

SCOTLAND / JUDGMENT

Docherty v HM Advocate [2016]

ScotHC HCJAC_49 (20 May 2016)

[2016] ScotHC HCJAC_49

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[2016] ScotHC HCJAC_49 [New search] [Help] APPEAL COURT, HIGH COURT OF JUSTICIARY

[2016] HCJAC 49 HCA/2014/3517/XC Lord Justice General Lady Dorrian Lord Bracadale OPINION OF THE COURT delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL in APPEAL AGAINST CONVICTION AND SENTENCE by JOHN DOCHERTY Appellant ; against HER MAJESTY'S ADVOCATE Respondent : Appellant: Findlay QC, Young; Faculty Criminal Appeal Service (for Westcourts Litigation, Greenock) Respondent: Scullion QC; the Crown Agent 20 May 2016

Introduction

- [1] On 17 June 2014, after a 52 day trial, the appellant was convicted of the murder of Elaine Doyle. The terms of the libel were that: “(1) on 2 June 1986 at a lane leading from Ardgowan Street, Greenock you ... did assault Elaine Doyle, 28 Ardgowan Street, Greenock and seize her by her hair, strike her on the head, struggle with her, remove or compel her to remove her clothing, force her to the ground, push her face into the ground, sit or kneel on top of her, place a ligature around her neck and strangle her and you did murder her.” On 6 August 2014, he was sentenced to life imprisonment with a punishment part of 21 years.
- [2] The appellant appeals against his conviction, in terms of section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995, on the ground that the jury’s verdict was unreasonable. He appeals against his punishment part on the basis that he ought to have been sentenced in accordance with practice at the time of the offence. The evidence
- [3] On the morning of Monday 2 June 1986, the body of 16 year old Elaine Doyle was found lying naked in a lane beside the Air Training Corps hut off Ardgowan Street, Greenock. Her clothing lay around her. She had been strangled at that location with a ligature. There was evidence of a struggle. The deceased had a black eye, suggesting that at least one blow had been delivered to her face. According to the pathologist, she had been killed as she lay face

down on the ground, with the killer pulling the ligature tight around her neck from behind while sitting astride or kneeling on her and pinning her down. There was no definite evidence of any sexual assault, but the circumstances in which the deceased was found suggested sexual motivation. A week later, the deceased's handbag was found, partly burned, a few blocks away outside the James Watt Library in Union Street.

- [4] The deceased had spent the evening of the previous Sunday with a group of female friends at a disco in the Celtic Supporters' Club in Laird Street. The appellant had also been in the Club (see *infra*) but there was no evidence, from any of those in their company, of any contact between the two. When the disco ended, the deceased and her friends had gone to a hamburger stall at the Mid Kirk. At about midnight, having moved to what is now the Oak Mall Shopping Centre, she left her friends to walk home. The walk would have taken her about 15 minutes. The lane in which her body was found was within 50 yards of the flat in Ardgowan Street where she lived with her parents. A young girl living near to the locus gave a statement at the time of hearing a scream at about 00.40am.
- [5] The principal evidence against the appellant came, first, from matches between the appellant's DNA, ultimately obtained in 2012, and cells captured on tape applied to the body of the deceased as it lay in the lane shortly after its discovery.
- [6] The protection of the crime scene in 1986 was not as it would be today. By coincidence, an early part of the investigation at the scene was video recorded, in what was then a pioneering experiment. This was in the days before DNA profiling had captured the imagination of criminal investigators; modern processes only having been developed two years later. Unlike the images of crime scenes in modern television dramas, none of the investigators was wearing clothing designed to prevent contamination. Although the police wore gloves when picking up items of clothing or turning the body, the purpose of doing so was to protect the officers from infection (notably AIDS) rather than to isolate the scene from extraneous objects. The video thus shows the police, notably DI Goldie, retrieving the deceased's clothing and putting it in, albeit separate, polythene bags, whilst wearing normal civilian clothing. Various other persons involved in the investigation are seen in the video images milling about near the body.
- [7] Keith Eynon, the forensic scientist, is also shown in the video images. He too was dressed in civilian clothes. At no time did he wear any gloves or other protective clothing, which would be regarded as standard today. His object had been to collect hairs and fibres for microscopic and chemical examination with a view to forensic matching. It was this exercise that saw him taking a series of tapings from the surface of the deceased's body.
- [8] Mr Eynon's technique was to unwind and cut lengths of tape from a roll, hold them tight and apply them to the body's surfaces, including all limbs, front and back of the torso and front of the face. The lengths were attached to clear acetate strips by reversing the ends and sticking them down. This, subject to some bulging of the tape shown in the video images, sealed the contents. Ultimately, Mr Eynon's search for fibres was frustrated by the previous

