

Relating to the Appeal of  
**ABDELBASET ALI MOHMED AL MEGRAHI**

**With particular attention to the evidence of Mr Anthony Gauci**

STATEMENT FROM:

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<b>CONTENTS</b>	<b>Page</b>
Synopsis of My Opinion.....	3
My Qualifications and Experience.....	5
Main Reports Drawn Upon.....	6
The Psychology of Long-Term Memory.....	7
The Issue of Identification.....	19
Lack of Information on the Full Interview Process.....	25
Relevance of the Psychology of Memory to the Testimony under Consideration...	26
Further Consideration of Mr.Gauci’s Remembering of the Crucial Episode.....	37
Inconsistencies in the Testimony Of Mr Gauci.....	37
Evaluation of Mr Gauci’s Testimony.....	38
Mr Gauci’s Identification Evidence.....	52
Inconsistencies in Mr Gauci’s Identification Evidence.....	52
Influences on Mr.Gauci’s Identification Evidence.....	53
Summary of Mr Gauci’s Identification Evidence.....	53
Summary of Testimony Evaluation.....	67
Conclusions.....	68
Statement of Truth.....	69
 Annexes:	
Annex A: Full List of Reports Drawn Upon.....	70
Annex B: Report on Experiment on Line-Up Administrator Effects.....	85
Annex C: Table of Inconsistencies in Testimony of Anthony Gauci.....	89
Annex D: Bibliography on Eyewitness Testimony.....	94

## SYNOPSIS OF MY OPINION:

1. There are two distinct aspects of Mr Gauci's memories that can be considered in the light of what is now known of the psychology of memory. One is the *recall* of the alleged event in his shop and the details of what happened then. The other is his alleged *recognition* of Mr Megrahi as a person who had come into his shop. These are rather different aspects of memory, but in both cases I consider there are grounds for doubting that his recall or his recognition are of the events or person as Mr Gauci claims.
2. Mr Gauci's reported memory is of one particular customer and sales event out of many others, recalled, initially, at a point ten months after the alleged event had occurred. In the absence of any particular features, at the time the event happened, that would render the event highly distinctive or emotionally significant to Mr Gauci, the scientific understanding of the rapid decay of human memory soon after the event being remembered would suggest that it is extremely unlikely the details of such a memory are accurate. The decay of memory is also inconsistent with any claims that in court, ten years after the incident, Mr Gauci could have a more accurate memory than closer to the time of the event.
3. As well as memory for the event being unlikely, recognition of the individual alleged to be involved and the accurate identification, in such circumstances, of a strange individual more than 2 years later, is highly unlikely.
4. The uninformed view that memory is open to improvement after the initial event by simple, effortful thinking on subsequent occasions is not supported by scientific research. Enrichment of the details of what is remembered is only possible by intensive psychological techniques including context reinstatement, which were not utilised, as far as I can tell, in relation to the central features of this case. Furthermore, such improvements tend towards providing additional detail rather than contradicting earlier accounts. Therefore the inconsistencies in Mr Gauci's testimony, that include a number of changes in details of alleged fact, across the seventeen statements I have examined, are more in accord with a vague memory that Mr Gauci is keen to make clearer than the developing of a more accurate memory of an actual incident.
5. It is now well established by psychologists that what a witness genuinely claims to remember, with confidence, is open to influence from various sources that will lead to distortions in the actual memory, such as implicitly leading questioning and prior exposure in relation to material that could influence identification of a suspect. So, although working with limited material that provides little information on the police interview process, I do consider that the variations and inconsistencies in Mr Gauci's accounts of

what he remembers are in accord with the recognised processes of influence on memory.

6. The processes at play in the present case are probably more powerful because of Mr Gauci's apparent desire to please and his recognition of the importance of his testimony. This could give rise to a phenomenon known as the reduction of 'cognitive dissonance' in which a person adjusts his cognitions to accord with his actions. In this case unconsciously adjusting his confidence in his opinion to make it coherent with his commitment to helping the police enquiry.
7. Of particular importance in influencing Mr Gauci's identification evidence is the possibility of his memory of who he thinks he saw in his shop having been distorted by his prior exposure to Mr Megrahi or images of him in other situations. This is a process which psychologists refer to as 'unconscious transference', whereby witnesses remember a person but not the context within which they saw that person, then wrongly assign the person to an incriminating context.
8. It is possible that aspects of the administration of the line up procedure, as well as dock-based identification, can have had biasing influences that could have distorted what Mr Gauci thought he remembered.
9. An experiment I conducted supported the well established psychological process of 'interviewer bias' was likely to have pertained in this case. This experiment demonstrated that a significantly high proportion of people asked to identify the most likely suspect from the set of photographs shown to Mr Gauci actually identified the photograph of Mr Megrahi when the interviewer was primed to believe he was the culprit.
10. A further challenge to the accuracy of Mr Gauci's recognition of Mr Megrahi as a man who came into his shop and bought items as alleged is that Mr Gauci positively identified at least two other men as the individual involved in the alleged incident. For a memory of the person to be clear at a period of months after the incident it would not be expected that a different person would be identified at some point. Such confusions are more consistent with an ambiguous and vague memory that has been unwittingly influenced by external sources.
11. It does seem possible that at various points in the police enquiry Mr Gauci may have identified up to six different people, at least, as the person who had been to his shop on the day in question in late 1988. It is difficult to know from the information available whether the various identifications were of the same or different people. Such a mixture of apparent recognitions is consistent with a vague, ill-defined memory rather than with the confident claims eventually made in court.

12. This leads me to the general view that Mr Gauci does not have a distinct memory of the particular incident described. Rather it is suggested the account he provides is constructed, innocently, in attempting to help police, by a witness unaware of the limitations of human memory and police officers unaware of the possible subtle influences of the interviewing and related processes that they used. It probably draws on disparate recollections of different individuals, sales and customer behaviours, drawn together in an account that is then shaped by a variety of recognised influences on memory.

#### MY QUALIFICATIONS AND EXPERIENCE:

I have the following qualifications: AcSS, BA, Ph.D, FBPsS, FRSA, FAPA, C.Psychol. I am a member of the Forensic Science Society and was formerly a Fellow of the British Institute of Management.

I am the Director of the Centre for Investigative Psychology that I established in 1994 at the University of Liverpool.

My full CV has also been made available to the court.

My work has led me to develop the new discipline of Investigative Psychology and I have concentrated on this area from the late 1980's, throughout the 1990's and onwards. I have published widely in this area, which covers all aspects of the ways in which scientific psychology can contribute to police investigations. This has included consideration of how evidence is collected and witness statements produced. Some of this work is published in the book I edited titled *Interviewing and Deception*.

MAIN REPORTS DRAWN UPON:

(A full set of all reports consulted is given in Annex A)

Series of Statements from Mr Anthony Gauci

Identification Evidence of Mr Anthony Gauci

Statements from Mr Paul Gauci

Statements from Police Officers Bell, Cairns and Crawford

Reports from the Identification Parade 13<sup>th</sup> April 1999

Transcript of Court Proceedings

## THE PSYCHOLOGY OF LONG-TERM MEMORY

Psychologists have been studying how memory works for well over a century, since the pioneering work of Hermann Ebbinghaus in 1885<sup>1</sup>. He substantiated the natural, rapid decay of memory over time, showing it did not steadily fade away but was very quickly lost after the initial experience unless some particular processes were put in place to maintain it.

However, it was the work of the British psychologist Sir Frederick Bartlett, in his 1932 book *Remembering*<sup>2</sup>, that laid the basis for our present day understanding. He importantly showed that memory loss, and changes in what was remembered over time, was not a matter of simple physiological decay but a product of social processes in which memory is modified by social context and contact with others.

More recently the US psychologist Elizabeth Loftus<sup>3,4</sup> has developed Bartlett's insights further. She has demonstrated the ways in which memories of what has happened in the past are influenced by the methods used for eliciting reports of those memories. She has shown that what people think they remember may not be based on any actual experience, but be a result of the way in which they have been questioned

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<sup>1</sup> Ebbinghaus, H. (1885) *Memory: A Contribution to Experimental Psychology*. New York: Teacher's College, Columbia University.

<sup>2</sup> Bartlett, F.C. (1932) *Remembering: A Study in Experimental and Social Psychology*. Cambridge: Cambridge University Press.

<sup>3</sup> Professor Loftus is one of the leading psychological authorities in the field of eyewitness testimony. Her work spans thirty years and includes more than a dozen books and over 250 articles on the topic of memory. She has been a consultant for the Federal Bureau of Investigation, the United States Secret Service, the International Revenue Service and the U.S. Department of Justice. She has received four honorary doctorates, some of the most prestigious awards in the field of psychology, and was recently named one of the top 100 most eminent psychologists in the 20<sup>th</sup> Century – 'Elizabeth F. Loftus: Awards for Distinguished Scientific Applications of Psychology', *American Psychologist*, 2003 (28), p864-866.

<sup>4</sup> See Loftus, E.F. (1979) *Eyewitness Testimony*. Cambridge; Harvard University Press.

Over 100 years of study of human memory can be summarised very briefly by reference to two general processes that weaken what is remembered. The first process is one of ‘recording’ the memory. If the initial information is not noticed or attended to it will not be effectively ‘stored’. Therefore, the more distinct the event, the more likely it is to attract attention, and thus the more likely are details of it to be remembered.

Secondly, once the information has been ‘committed to memory’ the person must ‘retrieve’ it<sup>5</sup>. The process of retrieval is vulnerable to distortion because the account that is given of a memory is not simply the presentation of a record, like the production of a faded photograph. Remembering is an active process of seeking to generate a report of what is remembered.

In essence, our current understanding of remembering anything that we have experienced more than a few moments ago, can be summarised as a process of ‘reconstructing’ past events. This reconstruction draws upon various strategies based on our knowledge and assumptions of what happens where and when. The more it follows day to day expectations the more able is the person to reconstruct what he thinks must have happened.

It is important to understand these remembering processes in a little more detail in order to be able to draw out their implications for the testimony of Mr Gauci.

#### 1. Decay over time

As mentioned, the central finding by psychologists who study memory is that memory for a past event becomes rapidly worse and less detailed over time<sup>6</sup>. This goes

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<sup>5</sup> For a general introduction to memory and the processes involved remembering, see Anderson, J.R. (1976) ‘Language, Memory and Thought’. Mahwah, NJ: Erlbaum.

<sup>6</sup> Loftus, Eyewitness Testimony; *supra*, note 4, at 53. H.E. Ebbinghaus first plotted the forgetting curve in 1885; *supra* note 1. His conclusions have been reaffirmed in many subsequent studies throughout the 20<sup>th</sup> century. See also Narby, D.J., Cutler, B.L. & Penrod, S.D. (1995) ‘The Effects of Witness, Target and Situational Factors on Eyewitness Identifications’ (noting that studies demonstrate that both recall

beyond everyday understanding of memory by showing that the decay over time increases very rapidly soon after the event and then the loss of memory levels off, technically following a negative exponential decay function<sup>7</sup> as shown in the classic portrayal of this by Ebbinghaus in Figure 1. It therefore follows that the longer the delay between an event and our attempts to remember it, the less complete and accurate the account will be<sup>8</sup>. This is true also for recognition in a police line-up or a set of identification photographs. This is considerably less reliable the longer the time from the event to the test<sup>9</sup>.

Figure 1 below illustrates the rate of memory decay. Broadly speaking, it shows that after one week just over 20% of information is accurately remembered. The overall pattern and process of forgetting is similar for real world, incidentally learnt material. For example, in a study of memory for street names in one's childhood neighbourhood, Schmidt et al. (2000) report a recall decline from an average of 25 street names to fewer than ten 5 years<sup>10</sup> later. Meeter, Muerre and Janssen (2004) report a decline for accurate response to open questions on news events (Dutch sample) from approximately 60% to approximately 30% at 300 days<sup>11</sup> later.

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and retention accuracy of human memory decline over time); In Sporer, S.L., Malpass, R.S. & Koehnken, G. 'Psychological Issues in Eyewitness Identification': Lawrence Erlbaum Associates.

<sup>7</sup> Ebbinghaus, 1885; *supra*, note 1.

<sup>8</sup> Kebbell, M.R. & Wagstaff, G.F. (1999) 'Face Value? Evaluating the Accuracy of Eyewitness Information'. Home Office: Police Research Series, Paper 102.

