocate*. There was no evidence that the appellant's prints had been found on any part of the cupboard itself, or on the water tank, or on the plinth supporting the tank, or on any nearby surfaces, which might suggest the appellant's presence at some stage inside the cupboard in the vicinity of the place where the rifle had been concealed. The rifle itself did not carry the appellant's prints, and there was no evidence assisting with the date on which, or the circumstances in which, the appellant's prints came to be on the plastic bag wrapped round the rifle. For example, there was no expert evidence tending to suggest that the rifle must have been in the plastic bag when the appellant's hand came into contact with the bag. Nor was there any evidence which might assist in ascertaining the date on which the rifle had been concealed. We do not regard as significant the circumstance that, at the time when police searched the flat, there were no plastic bags available for domestic use. All that

the evidence could establish was that one of the two black plastic rubbish bags wrapped round the concealed rifle carried the appellant's fingerprint and palm print, together with seven other unidentified prints unrelated to either the appellant or to his co-accused (including his girlfriend Louise Denny).

[20]

Against that background, we have come to the view that the evidence was insufficient to entitle a jury to draw the inference beyond reasonable doubt that the appellant had knowledge and control of the rifle concealed in the cupboard. In our opinion, the jury would be entitled to infer that the appellant had indeed come into contact at some time with the black plastic bag (a moveable item) which had been used by someone to wrap up the concealed rifle. Contact with such a bag might be thought unsurprising, given that the appellant was a visitor to the flat and that he might have come into contact with items and surfaces (both moveable and fixed) within or brought to the flat. Thus some additional evidence would in our view be necessary before the inference could properly be drawn beyond reasonable doubt that the appellant had been involved in handling or concealing the rifle and thus that he had the requisite knowledge of and control over the rifle.

[21]

We accept, of course, that even with such additional evidence, the resultant body of circumstantial evidence might be--

> 'open to more than one interpretation and...it is precisely the role of the

> jury to decide which interpretation to adopt....' (Lord Rodger of Earlsferry in *Fox v HM Advocate* at p 126F).

It would be for the jury, examining the circumstantial evidence as a whole, to decide what inferences to draw. It would not be necessary that each piece of circumstantial evidence was incriminating in itself, rather that the pieces, when looked at as a whole, gave rise to an inference of guilt such that there was sufficient corroborated evidence of guilt providing a case to answer, even if there was conflicting evidence inconsistent with the accused's guilt (which the jury might choose to reject): cf *Al Megrahi v HM Advocate*, paragraphs 31-36. However, in our view the evidence in the present case did not reach the stage or attain the level at which a jury would be entitled in law to consider competing interpretations including one of guilt on the part of the appellant of the offence libelled in charge (31).

[22]

It is neither necessary nor appropriate for this court to indicate what further strands of circumstantial evidence might have resulted in the necessary sufficiency of evidence in this particular case. The fact, for example, that the appellant had been present in the flat shortly before the weapon was discovered was not in our opinion enough. But it is perhaps worth emphasising some features which distinguish this case from previously decided cases in which there was held to be a sufficiency of evidence.

[23]

In *Maguire v HM Advocate* (the robbery of a shopkeeper), the accused's DNA was found on the internal surface of an item of personal clothing, namely a woollen multicoloured pullover, the sleeve of which had been made into a mask used by one of the robbers. The robber was seen to discard the mask in the course of the robbery. The mask was not an impersonal or neutral item such as the black plastic bag in the present case,

which might be used by a variety of individuals for a variety of purposes. As Lord Hamilton emphasised at paragraph 18:

> 'Much will depend on the nature of the item on which the fingerprint or other identifying link was found and its association in time and in place with the crime. The readiness with which the accused may innocently have come to be in contact with such an item may be such that, even in the absence of an explanation from him, no inference of sufficient association between him and the crime can legitimately be drawn.'

Further the complainer in *Maguire* had recognised the robber who discarded the mask as a 'local boy', and had given a description of that person. The appellant did in fact live in the neighbourhood, and the complainer's description was consistent with his appearance. The jury were entitled to prefer that evidence to the complainer's evidence in court when he maintained that he could not see any of the robbers in the courtroom. Finally there was the evidence relating to the appellant's interview with the police. When shown the woollen sleeve made into a mask, he stated that he did not recognise it and that he had never had contact with it. The jury were entitled to weigh up the appellant's response with all the other circumstances, including the fact that the sleeve was a distinctive multicoloured one, and that it bore the appellant's DNA on the inner surface, giving rise to an inference that he had come into contact with the inner surface of the sleeve, as one would when, for example, wearing it.

[24]

Thus in the particular circumstances of *Maguire,* there were several strands of circumstantial evidence coming from more than one source which provided the necessary 'aptitude and coherence of the several circumstances'

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(in the words of Lord Justice Clerk Aitchison in *Morton v HM Advocate*, quoted at para 31 in *Al Megrahi*). Thus there was a sufficiency of evidence, entitling a jury to assess the evidence and to decide what to accept, what to reject, and whether guilt had been established beyond reasonable doubt.

[25]

In *Langan v HM Advocate* (a murder, where the victim was found lying in a pool of blood in his living room), the appellant's fingerprint in blood was found on the hot-water tap of the kitchen sink. The blood was not identified, but another trace of blood on the kitchen sink was found to be of the same group as that of the deceased. There was evidence that the deceased's blood could have remained liquid for about 24 hours after death. When cautioned and charged, the appellant stated that he had never been in the victim's home. The circumstances in that case, taken together, provided a cogent body of evidence from which the inference could be drawn, beyond reasonable doubt, that the fingerprint had been made by the murderer when cleaning up after the murder. Accordingly there was a sufficiency of evidence for consideration by the jury.

[26]

In *Hamilton v HM Advocate*, a shop was broken into. A bottle which before the housebreaking had been in the shop, wrapped in paper, was found after the housebreaking to have been unwrapped and opened. The appellant's fingerprints were found on the bottle. There was nothing to suggest that the fingerprints might have been placed on the bottle at any time other than that at which the crime was committed. There was therefore a cogent body of circumstantial evidence entitling a jury to draw an inference of guilt beyond reasonable doubt.

[27]

By contrast with the cases of *Maguire, Langan,* and *Hamilton* above referred to, we do not consider that the circumstances in the present case provided a cogent body of evidence sufficient in law to entitle a jury to infer to the standard beyond reasonable doubt that the appellant had knowledge of, and control over, the rifle. As indicated in paragraph 20 above, the most that the jury could in our view properly infer from the particular circumstances of this case would be that the appellant had indeed come into contact at some time with the moveable black plastic bag in question. The circumstances in which, and the time at which, such contact was made, could not be inferred with any degree of certainty from the evidence led. Such contact could not in our view properly found an inference that the appellant had the requisite knowledge and control of the rifle concealed in the hall cupboard. Accordingly there was in law an insufficiency of evidence: cf *Slater v Vannet*; *Fulton v HM Advocate*; *Reilly v HM Advocate*; *MacDonald v HM Advocate*; and *Bath v HM Advocate*.

Ground 2

[28]

In the circumstances it is unnecessary to consider the second ground of appeal.

Decision

[29]

For the reasons given above, we shall sustain the first ground of appeal, and quash the appellant's conviction so far as relating to charge (31).