placement of a police blanket over the body to conceal it from onlookers. The blanket was not retained and never recovered. However, the tapings were kept. In due course, they were submitted for DNA examination, as techniques for DNA extraction and analysis developed over time.

- [9] A mixed female/male DNA profile was obtained from the taping of the deceased's face in January 2004. This had consisted of 2.00 nanograms (about 300 cells). In March 2006, a mixed profile was obtained from the tapings of the back, which had consisted of 6.00 ng (1000 cells). The major profile was of male origin, with the traces matching corresponding types in the profile of the deceased. In 2008, the face sample was re-analysed. The male traces matched the respective types in the male profile obtained from the back taping. The back profile was posted on the national DNA database as a reference sample. A sample from the front torso of the deceased contained a mixed profile, which included a major contribution from DNA matching that of DI Goldie. There was evidence from the video images that he had turned the body, but not that he had touched the chest.
- [10] The initial investigation in 1986 had identified the name of the appellant as someone who had been in the Celtic Club on the relevant night. His name had not been in the club's visitors' book. He had not come forward to volunteer information, despite his mother and his then girlfriend, namely LH, urging him to assist with the inquiry. On 26 October 1986, the police had located a friend of the appellant, namely JF, who told them that he had been in the Club with the appellant, whose address he correctly gave as 14 Ann Street. They had walked "about the town centre" for a short time. JF had taken a taxi home, arriving at about 11.50pm; a fact supported by his brother. The contemporaneous police investigative material noted: "T. I. E." [trace, interview and eliminate] the appellant, but this does not appear to have been followed through. The appellant was not interviewed in 1986. In 1987 he joined the army.
- [11] A review of the index of names held by the inquiry in 2011 and 2012 led to the appellant being traced. He eventually told the police that he had been at the Club that night. He was one of several hundreds asked to provide a voluntary DNA sample for screening. His sample matched the reference sample. The forensic scientists, namely Terence Randall and Pauline McSorley, were of the view that, given the method of strangulation, the DNA recovered from the taping to the back of the body was likely to have been contained in cells deposited directly onto the deceased's back (ie by primary rather than secondary or tertiary transfer) given the quantity involved. No DNA from anyone else was found on the deceased's body or her clothing other than that of members of her family or the investigators. The appellant was charged with the murder on 23 March 2013.
- [12] The second principal strand of evidence against the appellant came from MB. Mr B, who was aged 24, had been up from London. After spending some time in the Green Oak pub, he had gone to a flat in Brisbane Street to watch the opening match of the World Cup in Mexico. That match had kicked off at 11.00pm. At half time, the flat owner had decided to watch something else, so Mr B left to go to his parents' house, at the corner of Patrick and Union

Streets, for the second half. In his first statement, taken on 3 June 1986, he said that he had left the flat at 12.15 and arrived at his parents at 12.20. His route took him along Ardgowan Street, in the opposite direction from that predicted of the deceased heading home from the town centre.