<sup>9</sup> Buckhout, R. (1974) 'Eyewitness Testimony'. *Scientific American*, 231, p6.

<sup>10</sup> Schmidt, H.G., Peeck, V.H., Paas, F. & Van Breukenen, G.J. (2000) 'Remembering the Street Names of One's Childhood Neighbourhood: A Study of Very Long-Term Retention'. *Memory*, 8 (1), p. 37-49.

<sup>11</sup> Meeter, M., Murre, J.M.J. & Janssen, S.M.J. (2004) 'Remembering the News: Modeling retention Data from a Study with 14,000 Participants'. *Memory and Cognition*; in Press. See <http://www.neuromod.org> for details.

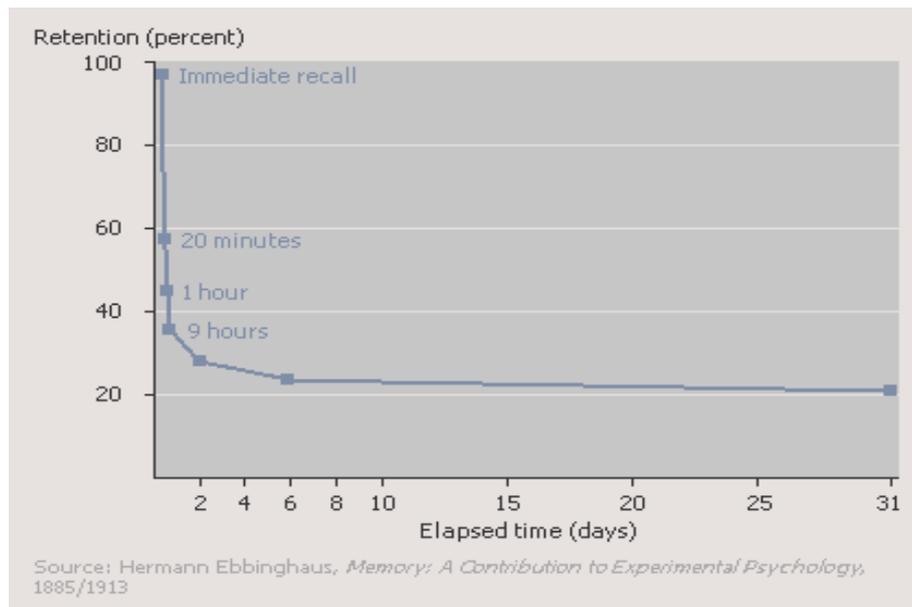


Figure 1. The Classic Decay Function for Memory as shown by Ebbinghaus.

The crucial issue here is that memory does not normally improve and that the majority of the forgetting takes place very close in time to the event. Within a few days the majority of the forgetting that will take place has taken place. This occurs even when people are at some pains to ‘store’ the memory and is much more marked when the event is not noteworthy at the time it happens.

## 2. Confabulation (filling in the gaps)

The loss of memory for events is dealt with by ‘reconstructing’ what happened. The processes of reconstructing non-significant memories may include associations we hold between places and events, our experience of the patterns typical of various sorts of activities and what we learn about people and activities.

This means that memories are open to distortion from events or information that occurs after the activities and experiences being remembered. These distortions are

not typically deliberate or conscious. The person remembering genuinely believes that the memory he is offering is what occurred, yet there is considerable evidence that it may be distorted by what happens after the event being recalled: Post-event information can not only enhance existing memories but also change a witness' memory and even cause non-existent details to be incorporated into a previously acquired memory<sup>12</sup>. It is also the case that under very special conditions a person can have his memory improved by being able to draw upon later experiences that he can relate back to the events he is trying to remember, most notably, for example, by being taken back to the actual location of an event and using the context specific associations to 'jog' his memory<sup>13</sup>. But this improvement adds detail and clarity. It is not a process that is expected to change any fundamental aspects of the memory itself<sup>14</sup>.

Any increase in details of memory due to attempts to 'remember better' is not necessarily combined with an increase in accuracy. It may just be drawing upon assumptions of what is likely to have happened. This can in fact be a filling in of spurious details<sup>15</sup>.

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<sup>12</sup> Finding detailed in a report by the Australian Law Reform Commission, 1985.

<sup>13</sup> See Krafka, C. & Penrod, S. (1985) 'Reinstatement of Context in a Field Experiment on Eyewitness Identification. *Journal of Personality and Social Psychology*, 49, p. 58-69.

<sup>14</sup> This general process has been summarized by Buckhout (1974), *supra* note 9; p, 27: "In analysing eyewitness reports in criminal cases we have seen the reports get more accurate, more complete or less ambiguous as the witness moves from the initial police report through to grand jury questioning to testimony at the trial. The process of filling in is an efficient way to remember, but it can lead to unreliable recognition testing: The witness may adjust his memory to fit the available suspect or pictures. The witness need not be lying; he is distorting or reconstructing his memory. In his very effort to be conscientious he may fabricate parts of his recall to make a chaotic memory seem more plausible to the people asking questions."

<sup>15</sup> *Id.*

In essence, the need to make our recollection consistent, probable and harmonious may cause us to fill gaps and repress information that will create conflicts,<sup>16</sup> thereby reducing the ‘cognitive dissonance’<sup>17</sup> that we may experience.

All of these processes illustrate how vulnerable memories are to suggestion of what could have been the case.

### 3. General Inaccuracy of Descriptions

In their general review Kebbell & Wagstaff (1999)<sup>18</sup> summarise the findings from studies in to the accuracy of various components of eyewitness descriptions as follows:

**Age:** Generally speaking, eyewitnesses are most accurate when estimating the age of someone of a similar age to themselves, because they are more familiar with that age group. Further, the greater the difference between the age of the witness and the age of the offender, the less accurate the estimate of the offender’s age by the witness is more likely to be.

**Height:** Witnesses tend to be poor at estimating heights, and, as with age, the greater the difference in height between the offender and the eyewitness, the worse the estimate tends to be.

**Build:** Witnesses are often poor at estimating build, with judgements being heavily influenced by clothing.

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<sup>16</sup> Marshall, J. (1990) ‘Law and Psychology in Conflict (2<sup>nd</sup> Edition)’. New York: Bobbs Merrill.

<sup>17</sup> See Festinger, L. & Carlsmith, J.M. (1959) ‘Cognitive Consequences of Forced Compliance’. *Journal of Abnormal and Social Psychology*, 58, p. 203-211.

<sup>18</sup> *Supra* note 8.

Clothing: Witnesses descriptions of the style of clothing tend to be reasonably accurate, but description of the colour of the clothing tends to be less accurate.

In general, then, witnesses are much less reliable in the descriptions they provide than is often realised. They are most accurate when what they are recalling is drawn from a familiar situation in which the person or events they describe are similar to themselves or their own common experiences.

#### 4. Influences on Distortion in Memory

Loftus has opened a whole area of research that she summarises in her paper 'Remembering what never happened'<sup>19</sup>. The essence of her findings is that people can come to believe they remember something by being lead to believe it happened even if that belief is offered implicitly in the phrasing of questions.

The law recognises this process in limitation on the use of 'leading' questions that imply what the answer is expected to be<sup>20</sup>.

Responses to questions can also be influenced by a variety of interacting social pressures. These can produce a desire to please through an awareness of the

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<sup>19</sup> Loftus, E.F. (2000) 'Remembering What Never Happened'. In E. Tulving (Ed.) 'Memory, Consciousness and the Brain: The Tallinn Conference'. Philadelphia: Psychology Press; p. 106-118.

<sup>20</sup> Loftus demonstrated the effects of leading questions on the accounts of eyewitnesses in an experiment that she details in her 1979 book 'Eyewitness Testimony' (*supra*, note 4); Witnesses saw a car accident in which one car drove through a stop sign. Half of the witnesses were asked "How fast was car A going when it ran the stop sign?" Of these witnesses, fifty-three percent later recalled seeing a stop sign. The other half of the witnesses were asked "How fast was car A going when it turned right?" Only thirty-five percent of these witnesses later remembered seeing a stop sign. Simply mentioning the stop sign greatly increased the likelihood that the witness would remember it. See also; Narby et al. (1995), *supra*, note 5, who describe how post-event questioning can distort witnesses' memories.

seriousness of a situation<sup>21</sup> or occur when a rapport or relationship develops with police officers involved in the case.<sup>22</sup> Such factors are likely to influence testimony through a motivational effect in relation to providing an account to police rather than by any actual impact on memory itself. The witness who is keen to help will make more effort to try and guess what the police want to hear and will persuade himself that his memory accords with what is required. For a witness there is pressure to remember, which can cause incorrect recollection to be produced – the desire to be correct, observant, helpful and not appear foolish<sup>23</sup>.

## 5. Unconscious Transference

Memory can also be distorted by exposure to other similar individuals or situations between an alleged event and its recall. Moreover, since recognition is context facilitated, out of context, witnesses can be aware that an individual is familiar but be confused about where they know that individual from. This is a process that gives rise to what has been termed ‘unconscious transference’,<sup>24</sup> whereby the witness remembers seeing a person but wrongly assigns that person to criminal context.<sup>25</sup>

Loftus (1979) gives as an example of this process the case of a railroad ticket agent who had been robbed at gunpoint and ended up identifying a sailor as his assailant. On the day of the robbery, however, the sailor had been away at sea. To the

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<sup>21</sup> Leippe, M.R., Wells, G.L. & Ostrom, T.M. (1978) ‘Crime Seriousness as a Determinant of Accuracy in Eyewitness Identification’. *Journal of Applied Psychology*, 63, p. 345-351.

<sup>22</sup> Collins, R., Lincoln, R. & Frank, M.G. (2002) ‘The Effect of Rapport in Forensic Interviewing’. *Psychiatry, Psychology and Law*, 9 (1), p. 69-78.

<sup>23</sup> Marshall (1990); supra note 16, p. 40.

<sup>24</sup> Loftus, E.F. (1976) ‘Unconscious Transference’. *Law and Psychology Review*, 2, p. 93-98.

<sup>25</sup> Ross, D.F., Ceci, S.J., Dunning, D. & Togliani, M.P. (1994) ‘Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person’. *Journal of Applied Psychology*, 84 (6), p. 918-930.

psychologists who reviewed this case, the sailor had been an obvious victim of the *unconscious transference* phenomenon. He was the one picked out from the lineup, because his face was the most familiar one to the ticket agent. As it turns out the sailor was based near the railroad station, and had purchased tickets from that very agent three times before the robbery<sup>26</sup>.

Loftus (1979) explains this phenomenon in the following terms:

‘Unconscious Transference is a by-product of the integrative, malleable nature of human memory. It appears that brief exposure to a person can cause that person to look familiar when he is seen later. For example, an incidental character seen prior to a crime [incident] will be familiar to a witness who is attempting to identify the perpetrator of a crime from a set of photographs. The character looks familiar and his familiarity is interpreted as being due to the perception at the time of the crime [incident], when in fact the familiarity is due to an observation made at a time prior to the crime [incident]. The familiar trace of the incidental character becomes integrated into the witness’ memory for the crime [incident]’<sup>27</sup>.

Unconscious Transference may take place when a witness identifies a suspect from a line-up. A person whose photograph has been seen before (for example; in a photo identification line-up) will look familiar<sup>28</sup>. This familiarity may be mistakenly related back to the crime or incident rather than back to the photographs. The chances of a mistaken identification increase dramatically in these situations.<sup>29</sup>

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<sup>26</sup> Detailed in Loftus (1979), *supra* note 4.

<sup>27</sup> *Id.*; p 142.

<sup>28</sup> See, as illustration, the experiment detailed by Loftus (1979), *id.*, p 143; In one experiment, a group of fifty students were told a story with six characters, one of whom was a criminal. The students were shown pictures of each character, who were generally similar in appearance. Three days later, the students were asked to choose the criminal from the story out of a photo array. In the photo arrays that did not include the criminal’s picture, sixty percent of the students chose someone else from the story who had a familiar face but was not the correct man.

<sup>29</sup> Noted in a 1985 report on eyewitness identification by the Australian Law Reform Commission.

It is not clear how widely this process may occur nor what degree of familiarity is necessary under what circumstances for it to surface. However, its existence is widely agreed on by psychologists as a process that needs to be guarded against when considering witness testimony.<sup>30</sup>

## 6. Impact of Salience of the Event

We are more likely to remember something accurately if there was something that made it particularly salient or ‘memorable’, intense or unusual in some way.<sup>31</sup> This would include characteristics that contrast with those involved in preceding and surrounding situations. For instance, we are more likely to remember a person’s clothing, race or age if it contrasts with that of other bystanders.<sup>32</sup> Pezdek & Prull (1993) point out that novel events are more readily detected and remembered because they contrast with other events<sup>33</sup>.

If the event has obvious significance and emotional impact at the time a phenomena known as ‘Flashbulb Memory’<sup>34</sup> may occur. Examples include your memory of where you were and exactly how you were told that the Twin Towers were attacked by aeroplanes on 9/11, or how you learnt of the death of John Lennon.

## 7. Lack of Relationship between Confidence and Accuracy

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<sup>30</sup> See Loftus (1979), *supra* note 4; also Ross et al. (1994), *supra* note 25. For more on the phenomenon of unconscious transference, see generally Brigham et al. (1999) ‘Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues’. *CT REV*, 36, p12; 14. Also, Read et al. (1990) ‘The Unconscious Transference Effect: Are Innocent Bystanders Ever Misidentified?’. *Applied Cognitive Psychology*, 4; p.3.

<sup>31</sup> Kebbell & Wagstaff (1999); *supra* note 8.

<sup>32</sup> *Id.*

<sup>33</sup> Pezdek, K. & Prull, M. (1993) ‘Fallacies in Memories for Conversations: Reflections on Clarence Thomas, Anita Hull and the Like’. *Applied Cognitive Psychology*, 84 (6), p. 299-310.

<sup>34</sup> Described by Brown, R. & Kulik, J. (1977) ‘Flashbulb Memories’. *Cognition*, 5, p. 73-99.

There is a well-established set of research findings that show there is no clear link between confidence and accuracy. Wells & Olson (2003) for example, summarised these studies claiming that the certainty an eyewitness expresses in identification is largely unrelated to the accuracy of their identification<sup>35</sup>. Furthermore, they state that over time confidence increases and the relationship of confidence to accuracy decreases. They also point out that in actual cases it is common for line-up administrators (usually the detective in the case) to give confirming feedback, which distorts the eyewitness's recollections of the certainty they had in their identification, thereby influencing the certainty of the eyewitness and confounding the confidence-accuracy relationship.<sup>36</sup> Further, in their review, Kebbell & Wagstaff (1999) state that 'in most situations the relationship between confidence in ability to make an identification and identification accuracy is low'.<sup>37</sup>

## 8. Difficulties of Cross-Racial Identification

On the whole, witnesses tend to be accurate at establishing when someone comes from a different racial background to their own. However, they are less accurate in describing the specific racial group to which an individual belongs.<sup>38</sup>

Cross-racial identification seems to be more difficult than same race identification. Studies show that people from one racial background have more difficulty in identifying individual members of another race than they do members of their own

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<sup>35</sup> Wells, G.L. & Olson, E.A. (2003) 'Eyewitness Testimony'. *Annual Review of Psychology*, 54, p. 277-95.

<sup>36</sup> See, for example; Bradfield, A.L., Wells, G.L. & Olson, E.A. (2002). 'The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy'. *Journal of Applied Psychology*, 87 (1), p. 112-120.

<sup>37</sup> Kebbell & Wagstaff (1999); *supra* note 8.

<sup>38</sup> MacLin, O.H., MacLin, M.K. & Malpass, R.S. (2001). 'Race, Arousal, Attention, Exposure and Delay: Examination of Factors Moderating Face Recognition'. *Psychology, Public Policy and Law*, 7 (1), p. 134-152.

race<sup>39</sup>. There have been many studies of this effect, and it has become referred to as an ORB – ‘Own Race Bias’.<sup>40,41</sup>

## 9. Context Re-Instatement

It is worth mentioning one important memory enhancement technique that has become part of good interview practice in many jurisdictions. This is the process of taking the person back to the situation in which the event occurred so that local cues can act as associative links to help the person remember<sup>42</sup>. This process is particularly powerful if the context was a novel one to the respondent because then particular aspects of the novel situation can be linked back to the events being recalled. Less is known about the power of context-reinstatement when the context is the day to day environment of the person trying to remember. It seems that in such situations the possibility for confusion over what was special about an event and what was a common occurrence may be more likely to mask the value of being in the situation in which the event took place.

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<sup>39</sup> For example; Loftus details an experiment in which researchers assembled seventy-two photographs of black and white males and females. Each subject viewed twenty-four of the slides, chosen at random. After a five minute break, the subject viewed all seventy-two photographs in random order, and were asked to identify the faces that they had seen before. Both blacks and whites were significantly better at recalling faces of their own race. See Loftus (1979), *supra* note 4, p. 139.

<sup>40</sup> Malpass, R.S. & Kravitz, J. (1969) ‘Recognition of Faces for Own or Other Race’. *Journal of Personality and Social Psychology*, 13; p. 133. See also; Messner, C.A. & Brigham, J.C. (2001) ‘Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review’. *Psychology, Public Policy and Law*, 7 (1), p. 3-35; for a detailed review of the literature considering this factor.

<sup>41</sup> This factor has been judicially noted in *R v. Lewis* (unreported), Court of Appeal, England: 14<sup>th</sup> March 1972).

<sup>42</sup> Context reinstatement is a vital component of the Cognitive Interview, recognized widely as an effective memory enhancement technique. See Fisher, R.P. & Geiselman, R.E. (1992) ‘*Memory-Enhancing Techniques for Investigative Interviewing*’. Springfield, Illinois; Charles C. Thomas.

## THE ISSUE OF IDENTIFICATION

There are important differences in *recalling* an event, which draws very heavily on the need to reconstruct what happened, and *recognition* when faced with options to choose from. This is experienced in daily life when a person cannot recall a name but can readily choose the correct name from those on offer. But although recognition is generally more accurate than recall it is still open to the distortions produced by instances that intervene between the event and the attempt to remember it.

Given the weakness of memory processes it is perhaps not surprising to find that eyewitness identifications are on the whole not very accurate<sup>43</sup>. Cutler and Penrod (1995) conducted a 'meta-analysis'<sup>44</sup> of eyewitness accuracy in 'natural settings' in 1995<sup>45</sup>. In a typical study they reviewed, a person enters a convenience store and performs some memorable action (such as paying in pennies) to ensure the clerk's attention. Soon afterwards the clerk views a photo spread and identifies the 'customer'. The percentage of correct identifications ranged from 34-48% and the percentage of false identifications from 34-38%. The implication of this is that, even after a relatively short interval, eyewitnesses are as likely to be incorrect as correct when attempting to identify strangers.<sup>46</sup>

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<sup>43</sup> Psychological evidence suggests that the accuracy of eyewitness identification in general and, in particular, eyewitness identification of strangers, is subject to weaknesses and dangers additional to those that attach to eyewitness testimony generally (Report by the Australian Law Reform Commission, 1985).

<sup>44</sup> A 'meta-analysis' is a statistical procedure whereby the results of a set of carefully selected studies are combined to determine the overall consensus that emerges from a variety of different researchers and laboratories.

<sup>45</sup> Cutler, B. & Penrod, S. (1995) *Mistaken Identity*. Cambridge: Cambridge University Press.

<sup>46</sup> See also; Naka, M., Itsukushima, Y. & Iton, Y. (1996) 'Eyewitness Testimony After 3 Months: A Field Study on Memory for Incidents in Everyday Life'. *Japanese Psychological Research*; Japanese Psychological Association; Brigham, J.C., Maass, A., Snyder, L.D. & Spaulding, K. (1982) 'Accuracy of Eyewitness Identifications in a Field Setting'. *Journal of Personality and Social Psychology*, 42, p. 673-681.

Thus, although the courts have typically relied heavily on eyewitness identification of suspects<sup>47</sup>, in which the witness is asked if they recognise individuals presented to them in vivo or as a photograph, there is growing evidence that such identifications can be unsafe. Indeed in 2001, MacLin et al published a major review showing that out of 62 people who had been exonerated by DNA evidence, 52 had been imprisoned on the basis of faulty eyewitness identification<sup>48,49</sup>. There is a growing belief that the majority of false convictions are due to errant eyewitness testimony<sup>50</sup>.

The reasons for errors in identifications are complex and not fully understood, but a large number of academic studies do point to factors, beyond the simple amount of time lapsed between the alleged event and the identification, that may be relevant.

One such process that has been examined is the pressure to perform. When a witness is brought in by the police to attempt identification he is likely to assume that the police have a suspect in mind or even in custody. He is therefore under pressure to pick someone, even if the officer showing the photographs or running the line-up is careful not to force the issue<sup>51</sup>.

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<sup>47</sup> In 1999, eyewitness identifications led to 75,000 prosecutions in the United States – The Innocence Project, Mistaken Identification; <http://www.innocenceproject.org/causes/mistakenid.php> (last visited Feb 20th, 2005).

<sup>48</sup> MacLin et al. (2001); *supra* note 38.

<sup>49</sup> Other studies have identified similar problems in the courts relying on eyewitness identification evidence. See, for example; Huff, C.R., Ratner, A. & Sagarin, E. (1986) 'Guilty Until Proven Innocent: Wrongful Convictions and Public Policy'. *Crime and Delinquency*, 32, p. 518-544; Wells, G.L., Small, M., Penrod, S., Malpass, R.S., Tulero, S.M. & Brimacombe, C.A.E. (1998) 'Eyewitness Identification Procedures: Recommendations for Line-Ups and Photospreads'. *Law and Human Behaviour*, 22, p. 603-647.

<sup>50</sup> Many factors contribute to false convictions, but one of the most prominent is inaccurate eyewitness identification - Overbeck, J. (2005) '*Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*'. *New York University Law Review*, 80, p1895. In recent years, DNA testing has thrown some light on how frequently mistaken identification actually occurs. In more than two-thirds of exoneration cases to date, conviction was based at least in part on faulty eyewitness identifications – Higgins, E.S. & Skinner, B.S. (2003) '*Establishing the Relevance of Expert Testimony Regarding Eyewitness Identification: Comparing Forty Recent Cases with the Psychological Studies*'. *N. KY. L. REV.*, 30, p71, 74; see also Rattner, A. (1988) 'Convicted but Innocent: Wrongful Conviction and the Criminal Justice System'. *Law and Human Behaviour*, 12, p283-289.

<sup>51</sup> Buckhout (1974); *supra* note 9.

Further, in an identification situation the witness is additionally subject to pressures generated by the desire to be correct, observant and helpful, and to not appear foolish, as discussed previously<sup>52</sup>.

Wells (1993) among others has documented the influence of line-up administrators on eyewitness identification<sup>53</sup>. They can inadvertently communicate their knowledge about which line-up member is the suspect and which members are fillers, through various verbal and non-verbal cues. This is illustrated by the study of Phillips et al. (1999), in which they manipulated line-up administrators' assumptions about the identity of the culprit and found that this affected the identifications that the eyewitnesses made<sup>54</sup>.

These studies point not only to weaknesses in the accuracy of the identification, but also to the way the process of seeking an identification can inappropriately influence the confidence the witness has in his selection. For example, Bradfield et al (2002) found that post-identification suggestions made to eyewitnesses by line-up administrators led the witnesses to develop high levels of certainty that they had made an accurate identification<sup>55</sup>. It is also worth repeating here that Wells & Olson (2003) also pointed out that it is common for line-up administrators (usually the detective in the case) to give confirming feedback. This appears to distort the eyewitness's recollections of the certainty they had in their identification, further confounding any relationship between confidence and accuracy<sup>56</sup>. This effect may be exaggerated by the tendency for people to look out for evidence that confirms their beliefs<sup>57</sup>.

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<sup>52</sup> Loftus (1979); *supra* note 4.

<sup>53</sup> Wells, G.L. (1993) 'What Do We Know About Eyewitness Identification?'. *American Psychologist*, 48 (5), p. 553-571.

<sup>54</sup> Phillips, M.R., McAuliff, B.D., Kovera, M.B. & Cutler, B.L. (1999) 'Double-Blind Photo Array Administration as a Safeguard Against Investigator Bias'. *Journal of Applied Psychology*, 84 (6), p. 940-951.

<sup>55</sup> Bradfield et al. (2002); *supra* note 36.

<sup>56</sup> Wells & Olson (2003); *supra* note 35.

<sup>57</sup> Kebbell & Wagstaff (1999); *supra* note 8.