- [13] According to Mr B in his evidence, he had seen a girl being followed by a male walking away from the town centre, up Ardgowan Street at Ardgowan Square and heading towards the locus, which was only a block further away. The male was walking faster, as if he was trying to catch up with her. It looked as if they might have been together, and he assumed that they were, although he did not see any interaction between them. They seemed “incongruous” as a couple in retrospect. Mr B said that he had only glanced at the male. He glanced twice at the girl.
- [14] The male was in his 20s, 5’8”, wearing dark clothing. He had “big eyes”, seemed angry and made Mr B look away. Mr B suffered from colour blindness, which affected his perception of shades. He thought that the male had red or auburn hair. He thought that he was someone called “Carrot” Docherty (no relation to the appellant). However, by 10 June he was “not sure” about the hair colour. The girl was about 20 with shoulder length hair. She was about the same height as the male.
- [15] Mr B had provided the statement of 3 June, having attended the police mobile unit, not because he thought that the girl might be the deceased, but because he was apprehensive that he would come under suspicion if he returned to London and either the girl or her pursuer had reported his presence to the police. On Sunday, 8 June 1986, the police took Mr B on a tour of all the local pubs and clubs in an effort to identify the male. This was not successful. This exercise was repeated on Sunday 23 June, when he did point out persons resembling the male, but they were not the culprits. Much later, on 28 February 1996, Mr B gave another statement in which he mentioned that the girl had a bag. By this time, he was convinced that he had indeed seen the deceased that night.
- [16] Much later still, on 11 September 2012, Mr B was visited by police officers in London. He was asked to look at twelve black and white photographs of young males taken in the 1980s. He excluded the males in nine photographs. Of the three other photographs, Mr B had said that one was “more like” the male he had seen. The “cannot exclude/more like” photograph was that of the appellant, taken for his army identity card in 1988. He is shown with fairly intense looking eyes.
- [17] The appellant’s line in cross was that the female was not the deceased and that the male was not the appellant. The advocate depute had succeeded in adducing Mr B’s testimony without much need to look at any of his several previous statements. The appellant was, understandably, to adopt the opposite technique. In his first statement, Mr B had said that the girl was wearing dark clothes with blue in them somewhere. He had not mentioned the distinct pattern on the deceased’s skirt. He had said that she was wearing beads, although she had a gold necklace with a Celtic cross. He did say that she was good looking with a

brown/fairish page boy hairstyle. This was reasonably accurate. The reason, for him not originally thinking that the girl he had seen was the deceased, was because the photograph used in the media had showed a curly, dark haired schoolgirl. In due course, having been shown up-to-date photographs, notably a group photograph (which was not produced), Mr B had identified the deceased.

- [18] The trial judge summarised the evidence of Mr B as being that he had at least seen a person resembling the appellant. The trial judge comments that, assuming the appellant was correct and Mr B had seen neither him nor the deceased, it was odd that neither male nor female had come forward for elimination purposes.
- [19] In addition to these two principal strands, there were other adminicles used by the Crown to prove guilt. First, there was evidence from a taxi driver that, sometime after midnight, he had seen a male of a similar height and build to the appellant, with shoulder length dark hair and wearing a dark bomber jacket, running from Ardgowan Street into Nelson Street. This would have taken him in the direction of the appellant's home in Ann Street. LH had given the appellant a similar leather jacket for his birthday, prior to this.
- [20] There was evidence that the appellant took a greater interest in the murder than, and seemed to know more than might have been expected from, someone with no involvement in the crime. LH testified to speaking to the appellant in the weeks after the murder about the police appeal for those attending the Celtic Club to come forward. The appellant had said that he had no intention of doing so. She said that he had also changed his social habits at the time; stopping his contact with JF. He had reacted violently, when she had again raised his failure to go to the police in about 1991 or 1992.
- [21] GH, who was a former work colleague and friend of the appellant, testified that the appellant had shown him the lane and the part of it where the body had been found. He had been able to point out where the deceased's parents had lived at the time of the murder. On another occasion, the appellant had shown Mr H the parents' new house in Gourrock. He had identified them in the garden of the house.
- [22] A search of the appellant's house had uncovered two copies of Inverclyde Memories, Issue Two (2007), a Greenock Telegraph publication which contained "stories that shaped our lives". Two pages were devoted to the deceased's case. The copies were in a suitcase containing memorabilia collected by the appellant's mother. There were other newspapers in the case, but no other issues of Memories .
- [23] The appellant had lodged special defences of alibi and incrimination. Forty-one individuals were incriminated. The list was not said to be exhaustive or exclusive. There was evidence from, or about, the incriminees who had been objects of suspicion over the course of the investigation. Two were convicted murderers; six had allegedly confessed or in some way incriminated themselves or made themselves objects of suspicion; and three had apparently put forward false alibis.

[24] The appellant did not give evidence. At his interview, in March 2013, he initially told the police that he did not know if he had been in the Celtic Club on the night of the murder, before accepting that he might have been there and then that he had been. He said that he did not know the deceased's parents, or where they lived. He was able to recall that the deceased's handbag had been recovered a week after the murder at the "museum". There was evidence that, other than LH, the appellant had not told any of his friends or relatives that he had been in the Club or, in due course, that he had provided a DNA sample in 2012.