## *Using Eyewitness Identification Research in Court*

In a recent survey of 64 experts on eyewitness evidence for the *American Psychologist*<sup>58</sup> 30 eyewitness research derived phenomena were evaluated in terms of their appropriateness for use in court. Eighty percent of the experts agreed that a number of the phenomena were sufficiently robust to be presented in court. Of potential relevance to the present case, these 'reliable' phenomena included effects of the wording of questions, line-up instructions, mug-shot induced bias, attitudes and expectations, confidence malleability, suggestibility, cross-race bias, the forgetting curve (memory decay) and unconscious transference.

However, the difficulty of drawing on academic research evidence is complicated by the fact that this area of psychology lends itself to tidy 'classroom', or 'laboratory' based experiments. These do not necessarily reflect the realities of the much more complex 'real' world. Thus an artificial event can be readily staged or a video shown and students can then easily be asked to identify the perpetrators or characterise the actions that occurred. Most of the published studies use this framework and the main findings to emerge about witness testimony have been drawn from the results of such studies. A recent extensive field trial in Illinois<sup>59</sup> is therefore of particular significance because it raises questions about the applicability of the laboratory studies to 'real-world' applications.

The Illinois study had the specific objective of comparing the conventional line-up, or its photographic equivalent with the sequential presentation of possible suspects. The published literature predicts that the sequential process would generate more valid results, but this was not found in these field studies of actual cases. However, it was also found that the purity of the laboratory study was exceedingly difficult to replicate

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<sup>58</sup> Kassin, S.M., Tubb, V.A., Hosch, H.M. & Memon, A. (2001) 'On the 'General Acceptance' of Eyewitness Testimony Research: A New Survey of the Experts'. *American Psychologist*, 56 (5), p405-416.

<sup>59</sup> Conducted by Wells et al. (1998); *supra* note 47.

in an actual police investigation, so that debate is likely to continue on the robustness of the results found in the Illinois study.

### *Good Practice Recommendations*

In response to the current level of understanding about the potential for errors in identification evidence and the processes that can generate these, a number of recommendations for good practice have been advanced. These therefore provide a bench-mark against which to consider any procedures and the possibility that those procedures may have introduced bias or inaccuracies.

In 1996 the American Psychologist/Law Society and Division 41 of the American Psychological Association made recommendations that<sup>60</sup>:

- double-blind testing should be used, in other words that the person managing any identification procedures should be ignorant of who was thought to be the culprit,
- eyewitnesses should be forewarned that the culprit might not be present
- distracters should be selected based on the eyewitness's verbal description of the perpetrator, i.e. that people who look like the person described by the eyewitness should be present in any selection of possible suspects,
- confidence should be assessed and recorded at the time of identification

Along similar lines the Innocence Project<sup>61</sup> specifies that identification line-ups:

- should be presented sequentially
- the individual conducting the line-up should not know the identity of the actual suspect
- witnesses should be warned that the suspect may or may not be in the line-up
- there should be a minimum of 8 photographs in a photo identification line-up

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<sup>60</sup> As outlined by Wells et al. (1998); *supra* note 47.

<sup>61</sup> *Supra* note 45

- no feedback should be given during or after a line-up
- witnesses should provide confidence ratings at the time of making their identification.

It is important to note that all of these recommendations are broken when the witness is asked to indicate in court whether the person in the dock is the person he remembers. In this case there is no hiding of whom it is believed is the culprit; there is no strong indication that the suspect may not actually be present for identification; there are no other people present that the witness may choose amongst who may be confused with the main suspect; the legal formalities can hide any lack of confidence the witness is willing to admit. Therefore a dock based identification is the most unsafe means of seeking a to obtain an opinion for a witness.

## LACK OF INFORMATION ON THE FULL INTERVIEW PROCESS

It will be apparent from the list of characteristics that influence accuracy of remembering that the context in which the memory is recalled is very important for understanding any likely biases or the degree of accuracy of the memory. This includes how questions are phrased, the events before and after the questioning and other aspects of the conditions under which the memory was reported. In the present case we have very little information on many of these crucial details. Assumptions therefore need to be made by close examination of what is reported and from knowledge of usual police practice.

Besides the lack of information on the full range of contacts between Mr Gauci and the police we also have no details of exactly how material was presented in mug-shot identification or in the line-ups, but it seems unlikely that the all processes indicated in the recommendations above were followed. In particular it seems that:

- The officers in charge of any identifications were not ignorant of whom the suspect was believed to be;
- Mr. Gauci, as far as I can tell, was not informed that the culprit may not be present in the list of photographs or the line-up;
- It seems very possible that feedback was given to Mr.Gauci on the opinion he offered as to the person he identified;
- The photographs were not presented sequentially.

## RELEVANCE OF THE PSYCHOLOGY OF MEMORY TO THE TESTIMONY UNDER CONSIDERATION

### General Decay in Memory

Mr Gauci was first interviewed 10 months after the alleged event in his shop. Studies of the psychology of memory, whether for experimental or real world material and for intentional or incidental learning, support a rapid decline in memory, with only small proportions of information being accurately recalled after such a long time interval. Irrespective of any other processes which may operate to influence memory, then, the simple passage of this much time to the first interview must cast doubt on Mr Gauci's ability to recall much of the alleged event.

The first identification of Mr Megrahi by Mr Gauci was two and a half years after the alleged event. It is even more unlikely that an accurate identification could be made of someone who had been seen casually so long after the event.

### Saliency

The general decay of the memory would be less if the event or person were particularly salient. Saliency is a product of the unusualness or the emotional significance of the event. It only influences the 'storing' of the memory at the time of the event. A remembered event can be re-interpreted as more significant at a later stage, but this only helps to hold it in memory thereafter. In terms of the unusualness of the event, clearly Mr Gauci had sold many different combinations of clothes to many different customers both prior to and subsequently to the alleged event. We do not have information on what mixture of clothing was typically bought in his shop, so it is difficult to judge how salient this event had been. The police interviews never explore this matter.

In his testimony, Mr Gauci implies that he remembers the sale because of the unusual behaviour of the customer in making his choice of purchases without particular interest. In the context of many other sales and customers, before the alleged event and during the ensuing ten month period, to be sufficiently salient to allow Mr Gauci to recall one incident, the behaviour and purchases would need to be remarkably unusual or to have some very particular emotional importance for him. Mr Gauci will have served customers expressing many varying levels of overt interest in their purchases, which will also have been made as combinations that would have appeared to have varying degrees of logical coherence to Mr Gauci.

There is no reason to consider the alleged event had any particular significance to Mr Gauci when it occurred. It must be remembered that the emotional significance now attributed to the event is unlikely to have been associated with it at the time.

Mr Gauci's detailed memory for the specific combination of goods requires particular consideration. Typically, people will rely on a common underlying conceptual theme, an implicit 'storyline' to recall combinations of multiple items. Therefore apparently random combinations would not have this commonality to produce any memory facilitating effect. Moreover, while there will be a high number of possible purchase combinations that make logical sense to Mr Gauci, there will be an almost infinite number that he would consider apparently random. Against this background, Mr Gauci's memory for the details of what was allegedly purchased is incompatible with what we know about memory processes.

The specific memory for the amounts of money paid also challenges our understanding of how memory works. Even to offer information on payments without the background information of how significant such a sum would have been raises questions of how much Mr Gauci is trying to help by providing details of which he was not sure. Of course, there are rare people who either have remarkable memories or, more usually, develop techniques, such as mnemonic devices to help them

remember details of events. But we have no information to indicate that either of these capabilities can be attributed to Mr Gauci.

### Confabulation

There are indications of Mr Gauci using logic, inference and assumption about what is likely to have happened to create a coherent account. This process of confabulation does suggest that detailed, valid memories for the events concerned do not exist. The most marked example of Mr Gauci's confabulation arises in relation to the shirts allegedly sold. On 30<sup>th</sup> January 1990 (see Annex A: A1) he states that:

*“I was shown a piece of grey shirt which had a ‘Slalom’ label on the pocket, and a complete grey slalom shirt. I got this make at the shop, I am sure I have some left. These are old stock, about 2 or 3 years ago, I think I have beige ones, grey ones and sky-blue ones. That time when the man came, I am sure I did not sell him a shirt. I’ll look out any shirts I have left.*

*I have now been shown a piece of blue and white striped cloth.*

*I got a small stripe like that; it is on a girl’s shirt, a slalom one I think.*

*That man didn’t buy any shirts for sure”.*

In other words, he is searching for possible memories of selling shirts, at some point he thinks he did not sell any shirts, but he is trying to calculate if he could have sold any, thereby building up an apparent memory, rather than an actual one. He is also apparently being provided with a series of examples to see if he can identify any of them as being similar to the ones he claims he sold. This is poor interview practice. It would have been better to get as open and full a description of the merchandise Mr Gauci remembers selling. By showing the witness fragments of blast-damaged clothing, as is the case here, the interviewer is, in effect, offering leading questions, implying that at least some of the material is relevant. Mr Gauci initially makes the logical point of saying he will determine if his shop ever sold anything like that

presented to him. He also indicates that he does not remember selling any shirts, but eventually is willing to accept that a small piece of cloth is similar to something he did have in his shop.

However, despite his statement that he remembers not selling any shirts to the man in question in late 1988, on 10<sup>th</sup> September 1990 (A2) he changes his account to:-

*“I have also been asked about the clothing which the man purchased and I cannot add anything to it. About three weeks ago I was cleaning boxes out in the shop and I remember that they had contained a slalom shirt and a blue and white light denim (texture) material shirt. I know that I sold you shirts like these and I now remember that the man who bought the clothing also bought a slalom shirt and a blue and white striped shirt. They were 3.75 or 5.25 Maltese pounds for the slalom one but the blue and white one was 5.25 Maltese pounds”.*

The implication in this second statement is that finding the box ‘jogged’ Mr Gauci’s memory. But while it may be the case that the box re-instated the memory for the shirts, this would not act as a prompt to entirely reinstate the actual purchase of these. This new ‘memory’ is likely to be an erroneous assumption that the shirts must have been sold to the man in the case that has been brought to Mr Gauci’s attention. In order, to make this memory more compatible with the original material shown to him by the police the colour of the shirts has been glossed over. Originally it was a ‘grey shirt’ and some ‘blue and white’ cloth. But when he finds empty boxes the colour of one shirt is no longer mentioned and the blue and white shirt is not declared as a woman’s which was in the original claim.

Also there is now the problem that he has in the period since his statement of 30<sup>th</sup> January 1990 (A1) and 10<sup>th</sup> September 1990 (A2) apparently sold shirts like the ones in question to the interviewing police officer; “I know I sold you shirts like these”

(A3). It is therefore possible that he now confuses when he sold what shirts to whom. Indeed the empty boxes he found could possibly have been due to the sale of shirts to the police officer.

It should also be noted, that the prices mentioned for the sales of shirts implies that the purchaser paid the sums of money mentioned, giving an apparent validity through such detail. But it is more likely that this is the general price at which such shirts are sold. The interviewer apparently did not clarify if Mr Gauci had any evidence or memory for that price being paid for them on the occasion in question. Further, the fact that in his first statement (A4) Gauci lists the items purchased by the man in late 1988, including the individual prices of each, but does not include the shirts, is perhaps evidence of the fact that they weren't part of his initial memory for the event.

Further significant confabulation appears to occur in relation to Mr Gauci's 'memory' of the man's exit from and return to the shop. In a first statement he makes no reference at all to seeing the man between him leaving the shop and returning to collect his parcels;

On 1<sup>st</sup> September 1989 (A5) he says:

*“The man said he had other shops to visit and he picked up the umbrella and said that he would come back shortly; he paid me in the cash which I think was 56 Maltese pounds. He then walked out the shop with the umbrella which he opened up as it was raining.*

*I continued to parcel up the goods which I made up into two parcels. About 15 minutes later this same man came back into the shop. He was not carrying anything else that he had bought elsewhere.”*

Subsequently Mr Gauci begins to fill in the gaps, creating a memory of seeing the man in a taxi before collecting his parcels (A6):

*5<sup>th</sup> March 1990 - "I have been asked to go over again the circumstances of the man (suspect) arriving and leaving my shop and the sighting of the white Mercedes taxi. I now remember that when the man left my shop he walked downhill in Tower Road towards the seafront. At that time it was raining.*

*About fifteen minutes later I was standing near the shop front when I saw a white Mercedes taxi driving up Tower Road. I could see that the man who had bought the clothing was seated in the front passenger seat of the taxi. I went back inside the shop, but before I did so I saw the taxi pull into the curb. On the same side of the road as my shop, about 20 yards up the street, where I have shown you, I then saw the man get out of the front passenger seat and start walking towards my shop. I went to get his parcels and he came into the shop".*

*5<sup>th</sup> March 1990 - I have been asked why I have not mentioned this before and I can only say that I did not think you asked me directly about it. I have been thinking about the man and I remember this now".*

Once again there seems to be some prompting by the interviewer, but we do not have the details of what the interviewer said. What was Mr.Gauci ‘asked directly’ that led him to develop these further details?