Submissions

Appellant

[25] It was submitted that the jury had returned a verdict which no reasonable jury, properly instructed, could have returned. The test was an objective one (*King v HM Advocate* 1999 JC 226, LJG (Rodger) at 228-229). It was not sufficient that the appellate court might entertain a reasonable doubt (*ibid* at 230). The test was very high (*Jenkins v HM Advocate* 2011 SCCR 575 , Lord Clarke at para [44]). The court had to be satisfied that no reasonable jury could have reached a guilty verdict, applying its collective knowledge and experience (*Geddes v HM Advocate* 2015 JC 229 , LJG (Carloway) at para [4] and [5]). The test was not, however, insurmountable. Although the evidence had to be looked at as a whole, the individual pieces required to be examined. If significant pieces fell to be rejected, the point would come when the whole structure was weakened, perhaps fatally. If this court, with its collective knowledge and experience, thought that the verdict was unreasonable, it must have been unreasonable for the jury to convict.

[26] The complaint centred, first, on the crime scene. The police inquiry had been inept and corrupt. There had been no measures to prevent contamination of the scene. The police blanket had been placed over the body prior to the attendance of the scientists. The blanket had not been retained. It had not been subject to any forensic examination. The forensic scientist who taped the body had worn no protective clothing. The taping exercise was carried out according to the standards of the time. They had been wholly inadequate for the recovery of items to be subjected to DNA analysis. There had been ample opportunity for contamination, cross-contamination and de-contamination. It was accepted that the appellant's DNA had been found on the tapings, but that was not the real question. The issue was whether the Crown had proved how it got there.

[27] The DNA found was a microscopically small quantity. The jury may have been overly influenced by the scientific findings about it. The DNA of DI Goldie had been found on the torso of the deceased, but there was no satisfactory explanation as to how it came to be there. The DNA of the forensic scientists, Mr Randall, Ms McSorley and Mr Eynon, DI Clark and a cleaner at the forensic laboratory, had contaminated the clothing of the deceased. The deceased's father's DNA had also been found.

- [28] The back taping covered a significant area of the back. It was not possible to know precisely where the appellant's DNA had been found. The evidence did not establish the nature of the material which had yielded the DNA. It could have been skin cells or saliva. The deceased and the appellant had both been at the disco on the night of the murder. A shouted conversation between the appellant and another, when the deceased was close by, could have been sufficient to allow DNA to be transferred from the appellant to the deceased. No DNA was recovered from the deceased's tights or pants. Her own DNA was not found on her clothing.
- [29] The second complaint concerned the evidence of Mr B. His testimony had been wholly unreliable and manifestly influenced by the police. No reasonable jury could have accepted it in so far as he had identified the deceased or the appellant. At one point, he had himself been suspected of the murder. He had said that his impression had been that the girl was aged around 20 (not 16). He had thought that she had been wearing beads, not a chain and a Celtic cross. There was no mention of the distinctive patterned skirt she had been wearing. He had thought that the male was only about one year older than the female (not 6 years). He had formed the impression that they were together.
- [30] From her photograph in the newspaper, Mr B had not thought that the girl was the deceased. The police had told him that they thought his description sounded like the deceased, thus, planting the idea into his mind. Mr B had said that the police had then shown him another photograph; this time of the deceased at a party with others. There was no reference to this in any statement. That photograph had not been produced. It had never existed. He was shown another photograph in court, but he could not identify the deceased.
- [31] Although Mr B had selected the appellant's photograph from a group of twelve, there had been improper police pressure and influence. The photograph of the appellant had been distinctive. Mr B had originally said that the male had been red headed and that he had thought he was another named person. Although the Crown claimed that Mr B had identified persons similar to the deceased and the appellant, all that could be said was that he had identified a male and a female. The later reference to a handbag was another example of police interference. The fact that Mr B did not hear anything, as he continued his walk home, indicated that the persons, whom he had seen, did not include the deceased. By the time the police had gone to London to show him photographs, he had become thoroughly discredited.
- [32] The police investigation had revealed the appellant's name, but this had not been pursued. There had been a lack of response from the public. The appellant's change of routine was not unusual. His joining the army was not surprising, given economic conditions at the time. He had returned to Greenock on visits and ultimately on leaving the army. He had set up home and taken up employment in Greenock. There had been no evidence that the appellant had touched his mother's memorabilia. He had volunteered his DNA sample. The fact that he did not tell others about this was hardly suspicious. He had responded to questioning at interview, although he had not needed to do so. Crown

- [33] The advocate depute submitted that, for an appellant to succeed, the court must be able to hold “that no reasonable jury could have returned a guilty verdict on the evidence before them” (*King v HM Advocate* (*supra*), LJG (Rodger) at 228; *Geddes v HM Advocate* (*supra*), LJG (Carloway) at para [4]). The test was a high one. It was only in the most exceptional circumstances that an appeal on this ground would succeed (*Harris v HM Advocate* 2012 SCCR 234, Lord Bonomy at para [67]; *King v HM Advocate* (*supra*) at 230). The appellant required to satisfy the court that there was no cogent framework of evidence that the jury were entitled to accept as credible and reliable and which would have entitled them to return a guilty verdict (*MacKinnon v HM Advocate*
- [2015] HCJAC 6 , Lady Dorrian at para [6]).
- [34] The evidence had to be considered as a whole (*Geddes* (*supra*) at para [6]). The testimony of particular witnesses or pieces of evidence should not be looked at in isolation, but along with, and in the context of, all the other evidence in the case (*Fletcher v HM Advocate*
- [2012] HCJAC 91, Lord Carloway at para [9]; *MacKinnon v HM Advocate* (*supra*) at para [5]). Where there was a sufficiency of evidence, the weight to be given to contradictions and inconsistencies was a matter for the jury (*Toal v HM Advocate* 2012 SCCR 735, LJG (Hamilton) at paras [61] and [64]). The appellant’s criticisms involved an attack on the reliability of certain individual elements or strands of evidence, rather than one which addressed the cogency of the circumstantial case as a whole (*Mitchell v HM Advocate* 2008 SCCR 469 , LJG (Hamilton) at para [111]).
- [35] The male and the female described by Mr B were similar to the deceased and the appellant. Mr B’s reliability had to be assessed in light of the evidence that the deceased had left her friends to walk home and that her route was likely to have taken her through the area where Mr B said he had been. The timing of Mr B’s journey coincided with that of the deceased. At the same time, the appellant was placed in the town centre alone. A male was subsequently seen running from the scene wearing a bomber jacket, similar in style to that owned by the appellant. There was also the appellant’s demonstrated failure to contact the police and his reaction years later when his involvement was raised. Mr B’s reliability also had to be assessed in light of the DNA evidence.
- [36] The evidence of the recovery and interpretation of the DNA from the tapings should equally not be considered in isolation, but in the context of the evidence as a whole. The jury had been shown video images of the crime scene and the taping exercise. They had heard the evidence about the potential for contamination. On the other hand, it had been explained that, once the taping had been attached to the acetate strip, it amounted to a sealed record of DNA recovered from the body. The video footage had not been continuous. Mr Eynon had later examined the clothing in the laboratory. Although there was a possibility of secondary or tertiary transfer, both forensic scientists said that it was more likely that the DNA recovered from the back of the deceased had been deposited by primary or direct transfer.