Research would indicate that to the extent he has a memory for the incident at all, the first account in 1989 will be most accurate, but it is possible that helping customers with parcels to their car is not uncommon and occurred during the period between the two interviews, leading Mr Gauci to think he remembered the events differently, filling in further details from these other events.

On the 10<sup>th</sup> September 1990 (A7) Gauci attempts to clarify the confusion;

*“In my original statement I said that I next saw the man when he returned to the shop but subsequently I said that I had seen him sitting in the front seat of the taxi which was driven up Tower Road.*

*What happened was I went to the front of the shop and was looking out and saw the taxi being driven up the street. As it passed my shop I recognized that the front seat passenger was the same man that had bought the clothing. I saw the taxi stop at the corner where I pointed out to the officer (top of Tower Road), and I went back into the shop to collect the parcels. The man came back down to the shop and I met him in the hallway.”*

The way in which Mr Gauci is attempting to ‘work it out’ rather than having any real memories to rely on would seem to be revealed in his comment of ‘...What happened was...’ His account of his memory is more in accord with him trying to recall typical events and assign them to the episode in question, and suggests he is trying to remember which of many typical events he was recalling. However, as in all this material there are ambiguities in the English versions we have. Mr Gauci is quoted as saying that the man ‘got into the front seat behind the driver’. Should this be ‘next to the driver’? Such ambiguities raise serious doubts about how much of the details can be relied on for the accounts of the events described.

There is also clear confabulation in relation to specific details of the date. This becomes most clear when he gives a statement in court (A8). The claim that the Christmas lights were not put up until about 15 days before Christmas is turned into the claim that the man came to the shop in the middle of December, although in his early statements Mr Gauci specifies that it was late November.

It must be stressed that this confabulation is likely to be unconscious on the part of Mr Gauci and is unlikely to be a deliberate attempt at deceit. Indeed it is likely to imply that Mr Gauci is genuine in his intention to help. But it is my view that the testimony generated from this confabulation is not derived from actual memories of events.

### Distortions

The accuracy of memory that is retained is vulnerable to a variety of influences that can distort it. In the present case, there are indications that Mr Gauci's memory of the event was subjected to a number of these influences.

Some of these distorting influences arise from social processes. Witnesses may be so keen to help, particularly in serious cases or those that touch on issues of symbolic or ideological import, that they exaggerate or enhance testimony, often without even being aware that this is what they are doing.

Mr Gauci's testimony does appear to have been vulnerable to this, as some of his words in the statement of 10<sup>th</sup> September 1990 (A9) indicate:

*“I know why you (Scottish Police) are here and I know about the plane that crashed in Scotland after a bomb exploded. I am not frightened to identify the person and if I saw his photograph I would point it out”.*

This desire to help can become more pronounced when the witness develops a rapport or relationship with the police officers involved in the case. This can, again unintentionally, lead to further distortions as the witness attempts to please or respond to the agenda of the police. This can be a subtle process that does not take the form of overt or illegitimate pressure. There are indications that helping the police has some emotional significance for Mr Gauci. For example:

*10<sup>th</sup> September 1990 (A10) - “My father (not a witness) and Paul, my brother, do not want to help you and do not care. They do not want me to help you”.*

*5<sup>th</sup> March 1990 (A11) - “Paul, my brother, and my father do not want me to be involved in this matter and they don’t know I’m still helping you. When Paul is suspicious about me helping you he argues and causes trouble with me. When I made arrangements with you to view the taxi outside my shop about 10 days ago, the taxi driver (Julian Genovese) came into my shop in the morning but I wasn’t in. He spoke to Paul and told him that he would be parked outside later with his taxi. When I came back, Paul accused me of helping you and said I had arranged to look at the taxi, but I denied it and said that I didn’t know what he was talking about. However, he did not really believe me and he upset me”.*

*4<sup>th</sup> November 1991 (A12) - “I still have problems with my father. He is still against me helping you and he fights with me about it”.*

*4<sup>th</sup> November 1991 (A13) - [Note added by police at the end of the interview:] ‘The witness is still clearly prepared to assist the inquiry however he is obviously still under family pressure because of his involvement, his father recently assaulted the witness who sustained a laceration to his right forearm’.*

The first statements given by Mr Gauci are less likely to have suffered from this but it may have had a bearing on some of the later developments of these early statements and on the identification evidence, given approximately 18 months after the police began interviewing Mr Gauci.

The psychological process known as ‘cognitive dissonance reduction’<sup>62</sup> is relevant here. This is the psychological mechanism whereby we change our cognitions to reduce dissonance between what we do and what we say<sup>63</sup>. So if Mr Gauci believed what he was doing in helping the police had great significance, even to the extent of being at variance with his family’s wishes, then he would want to believe that his testimony was strong and clear otherwise his efforts would be psychologically dissonant with his actions.

As noted, distortions in what a person believes he remembers and thus in his testimony can be produced by questioning techniques, in particular the use of leading questions and closed rather than open questioning. Full information on the question techniques in the current case is not available to me but it should be noted that the statements I have access to do indicate that Mr Gauci was formally interviewed at least seventeen times in total, including nine separate interviews between 1<sup>st</sup> September and 4<sup>th</sup> October 1989. Further, we have no information about any informal discussions between Mr. Gauci and interviewing police officers, or any other contacts that could have influenced what he thought he remembered. So although all these interviews and contacts may have been considered useful and necessary to the investigation, such an intensity of involvement may have had an overall ‘leading’ effect, as well as giving emotional significance to his experience of his testimony. The repeated interviews may have implied to Mr Gauci that his testimony was centrally important to the case but not yet fully adequate or detailed enough, leading him to extend, clarify and develop his accounts beyond that which he was genuinely able to remember.

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<sup>62</sup> See Festinger, L. (1957) ‘*A Theory of Cognitive Dissonance*’. Evanston, Illinois: Row Peterson. The theory of cognitive dissonance is based on four basic propositions; a) inconsistencies between cognitions in an individual generate a feeling of dissonance; b) dissonance is unpleasant and the individual is motivated to remove it; c) in addition to trying to remove dissonance, the individual will actively avoid situations and information that may increase it; d) the motivation increases with the increase in dissonance which depends, in turn, on how different the cognitions are. As summarized by Banyard, P. & Grayson, A. (1996) ‘*Introducing Psychological Research*’. Basingstoke: Macmillan Press Ltd.

<sup>63</sup> Festinger, L. & Carlsmith, J.M. (1959) ‘Cognitive Consequences of Forced Compliance’. *Journal of Abnormal and Social Psychology*, 58, 203-210.

Further distortions in testimony and identification evidence can arise from exposure to similar individuals, through photographs or descriptions or casual meetings, and the unconscious transference effect this can produce.

In the present case, these potentially distorting processes, operating in combination and interacting with one another, would largely have come into play after Mr Gauci was first interviewed ten months after the alleged event in question. At this point the 'memory' he was relying upon would have already decayed, making it particularly vulnerable to these processes.

## FURTHER CONSIDERATION OF MR.GAUCI'S REMEMBERING OF THE CRUCIAL EPISODE.

### Inconsistencies in the Testimony of Mr Gauci<sup>64</sup>

There are variations on points of fact in Mr Gauci's account. The psychology of human memory does not provide any basis for these unless an individual undergoes an intensive context reinstatement process. It is extremely rare for people to improve on initial memory merely through effortful thinking. Therefore the presence of these inconsistencies do strongly suggest then that Mr Gauci's account is one that has been influenced by memory construction and distortion processes.

The consistencies in Mr Gauci's account are also of interest. They may be an indication of his commitment and belief that he remembers the alleged incident. However, this commitment should not be assumed to imply or equate to accuracy. Many studies already cited, show there is no strong relationship between confidence and accuracy. This point is worth emphasising because the judge in this case, as in many others, took the witness' desire to be helpful and his eventual confidence in his opinion as indicators of accuracy of his memory, whereas there are recognisable psychological processes that would indicate that the less determined a witness was to help the less open they would be to other irrelevant influences.

Indications of how Mr Gauci's account of what he remembers changes can be seen for example in his report of how much was paid for the goods, indicating a change from 56 to 77 Maltese pounds (A14 and A15), including information on exactly how the currency was provided. Yet there is no indication of how this change in memory came about. It could have been a calculation influenced by what he subsequently claimed was bought. The currency variation from six to ten pounds with the

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<sup>64</sup> For further details on the issues discussed in the present section please refer to Annex C: Tables of Inconsistencies in the Testimony of Anthony Gauci.

appropriate change could be a logical deduction of what he says he remembers rather than the actual memory. Unfortunately the interviewer did not probe on these details. The remembering of the lamb motif is another example of how he adjusts what he remembers to fit the current circumstances. He is quite honest about this saying ‘I accept that’ the motifs were ‘probably’ all the same. But he then develops his confidence further after having been shown what the police are looking for, claiming that he is ‘fairly certain’ that the motif was on the example he was shown by the police.

### Evaluation of Mr Gauci’s Testimony

The form of the inconsistencies should be considered in the light of general psychological findings that it is highly unlikely that Mr Gauci would have a memory of one particular customer and sales event out of many others, recalled at a point ten months after the alleged event had occurred, unless the event had been highly unusual or very emotionally significant to Mr Gauci at the time.

Certainly in considering the details of his testimony, there are indications that Mr Gauci does not have distinct memories for the individual components of his account.

### **When the alleged event occurred**

Mr Gauci is clear and consistent about the day in question being a weekday, presumably because the pattern of shoppers is different on weekdays to weekends. But although he cannot relate the date or the time of year to an invoice for what he sold he seems to remember the distinct conditions of selling and the lack of Christmas decorating to pinpoint a time of year. This could probably be noteworthy, especially a year later, when he may be beginning to plan for the coming Christmas, but there are confusions in the details that emerge over different interviews. Furthermore, he aspects of memory he was drawing on to inform himself about the time of year do not

seem to have been checked in the police interviews, for example; the consistency with which Christmas decorations were put up each year.

Mr Gauci's account of precisely when the alleged event took place while consistent on some points (e.g. that it was a week day), is inconsistent on when it took place relative to Christmas. On 10<sup>th</sup> September 1990 (A52) he says:

*“ ...there were no Christmas decorations up as I have already said, and I believe that it was the end of November”*

However, in court he asserted that the alleged incident was:

*“...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. I remember that there were Christmas lights.”*

Although we would not necessarily expect Mr Gauci to remember a precise date, it is surprising that he is confused about the timing in relation to whether or not the Christmas decorations/lights were up as this would be expected to be a salient component of a distinct memory. It seems plausible that the discussion in the early interviews of whether the Christmas lights were up or not became incorporated into his memory of any possible events in his shop so that by the time he came to court ten years later he now thinks he remembers the Christmas lights being up.

There is further indication that Mr Gauci does not have a clear memory for when the alleged purchase took place in his statement of 10<sup>th</sup> September 1990 (A53). In this part of the statement he notes that:

*“I know that the invoice for the clothing was the 18<sup>th</sup> November and it was obviously after that”*

The use of the word ‘obviously’ would suggest that Mr Gauci is ‘working it out’ what is likely to have been the case rather than recalling directly.

### **The Man’s Behaviour**

Mr Gauci provides an account of the man’s behaviour during the alleged incident. He states that:

*1<sup>st</sup> September 1989 (A54) - “The man’s behaviour was very strange, that is why I can now remember. It was as if anything I suggested he buy he would take it”.*

*1<sup>st</sup> September 1989 (A55) - “The man’s behaviour was very strange, he was looking about and he saw the baby-gro on the rack beside him. He said ‘what age?’, I said ‘one to two years’, he said he would take one. I asked him what coloured and he said ‘blue’ but he didn’t seem fussy. He just looked around the shop and pointed if he saw anything. On picking out the trousers I asked him what size and he said ‘more or less my size’. The Libyans do not really know their sizes or bother. The Libyans just normally put their elbow into the trousers and if it fits both sides they say they will take it. I do not know how they do this. I then gave him the brown check in 34 size. The light trousers were in the 36 size. I would think I could identify the man again”.*

These accounts would give little reason to consider the alleged event sufficiently salient, either through its unusualness or emotional significance to Mr Gauci then, that he would recall it ten months later. Mr Gauci does describe the man’s behaviour as ‘very strange’, possibly in justification of his alleged memory, yet there is little in his description to substantiate this. The ‘strange’ components seem to relate solely to the fact that the man didn’t seem very interested in his purchases. Mr Gauci’s assertion that “ it seemed as if anything I suggest he buy he would take it” does not bear close scrutiny as it implies Mr Gauci actually offered the man random or inappropriate goods.

Unless the man's behaviour during the alleged incident were considerably more extreme, it is difficult to understand why Mr Gauci would have a clear memory for it. There is also a discrepancy between the man buying 'anything suggested' and the question about the age for which the baby-gro was suitable.

Without a lot more information about the sort of people who use Mr Gauci's shop it is difficult to be confident that the event he describes was unusual. A shop that was frequented by tourists who know the goods are more available or cheaper than those back at home may have many people who would buy a selection of clothing thinking that they could be gifts for an extended family without being clear exactly who each gift would be for. It would therefore have been crucial to determine how unusual the event was likely to be, especially in the weeks leading up to Christmas, when an increase in people buying a variety of clothing may be expected, before I could be confident that it had the required salience to be a clear memory.

The changes in the account of the behaviour are consistent with a view that Mr Gauci does not have a distinct memory for the man's behaviour. On 1<sup>st</sup> September 1989 (A56) his position is that:

*"The man said he had other shops to visit and he picked up the umbrella and said that he would come back shortly; he paid me in the cash which I think was 56 Maltese pounds. He then walked out the shop with the umbrella which he opened up as it was raining.*

*I continued to parcel up the goods which I made up into two parcels. About 15 minutes later this same man came back into the shop. He was not carrying anything else that he had bought elsewhere.*

*I can't state that the man entered the taxi, I can only say that he walked towards the car".*

But then, on 10<sup>th</sup> September 1990 (A57), Mr Gauci claims:

*"I asked if I could carry the parcels to his car and he said he had a taxi. The man then walked up to the taxi and he got into the front seat behind the driver. I can't say anything more about the taxi, it's just as I described to you, the old type".*

Also on 10<sup>th</sup> September 1990 (A58) he says:

*"In my original statement I said that I next saw the man when he returned to the shop but subsequently I said that I had seen him sitting in the front seat of the taxi which was driven up Tower Road. What happened was I went to the front of the shop and was looking out and saw the taxi being driven up the street. As it passed my shop I recognized that the front seat passenger was the same man that had bought the clothing. I saw the taxi stop at the corner where I pointed out to the officer (top of Tower Road), and I went back into the shop to collect the parcels. The man came back down to the shop and I met him in the hallway.*

Yet, on 5<sup>th</sup> March 1990 (A59), he states:

*"I have been asked to go over again the circumstances of the man (suspect) arriving and leaving my shop and the sighting of the white Mercedes taxi. I now remember that when the man left my shop he walked downhill in Tower Road towards the seafront. At that time it was raining.*

*About fifteen minutes later I was standing near the shop front when I saw a white Mercedes taxi driving up Tower Road. I could see that the man who had*

*bought the clothing was seated in the front passenger seat of the taxi. I went back inside the shop, but before I did so I saw the taxi pull into the curb. On the same side of the road as my shop, about 20 yards up the street, where I have shown you, I then saw the man get out of the front passenger seat and start walking towards my shop. I went to get his parcels and he came into the shop”.*

Some specific changes in this last statement may be attributable to the partial context reinstatement activity on 22<sup>nd</sup> February 1990 (A60), when Mr Gauci viewed a taxi with police. However, other types of changes and the changes prior to and subsequent to this do imply that Mr Gauci has no clear memory of the behaviour.

### **How Man Left the Shop**

The comments on how the man left the shop have a clear pattern to them in the interviews of 1<sup>st</sup> September 1989 (A61) and 21<sup>st</sup> February 1990 (A62). This pattern would seem to be one that other shoppers may have followed of leaving the goods to be parcelled and then returning for them, and so the memories may draw upon these routine activities:

*1<sup>st</sup> September 1989 (A61) - “The man said he had other shops to visit and he picked up the umbrella and said that he would come back shortly; he paid me in the cash which I think was 56 Maltese pounds. He then walked out the shop with the umbrella which he opened up as it was raining. I continued to parcel up the goods which I made up into two parcels. About 15 minutes later this same man came back into the shop. He was not carrying anything else that he had bought elsewhere.”*

*21<sup>st</sup> February 1990 (A62) - “He left the shop after having made the purchases and turned right down Tower Road. At that time he had the umbrella raised*

*and open. When he returned to the shop he had come from the same direction but the umbrella was down because it had almost stopped raining and it was just drops coming down”.*

However the information with regards to this point changes by the interview that Mr Gauci gives on the 5<sup>th</sup> March 1990 (A63).

*5<sup>th</sup> March 1990 - “I have been asked to go over again the circumstances of the man (suspect) arriving and leaving my shop and the sighting of the white Mercedes taxi. I now remember that when the man left my shop he walked downhill in Tower Road towards the seafront. At that time it was raining. About fifteen minutes later I was standing near the shop front when I saw a white Mercedes taxi driving up Tower Road. I could see that the man who had bought the clothing was seated in the front passenger seat of the taxi. I went back inside the shop, but before I did so I saw the taxi pull into the curb. On the same side of the road as my shop, about 20 yards up the street, where I have shown you, I then saw the man get out of the front passenger seat and start walking towards my shop. I went to get his parcels and he came into the shop..... I have been asked why I have not mentioned this before and I can only say that I did not think you asked me directly about it. I have been thinking about the man and I remember this now”.*

What is notable here are the comments “I have been asked to go over again” and “you asked me directly about it”, which imply some pressure from the police to get Mr Gauci to agree with what is their understanding of the situation.

However, the details that Mr Gauci offers of what he now remembers include the level of contextual information that is normally taken to indicate validity. Without knowing the precise details of how the interview was conducted it is therefore difficult to say whether or not this detailed information was inadvertently ‘shaped’ by the police or came out of some associations from contextual re-instatement.

## **The Purchases**

Any memory for one particular chosen combination of items from an overall set of numerous possible combinations, and distinct from many previous and subsequent combinations chosen by other customers, requires explanation. Memory would be partially facilitated if there were a common meaningful theme running through all the items and defining the particular combination (such as an entire new school uniform or a wedding outfit, for example). Conversely, memory would be facilitated if the items in any given combination were strikingly incompatible, to such an extent that they stood out from any other general random combination.

There is no rationale in Mr Gauci's account of the alleged purchases giving either a common theme to the items or, alternatively, an indication of what it was about the particular combination allegedly purchased that was so unusual as to make it remarkable. In the absence of any clear and compelling explanation of why the reported combination would be remembered, I am of the view that it is not plausible that Mr Gauci would have a memory for a set of apparently random purchases acquired ten months previously.

Memory does relate to things that catch our attention and are noted, especially if they have significance for us. It is therefore understandable that a shopper who bought a curious mixture of clothing, including shirts and baby-gros, some of which obviously did not fit him would be remembered by the shop-keeper, especially if the total added up to a notable amount of money. We have no indication of whether Anthony Gauci mentioned the curious set of purchases to his brother Paul as might have been expected in a family business.

The details of what was bought could have been confused by many matters, including the shopper changing his mind during the process of purchasing and other shoppers who may have bought clothing soon after, or even by other shoppers who also bought

a large number of goods. We have no indication as to whether the police did check on the unusualness of the purchases by asking how common such purchases were. So it is difficult to evaluate exactly how unusual the purchase event was and the particular mix of purchases was.

In this regard the variety of accounts given by Mr Gauci of what exactly was bought is understandable. The influence of being shown goods and asked if they were similar to those sold is fraught with problems, especially when the police indicate they have checked the numbers of certain items available then indicate to the shop keeper that they must have sold some of them. Furthermore, we have no indication of how good the inventory keeping was in Mr Gauci's shop, so it is difficult to establish how much of MrGauci's comments rely in memory and how much from checking with files. The comment on 10<sup>th</sup> September 1990 (A64) that the finding of empty shirt boxes led to remembering who had bought the shirts two years earlier indicates a remarkably lackadaisical approach to stock-keeping. This means that the influence of external sources, in this case police comments and questions, could have a significant impact in influencing memory for the details of items purchased.

The many changes in the details of the purchases across Mr Gauci's statements do suggest that he does not have a true memory of a purchase combination but may be trying in later statements to recall the list of items from earlier statements.

Along similar lines, there is clear evidence of confabulation in the account. On 10<sup>th</sup> September 1990 (A65), Mr Gauci introduces additional items:

*“I have also been asked about the clothing which the man purchased and I cannot add anything to it. About three weeks ago I was cleaning boxes out in the shop and I remember that they had contained a slalom shirt and a blue and white light denim (texture) material shirt. I know that I sold you shirts like these and I now remember that the man who bought the clothing also bought a slalom shirt and a blue and white striped shirt.”*

The psychology of human memory does sometimes allow for the remembering of additional, although not typically contradictory, details, if the individual undergoes an intensive process of revisiting the whole event and the entire physical and psychological context in which it took place. In this case the questioning from the police indicated in ‘I have also been asked’ shows the pressure Mr.Gauci was under to try and find some connection with the purchase in which the police were interested. It therefore is very possible that his finding of the empty boxes allowed him to construct a plausible memory. In his statement he also mentions a change in price paid, which is a remarkably precise memory against the background of other confusions. It is therefore possible that he worked out what the price must have been once he thought of what he was likely to have sold. This is consistent with Mr. Gauci generating this testimony from what he thought was plausibly the case rather than directly from any actual distinct memory.

Of further concern in this regard are his earlier clear statements that *“That man didn’t buy any shirts for sure”* (30<sup>th</sup> January 1990; A66).

This specific denial is clearly a response to a direct suggestion from police that the alleged purchases did include shirts. The inclusion of the shirts in his account is also consistent with the pieces of shirt we know he saw in the blast damaged clothing. Although I do not have full information, it appears that Mr Gauci’s does not mention shirts until he was shown the blast damaged shirt material. This again highlights Mr Gauci’s vulnerability to external influence such as the desire to please the police and an awareness of the gravity of the situation, in the construction of his account.

### **Age of Purchaser**

Academic studies indicate that people are reasonably accurate in estimating another person’s age and tend to become more able to do this the closer in age the person is to themselves. The accuracy is usually estimated to be plus or minus ten years. Unfortunately we have no evidence as to how accurate Mr Gauci’s estimates of age

usually are, especially of people he believes to be 'Libyan'. But as a man who deals with many customers we can assume he is no less accurate than is usual.

It is therefore significant that on many occasions Mr Gauci is clear that the person who bought the clothes from him is around 50 years of age. Of particular note in this regard is his statement of 13<sup>th</sup> September 1989 (A67) in which he says he saw the man who bought the clothes in Tony's Bar. Mr Gauci is clear in stating:

*"I would say the man was 50 years of age."*

This accords with his subsequent statement that of 25<sup>th</sup> September 1989 (A68) that the man who came into the shop:

*"Was about 50 years of age."*

A year later on 10<sup>th</sup> September 1990 (A69) he also is adamant:

*"I would say he was about 50 years."*

Also on 15<sup>th</sup> February 1991 (A70) when he was shown 12 photographs on a card he said that they were all "of men younger than the man who bought the clothing."

This figure of 50 years therefore is a clear indication of a strong component of his memory. It may be expected that a person selling clothing would make a note of the 'generation' a customer represented as this may relate to styles and other matter that would aid in selling. Therefore the repetition by Mr Gauci of a specific age from his earliest interviews needs to be treated with some respect. But caution also needs to be exerted in relation to the consistency of this age because it is possible that having once specified the age he remembered having done that and determined to stick to this figure to show his own consistency. Furthermore, we cannot be confident that the

man he describes was necessarily the person who bought the crucial clothing without further evidence of that.