- [37] There was a coherent and compelling body of circumstantial evidence which supported the conclusion that the appellant was guilty. This was: (a) the pathologist's evidence that the deceased was strangled from behind with a ligature; (b) the forensic scientist's testimony that the tapings had been kept in a sealed state; (c) the DNA matching; (d) the likelihood that the DNA came from a primary transfer; (e) the evidence that the appellant was alone in the town centre at or about the time when the deceased was walking home; (f) the testimony from Mr B that he saw a male, similar in appearance to the appellant, following a female; (g) evidence from the taxi driver that he saw a male wearing a dark bomber jacket, running from the locus towards his home; (h) the evidence of the appellant's behaviour in refusing to contact the police, his change of routine and ultimate decision to join the army; (i) the appellant's angry reaction years later when the issue of his failure to contact the police was raised; (j) the detailed knowledge which the appellant demonstrated to a work colleague about where the deceased's body had been found and where her parents had lived; (k) the appellant's reluctance during interview to provide a truthful account of his movements and his knowledge of the circumstances of the death and her family; (l) the interview of the appellant in which he had been able, 27 years later, to recall where the deceased's handbag had been recovered; and (m) the evidence that, at the time of his arrest, his family and friends had been unaware that he had been in the Celtic Club at the relevant time and that he had provided a voluntary sample of DNA to the police in May 2012.
- [38] When considered alongside the other evidence in the case, the evidence of the lies which the appellant had told during his interview would have entitled the jury to conclude that he was hiding a secret in relation to the death in order to avoid detection (Ryan v HM Advocate [2011] HCJAC 83, Lord Mackay at para [19]). Decision
- [39] In Geddes v HM Advocate 2015 JC 229 , under reference to AJE v HM Advocate 2002 JC 215 and Gage v HM Advocate 2012 JC 319 , the test for the review of a jury's verdict under section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995 was described (at para [4]) as well settled. It involves an objective exercise in which, for the appellant to succeed, the court must be able to hold that "no reasonable jury could have returned a guilty verdict on the evidence before them". Following Harris v HM Advocate 2012 SCCR 234, it was emphasised that it was only in the most "exceptional of circumstances that an appeal on this ground will succeed". The test has not been met in this case.
- [40] The starting point, so far as proof of guilt is concerned, must be the DNA findings. It is not disputed that the appellant's DNA was found on tapings taken from the back of the deceased's body, as well as from her face, as it lay in situ not long after the murder. It is undoubtedly true that there were significant deficiencies, applying modern standards, in the manner in which the crime scene and the recoveries from it were preserved for laboratory examination. The risk of contamination was clear and, in some respects, realised. The DNA of either the forensic scientists, and their staff, or the police officers on the scene, was found on the clothing. The DNA of one officer was recovered on a taping from the deceased's chest. None of this detracts, however, from the central finding that the appellant's DNA was on the

tapings. Apart from that of the officer, who had been in contact with the body, no-one else's DNA was found on any body taping. No DNA from anyone other than the investigators or the deceased's family was found on any tapings of her clothing.

- [41] It can readily be understood how DNA from those involved in the investigation of the murder may inadvertently have found its way onto the deceased's body or clothing. On the other hand, there is simply no plausible explanation as how the appellant's DNA could have found its way onto the tapings, other than if the appellant had been the killer and deposited microscopic elements of DNA onto the naked back of the deceased when he strangled her to death. This evidence alone would have entitled the jury to convict the appellant.
- [42] The contention of the appellant, that his DNA may have been transmitted by shouting whilst the appellant and the deceased were in the Celtic Club earlier in the evening, is essentially speculative. It is not supported by any evidence that such shouting ever occurred, far less that it happened near the deceased. None of the several witnesses, who had been with the deceased, spoke to her being in close proximity with the appellant in the Club. No DNA transfer occurred between the deceased and any of her friends, who were in contact with her. Even if a transfer from the appellant to the deceased had occurred in the manner postulated, the fact that the DNA found its way onto the deceased's naked back, when it was not found on any of her clothing, adds a further level of implausibility to the appellant's contention. Although much was made in the appeal, as it had been at the trial, about the part which may have been played by the police blanket, there is nothing to explain how its use might realistically have transferred DNA from the appellant to the deceased.
- [43] The DNA evidence does not, of course, exist in isolation. It is found in a context in which the appellant is placed in Greenock town centre at or about the same time as the deceased. Both are, at that time, alone, having separated from their respective friends. Both have been in the same Club earlier that night. Criticism was made at the trial by both Crown and defence of the testimony of Mr B. It fell under close scrutiny because of its possible significance if taken at its highest as, eventually, a positive identification of the deceased as the female and a reasonably strong resemblance identification of the appellant as the male. Applying a degree of objectivity to the results of this scrutiny, it is significant to note that Mr B undoubtedly did go to the police shortly after he heard of the murder. He gave them an account which fitted well with the deceased's likely route home and her falling foul of a pursuing assailant shortly before reaching her door. It is an account which fits with what must have happened, even if it is not surprising that, from two glances at the female and only one at the following male, any evidence of identification was far from being without defect.
- [44] Yet the final position of the Crown about the import of Mr B's testimony is correct. It amounted at least to an identification of the deceased in her final moments, under reference to her hair, general look and partly blue clothing, albeit that, if correct in the identification, Mr B had mistaken other aspects of her clothing, notably the patterned skirt, and her jewellery. It must, after all, be assumed in this connection that, notwithstanding the attack

on Mr B's reliability on this identification, there is little evidential basis for a contention that he did not see the deceased as he made his way to his parents' house.