His later willingness to respond to police requests that he ignore the age of people presented to him as possible culprits therefore needs to be considered in the light of his subsequent readiness to be as helpful to the police as he felt was reasonable.

### **Description of Purchaser**

It is to be expected that a person selling clothing would be alert to the size and general build of a customer. If the customer bought clothes that the seller believed would not fit the customer it would also be expected that he would have a mental note of this because of the risk of the customer returning the goods. This would further enhance his recall of the build of the customer. However, unfortunately, the police interviews do not record why Mr Gauci remembers any details of the customer. This makes it difficult to evaluate the thought processes that may have given rise to Mr Gauci committing any particular details to memory.

But assuming the processes indicated in relation to selling it is reasonable to assume that when he said on 1<sup>st</sup> September 1989 (A71) that the customer had been

“Six foot or more in height. He had a big chest and a large head. He was well-built but not fat or with a big stomach.”

That this was a reasonably undistorted memory is also supported by his repetition of very similar information on 25<sup>th</sup> September 1989 (A72) although now the man he describes was considered to be possibly “just under six foot in height ” and was now described as “well built, not fat and I would say that he had a 36 inch waste”.

In general research shows that hair style and colour and the presence or absence of facial hair is an important part of how people recognise and remember other people. So the statement on 1<sup>st</sup> September 1989 (A73) that the man's "hair was very black" and that he was "clean-shaven with no facial hair", re-iterated when describing a similar man on 25<sup>th</sup> September 1989 (A74) as having "black hair" and "no hair on his face" lends support to these being undistorted memories.

Skin colour is, of course, significant in all cultures but what counts as 'dark skin', (mentioned by Mr Gauci on a number of occasions, but notably on 1<sup>st</sup> (A75) and 25<sup>th</sup> (A76) September 1989) could have been tested by the police asking him to indicate more clearly by cross-reference to examples exactly what this meant. However, whatever it meant to Mr Gauci, given the lighting in his shop, it is reasonable to assume that the person he remembers did have 'dark skin'.

The reference to the shopper being 'Libyan' requires careful consideration. In many cultures those from other ethnic groups are classified in some general sense. For example, many people in the U.K. will characterise any 'black' person as 'African' even though they may show mixed race characteristics and be from Polynesia. These characterisations typically draw upon the most well-known national group that have the characteristics perceived as different from the locals. Another common example in the UK is that all oriental looking people are thought of as 'Chinese' although they may be Japanese, Korean etc. It is therefore important to establish what exactly the description by Mr Gauci of the shopper as 'Libyan' actually means. Was he questioned for example, as to whether the shopper might have been Egyptian, Moroccan, Lebanese, Palestinian etc? There may well have been clues in the accent or forms of speech of the shopper, but again this would need to have been tested by the police interviewers to be sure. We do not even have clear information as to what language the conversation with the shopper was in and whether there are distinct differences in Maltese Arabic as opposed to Libyan Arabic of which Mr.Gauci may be aware.

The comment on 1<sup>st</sup> September 1989 (A77) about the patterns of shopping typical of Libyans is not used to explore whether the shopper was not following this pattern because he was not a Libyan. However, the reference to 'dark skin' and the acknowledgement that the shopper was of an Arabic origin are likely to be undistorted memories of actual shoppers.

## MR GAUCI'S IDENTIFICATION EVIDENCE

### Inconsistencies in Mr Gauci's Identification Evidence

The problems of determining the likely validity of Mr Gauci's identification evidence are compounded by the number of occasions over a ten year period that he was called on to make identifications and the lack of information on the intervening events and images that may have influenced who he identified. The clarity and validity of his ability to identify the man he claims came to his shop is certainly thrown in doubt by the fact that he identified on various occasions, as summarized in Table 1:

1. A person who was not Mr. Megrahi,
2. Salem Mohd Abdel Hady Taha
3. Abu Talb, and
4. Mr. Megrahi

Various other people are referred to as having been seen in bars or coming into his shop, but it is not clear if they are regarded as the same person as one of these four or some other person. It also should be noted that it is the identification of Abu Talb that is clearest, but that could be a function of the picture being in a newspaper.

This mixture of identifications does not lend support to a clear mental image that is present since the time of the key episode, but rather a search to fit a face to a vague memory. Such a search is exceptionally vulnerable to the sorts of external influences that the psychological study of memory has established over many years.

**Table 1: Other Positive Identifications**

<p>Mr Gauci positively identified Mr Megrahi in photo I.D. (15.02.91) and in 1999 ID parade:</p> <p>(15.02.91 – A78)</p> <p>“I would say that the photograph at number 8 (Mr. Megrahi) 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 ten years or more older and he would look like the man who bought the clothes”. I can only say that this photograph (number 8) resembles the man who bought the clothing, but it is younger”.</p>	<p>Mr Gauci also ‘positively’ identifies: (is as positive or certain on the following occasions as he was in identifying Mr. Megrahi)</p> <p>(14.09.89 – A79) – Mr Gauci identifies a man as being like the customer who bought the clothing but too young: “This photograph is similar to the man who bought the clothing. The man in the photograph is too young to be the man who bought the clothing. If the man in the photograph was older by about 20 years he would look like the man who bought the clothing”. (Identity of person selected unknown, but definitely not Mr Megrahi)</p> <p>(10.09.90 – A80) Identifies Salem Mohd Abdel Hady Taha, saying he looks similar to the man who bought the clothing (in terms of facial features) but not old enough</p> <p>(this is similar to what Mr Gauci says when identifying Mr Megrahi)</p> <p>(05.03.90 – A81) – positively ID’s Abu Talb from a newspaper article shown to him by his brother: “I think the photograph printed in the newspaper may have been the man who bought the clothing. He looks like him.” “That was the name, Abu Talb”          “All I can say about the photograph printed in the newspaper is that I think the man looks the same as the one who bought the clothing”.</p> <p>(This is, in fact, a more positive identification than that he makes of Mr Megrahi – this is the most positive identification he makes throughout the whole process).</p>
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Influences on Mr.Gauci’s Identification Evidence

Of particular note in this is the positive identification of Mr Megrahi from a set of photograph on 15<sup>th</sup> February 1991 (A82). At that stage in the investigation the police

were apparently focusing on Mr. Megrahi as the likely culprit. They therefore had a lot invested in Mr Gauci choosing Mr Megrahi from the photographs.

There is a considerable amount of research to show that people can be influenced in their judgments by subtle cues from others around them. In psychological studies these influences are known as ‘experimenter effects’<sup>65</sup>, whereby the experimenter inadvertently influences the judgment of participants in the study. This influence can be from subtle cues by which the investigator inadvertently indicates the response he wants from his respondent, or ways in which the study is set-up that unwittingly limits the choices the respondent may make. This is the reason ‘double-blind’ studies are carried out so that the experimenter does not know the expected outcome<sup>66</sup>.

In order to explore this possibility a little further in the present case I set up an experiment in which the set of photographs used in February 1991 were presented to people unaware of the court case, who were simply requested to guess which of the people pictured was a terrorist. I used two conditions. In one the interviewer was not informed at all which picture was the suspect. In the second the interviewer was informed. The remarkable results are given in Table 3.

**Table 3: Frequencies in Photo Id Study**

		SuspectID		Total
		Someone other than Suspect was Selected from Line-up	Suspect was Selected from Line-up	
Condition	Interviewer Did Not Know Who Suspect Was	20	0	20
	Interviewer Knew Who Suspect Was	21	15	36
Total		41	15	56

<sup>65</sup> Rosenthal, R. (1966). *Experimenter effects in behavioral research*. New York: Appleton-Century-Crofts.

<sup>66</sup> An example of one such study is that of Phillips et al. (1999); *supra* note 52. See Wells et al. (1998), *supra* note 47, for details on the utilization of such procedures and their value to the investigative process.

As can be seen, out of a total of 56 respondents, more than a quarter chose the picture of Mr Megrahi. Their choice was just from the nature of the photograph in the selection. But these selections are drawn entirely from the group of people interviewed by the person who had been 'primed' to know who the suspect was. In statistical terms there is only a probability of this happening by chance once in every thousand cases.

It is worth emphasizing that this was a neutral experiment carried out with people in an informal setting, not the intense atmosphere of a police station with a great deal riding on the result. There also seems to be an implicit 'negotiation' in Mr Gauci's identification of photograph number 8. He is not confident about the hair or the age of the man so discusses with the police officer running the identification procedure the likelihood of it being the man in question. There is therefore a very great possibility that Mr Gauci was inadvertently primed to select Mr Megrahi from the photographs provided.

There are further potential influences on the selection of Mr Megrahi made by Mr Gauci in February 1991. It seems very likely that he was encouraged once he had made this selection, even if this was not done openly. Further, the fact that Mr Megrahi was subsequently arrested and featured in later line-ups and appeared in court would bolster Mr Gauci's confidence in his judgement and could lead to him identifying Mr Megrahi in future situations, because of having selected him in the photographic, mug-shot ID<sup>67</sup>

The process of line-up administration has also been shown to carry many implicit influences<sup>68</sup>. Importantly, a suspect who has been in prison for some time or who is very nervous of the implications of being in a line-up process may indicate this in his demeanour. If the line-up takes place in a prison context when it is known that a

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<sup>67</sup> In keeping with findings on the impact of prior identifications and mug-shot exposures – see, for example; Brown, E., Deffenbacher, K. & Sturgill, W. (1977) 'Memory for Faces and the Circumstances of Encounter'. *Journal of Applied Psychology*, 62, p. 311-8.

<sup>68</sup> See, for example; Wells (1993), *supra* note 51; Phillips et al. (1999), *supra* note 52.

serious suspect has been held in that location for some time then the witness will implicitly be lead to believe that the offender is present in the line-up. In such cases research has shown that the witness will attempt to identify some one as the most likely culprit, rather than being sure he is the actual culprit

This is particularly noteworthy in the account of the line-up held in the Netherlands on 11<sup>th</sup> April 1999 (A83). When asked to select a person Mr Gauci is reported to have said:

*“Not exactly the man I saw in the shop. It is ten years ago, but the man who look a little bit like exactly is the number 5”.*

The police officers write that they read this back to Mr Gauci and he asked him to remove “it is” and replace it with “I saw him”. This would then read:

*“Not exactly the man I saw in the shop. I saw him ten years ago, but the man who look a little bit like exactly is the number 5”.*

Neither of these two sentences makes direct sense, and Mr Gauci is reported as speaking in ‘broken English’. But the confusion in his identification and his concern that he cannot locate the person confidently is clear. It is also apparent that he believes he should be able to identify the shopper. He is selects a person from those available rather than exploring the option that none of the people present had ever entered his shop.

The development of Mr Gauci’s formulation of an image of whom he had seen in his shop that lead to identification in court can be gleaned from the sequence of occasions in which his identification opinions were sought.

## Summary of Mr Gauci's Identification Evidence

- 1. 14<sup>th</sup> September 1989 (A84) – Photo I.D.; shown 19 pictures, identifies a man (unknown) who 'is similar to the man who bought the clothing' but 'too young': 'If the man in the photograph was older by about 20 years he would look like the man who bought the clothing'. Characteristics of fill-ins unknown. Details of administration procedure unknown.
- 2. 26<sup>th</sup> September 1989 (A85) – Photo I.D.; shown an unspecified number of photographs, fails to identify anyone as the man who he sold the clothing to. Notes that he pointed out one photograph of 'a man who has the same hair style', but notes that 'this is not the man I sold the clothing to as the man in the photograph is too young'. Characteristics of fill-ins unknown. Details of administration procedure unknown.
- 3. 2<sup>nd</sup> October 1989 (A86) – Freeze-Frame Identification (Abu Talb); says 'I can state that the photograph I was shown is similar to the man that came into my shop although I am unable to say that it is definitely the same person'.
- 4. 6<sup>th</sup> December 1989 (A87); shown 19 pictures (including Abu Talb, El Wahabi and El Khayyat); Mr Gauci was unable to identify any of the men shown in the photographs as the man who bought the clothing from his shop in November 1988. Characteristics of fill-ins unknown. Details of administration procedure unknown.
- 5. 5<sup>th</sup> March 1990 (A88) – positively identifies Abu Talb from a newspaper article (Sunday Times, dated 05/11/89) shown to him by his brother: 'I think the photograph printed in the newspaper may have been the man who bought the clothing. He looks like him' 'That was the name, Abu Talb' 'All I can say about the photograph printed in the newspaper is that I think the man looks the same as the one who bought the clothing.'