- [45] The position with the identification of the male is, no doubt, different; standing the appellant's presumed instructions at trial. Yet, although Mr B's description of the male having red hair must point away from the appellant as the pursuer, the fact remains that Mr B did pick the appellant's photograph as one of three out of twelve depicting a person who might have been the male. His description of the male by age and height coincided with that of the appellant, even if that relating to his build did not. There are, as might be expected, factors pointing to the appellant as being the man seen and factors detracting from that position. All that might be said is that the appellant resembled, albeit only in a general sense, the man. That was something which the jury were entitled to take into account in looking at the DNA findings. The other feature in this area is the taxi driver's sighting of a person running away from the area in the direction of the appellant's address (and many others) wearing a jacket of a type which the appellant had been given by his then girlfriend.
- [46] There are undoubtedly other adminicles which the jury would have been entitled to regard as incriminating. The pointing out to his workmate of the place where the body was found may be seen as particularly suspicious in so far as he was, for reasons otherwise unexplained, aware of the side of the lane where the body was left to lie. His interest in the deceased's parents is interesting, and also unexplained. His recollection of the place where the handbag was found falls into the same category. Finally, there are the deceased's actions, after the event, in not responding to the plea to come forward as being at the Club, his change in social activities and decision to join the army. Each of these matters may be capable of innocent explanation, but no such explanation was tendered. In such circumstances, the jury would have been entitled to take them all into account in assessing what remains the most important incriminating material; that being the DNA match.
- [47] In all of this, the argument, that the appellant being less than entirely truthful in his interview can be used against him, has not been ignored. However, such lies as he might be seen as telling have a very limited part to play in establishing the true facts (cf *Ryan v HM Advocate*
- [2011] HCJAC 83 at para [19] following *Bovill v HM Advocate* 2003 SCCR 182).
- [48] In all the circumstances, this was a compelling circumstantial case and the appeal against conviction is refused. Sentence
- [49] It was submitted that the punishment part of 21 years was excessive. The appellant's schedule of previous convictions disclosed only minor, non-analogous offences. Since the date of the murder, he had not been in any trouble. He had served as a member of the armed forces. He lived with his long-term partner and their daughter openly in the Greenock area. There was no suggestion that he posed any continuing danger to the public.
- [50] Although it was recognised that the dictum in *Sinclair v HM Advocate*

- [2016] HCJAC 24 (Lady Paton at para [51]), may preclude such an argument, the contention was that the punishment part ought to have been in accordance with sentencing practice in 1986. Had it been so, there would have been no prospect of a punishment part of this level.
- [51] This was a murder of an innocent 16 year old girl making her way home along the public streets after a night out in central Greenock. It is a crime of rare callousness and brutality. As the trial judge records, it caused widespread public revulsion and anxiety and terrible anguish for the deceased's family over many years. Although the fact that the appellant was in his early 20s when he committed the crime, and is now 51, is a matter to be taken into account, a significant punishment part was inevitable notwithstanding the appellant's unblemished record since joining the army in the year after the crime. That record was a matter to which the judge had due regard.
- [52] Had the appellant been sentenced in 1986, no punishment part would have been imposed. Rather, one would have been selected sometime after the Convention Rights (Compliance) (Scotland) Act 2001 had come into force (see Sch 1). Except in certain limited circumstances, where there has been a change in penalty after the commission of a crime, it is incumbent upon a judge to sentence in accordance with current sentencing practice, notably modern notions of retribution and deterrence when fixing a punishment part (Sinclair v HM Advocate
- [2016] HCJAC 24 , Lady Paton at para [51]). In these circumstances, the punishment part selected for this murder cannot be regarded as excessive. The appeal against sentence is also refused. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: [https://www.bailii.org/scot/cases/ScotHC/2016/\[2016\]HCJAC49.html](https://www.bailii.org/scot/cases/ScotHC/2016/[2016]HCJAC49.html)

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Prepared on 25 October 2026 · Esheria