- 6. 31<sup>st</sup> August 1990 (A89) – Photo I.D.; shown 2 sets of 12 photographs; in first set he described one picture (unknown) as being ‘similar in the shape of the face and style of hair, but it was not the photograph of the man I have described’. He also identifies 3 photographs that are ‘of men the correct age of the man I have described’. Did not identify anyone from second set of photographs. Characteristics of fill-ins unknown. Details of administration procedure unknown
- 7. 10<sup>th</sup> September 1990 (A90) – Photo I.D.; Mr Gauci is shown an number of photographs, including one of ‘Salem Mohd Abdel Hady Taha (b. 03/04/58), which he says looks similar to the man who bought the clothing (in terms of facial features) but not old enough. Characteristics of fill-ins unknown. Details of administration procedure unknown.
- 8. 15<sup>th</sup> February 1991 (A91) – Photo I.D.; Shown 12 photographs (Characteristics of fill-ins unknown. Details of administration procedure unknown). Initial impression was that ‘all the photographs were of men younger than the man who bought the clothing.’ He tells Bell this, and Bell tells him to look at all the photographs carefully and to try and allow for any age difference. He then points out one of the photographs (Number 8 – Mr. Megrahi), who he says is ‘is similar to the man who bought the clothing’, but is too young – ‘he would perhaps have to look about ten years or more older and he would look like the man who bought the clothes’. ‘I can only say that this photograph (number 8) resembles the man who bought the clothing, but it is younger’. He adds: ‘I can only say that of all of the photographs that 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’.
- 9. 13<sup>th</sup> April 1999 – Identification Parade: I.D.’s number 5 (Mr. Megrahi), saying ‘Not exactly the man I saw in the shop. 10 years ago I saw him. But the

man who looks a little like him exactly is number 5'. Details of full administration procedure and feedback given are unknown. Characteristics of fill-ins are provided, photographs are not.

- 10. Identification in Court: Identifies Mr Megrahi (full details of what is said/nature of the identification given in court transcript). Dock Identification.

It can be seen from this list that there are seven occasions on which Mr Megrahi is not identified, but other people are indicated as possible. Then on the eighth attempt, after some negotiation on hair style and age Mr Gauci reluctantly agrees that Mr Megrahi's photograph is similar to the man who was in his shop. Then eight years later he picks him out of an identification parade, but with the curious phrase 'a little bit like him exactly'. Having selected him in a line-up then seeing him in court it is perhaps inevitable, given Mr Gauci's desire to be helpful that he agrees the man in court is the person who visited his shop ten years earlier.

In general terms, then, the actual accurate identification of one individual customer, out of many, with whom a witness had a brief encounter two and a half years previously (first identification of Mr. Megrahi was on the 15<sup>th</sup> February 1991) is unlikely.

The identification of two other different individuals as the man who allegedly came to the shop, and prior to the identification of Mr. Megrahi, certainly suggests a clear memory for the individual does not exist.

Mr Gauci also claims to have seen the man who allegedly came into his shop in 1988 on a number of other occasions, including sightings as:

1. One of four men in Tony's Bar, Sliema in Summer 1989:

*13<sup>th</sup> September 1990 (A92): "In June 1989, when I saw Libyans in Tony's Bar, Sliema. I thought one of the four was the man who had bought the clothing. I believe this man was similar to the man who bought the clothing and looked like him but I cannot say it was definitely the same man."*

2. The man buying children's dresses in September 1989:

*25<sup>th</sup> September 1989 (A93) "if he was killed in the plane then it must have been his twin that bought the four dresses, they really looked like the same men"*.

3. Man who bought blankets from him around May 1987:

*21<sup>st</sup> February 1990 (A94): "I have not mentioned this before because I did not remember it. ...I cannot be certain this is the same man but it could have been"*.

In themselves, some of these claims are highly implausible, particularly the sudden memory that did not previously exist, for a subsequent sighting in the bar of the man who had allegedly been so salient to him at the time of the alleged sale as well as the sudden recollection of a not otherwise noteworthy sale three years before. These 'memories' are revealing in relation to Mr Gauci's determination to be as helpful as possible, but not tying his memories into any strong factual basis.

More directly, however, they throw doubt on the identification evidence. There is no information on who all these men were or how many different individuals the descriptions refer to. It is also of note, however that I can find no direct, overt link by

Mr Gauci to indicate that he believes it was the same man in these separate sightings (e.g. that the man who bought the dresses had previously bought the blankets).

The multiple sightings and his lack of certainty in his descriptions of them indicate an unclear memory for the man. The alleged sightings would probably have provided further confusion. They also seem to imply a great readiness to identify various similar individuals as the man in question. In such circumstances, it seems highly likely that Mr Gauci would be vulnerable to an increasingly recognised phenomenon in eyewitness identification referred to as ‘unconscious transference’<sup>69,70</sup>. Thus any of the alleged identifications could have been of people that Mr Gauci had seen in some other capacity or even through media exposure, who he had then unwittingly assigned to the incident in question.

As outlined earlier it is also the case that eyewitness identification is not immune as may be the lay expectation, but rather can be influenced by aspects of the administration process.

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<sup>69</sup> In a 2004 report to the House of Delegates, the Criminal Justice section of the American Bar Association describes ‘unconscious transference’ in the following terms:

‘Unconscious transference is also a significant problem in which an eyewitness is familiar with the suspect from some event other than the crime (perhaps, for example, because both occasionally use the same subway station), does not recall why he knows the suspect, and therefore assumes that he knows the suspect because the suspect is the perpetrator’.

<sup>70</sup> In addressing how the procedures adopted by the police during the detection process can introduce bias and unwittingly encourage positive identifications, for example, the 1985 report by the Australian Law Reform Commission cites a case involving a Commission Research Officer (*p.247*); after witnessing an assault she spent a day at police headquarters where she viewed scores of photographs of convicted criminals. During the day, on several different occasions, police officers presented to her a photograph of the same person interspersed among other photographs. Research suggests that ‘Unconscious Transference’ is likely to occur in such circumstances. Although a positive identification of the offender might not be made on first sight of the photograph, the chances of positive identification can be expected to increase on a subsequent viewing. By the time that a photograph is presented for the 3<sup>rd</sup> or 4<sup>th</sup> time, the likelihood of a positive identification is high. This factor may be heightened where a subtle shift of emphasis takes place during the investigation. In the experience of the research officer the police give a directive at the outset to ‘point out anyone who looks like the offender’. Such a statement obviously aims to assist the police in the detection process. However, by the time a photograph is shown for the third time the question changed to ‘is this the fellow?’ The entire purpose of the procedure has changed from detection to identification.

I do not have full information on the administration process but there are indications of inappropriate influence in the present case. The statements I examined detail the following conversation between Mr Gauci and one of the Police Officers (Identification; 15<sup>th</sup> February 1991; A95):

*“I looked at every photograph on the card, and I counted a total of 12 photographs on the card. The first impression I had was that all the photographs were of men younger than the man who bought the clothing. I told Mr. Bell this. I was asked to look at all the photographs carefully and to try and allow for any age difference”.*

Such a conversation implies that the suspect is present in the set of pictures as well as acting as a prompt to Mr Gauci that it was appropriate to turn his hesitant comment on Mr Megrahi’s resemblance (as opposed to identification) into an actual identification:

*“I would say that the photograph at 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 ten years or more older and he would look like the man who bought the clothes. It has been a long time now and I can only say that this photograph (number 8) resembles the man who bought the clothing, but it is younger”.* (15<sup>th</sup> February 1991; A96).

A report presented by the Australian Law Reform Commission in 1985 states that when a witness responds with a statement like ‘I’m not really sure, but number 5 sort of looks like him’, the witness is giving a response that is obviously closer to a guess than a confident report, but, unfortunately, this guess has all too often graduated over time to the standing of a confident observation.

Loftus notes that:

‘Guessing can be dangerous. When a witness is uncertain, guessing can fill gaps in memory. Later, when searching his memory, a witness may incorrectly ‘recall’ something that had earlier merely been a guess but is now part of memory. Furthermore, while an initial guess may be offered with low confidence, later, when the witness mistakes the guess for a real memory, the confidence level can rise. This seems to occur because a witness is now ‘seeing’ an item that he himself has constructed in memory’.

These observations have notable implications, for example; for the use of later identifications provided by a witness in court.

### **Dock Identification**

Quite apart from the above factors, the psychological research does suggest that any identification in the dock should be treated with caution. One central challenge to all identification evidence is to remove any influence that may distort what the witness remembers. Psychologists often refer to this as the witness being influenced by ‘suggestion’, but the Devlin Report<sup>71</sup> draws direct parallels with the process of ‘leading questions’<sup>72</sup>. If the witness is overtly or indirectly asked to agree whether or not a particular individual is the person in question then, for many people who feel the pressure of the situation, the implication is that this indeed is the person. Most jurisdictions use some sort of line-up to avoid any implicit identification of the offender, but the one context in which this cannot be avoided is when a defendant is

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<sup>71</sup> Devlin, Hon. Lord Patrick (1976) ‘Report to the Secretary of State for the Home Department of the Departmental Committee of Evidence of Identification in Criminal Cases’. Home Office, HMSO.

<sup>72</sup> A major objection which can be leveled against dock identifications is that it is, in essence, a response to a form of leading question. The proper form of question is ‘Do you see the person referred to in court?’ It is obvious that the expected or ‘correct’ answer to such a question is a positive identification (Australian Law Reform Commission Report, 1985). As Gobbo et al. (1979) point out, this is because of the expectation of the witness. The expectation that the person in the dock is indeed the criminal is likely to affect the recognition process. Thus a positive identification is very likely – Gobbo, J.A., Byrne, D. & Heydon, J.D. (1979) ‘Cross on Evidence’ (2<sup>nd</sup> Edition). Butterworths, Sydney.

standing in the dock. It is for this reason that there are pressures in many jurisdictions not to allow dock identifications to be primary evidence<sup>73</sup>.

The process of identification made by Mr Gauci during the trial therefore is potentially unsafe given the pressures of the situation and the earlier priming from other events. But when taken together with priming from the earlier exposure to a picture of the person who was then indicated as the likely culprit the dock identification would be even more unsafe.

### **Cross-racial identification.**

The research literature discussed above suggests that people are usually able to identify the race of a person. However these studies tend to be working on crude distinctions between, for example, Mexican, European, and African. Unless a person has considerable knowledge of different ethnic groups it seems unlikely that he could tell one African group from another or, more importantly in this case, one Arab group from another.

It is not clear why Mr Gauci thought the person buying clothes from him was Libyan, other than the possibility that the most common Arab group who visit his shop are drawn from that country. It was not established if he had much experience of other Arab groups such as Palestinians, say, or Egyptians.

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<sup>73</sup> In relation to the unreliability of dock identifications, Gobbo et al. (1979), see id; p. 22, observe that: 'it might be thought that in criminal cases there could not be better identification of the accused than that of a witness who gets into the box and swears that the man in the dock is the one that he saw [in relation to the crime]. Nevertheless, such evidence is suspect where there has been no previous identification of the accused by the witness. This is because it's weight is reduced by the reflection that, if there is any danger of resemblance between the man in the dock and the person previously seen by the witness, the witness may very well think to himself that the police must have got hold of the right person, with the result that he will be inclined to swear positively to a fact of which he is by no means certain.'

Beyond the identification of the particular ethnic group from which the purchaser was believed to have come there is the further problem of cross-racial identification. There is considerable evidence that people find it much more difficult to identify accurately people of different racial features to their own race than for people of different racial appearance.

In the present case we do not know the extent to which Libyan or Arab characteristics are different from those of Mr Gauci and his associates. The ease with which he can recognise people in general has not been explored, let alone his ability to distinguish between people that he thinks of as having a distinct ethnic origin.

We do not know how the possibility of the purchaser in question being Libyan arose. But if it were spontaneous it does mean that Mr Gauci uses this classification to characterise people. This indicates that it is a salient aspect of people for him and may thus be associated with stereotyping such that when shown a suspect or set of photographs he will seek someone who looks to him as being Libyan. Without a lot more detailed examination of Mr Gauci it is difficult to be certain of what exactly is involved in identifying the shopper as Libyan.

In summary of the identification testimony:

- It is unlikely Mr Gauci would be able to identify one customer two and a half years after the initial, sighting which was unremarkable at the time. It is widely understood that in most cases memory becomes worse over time and is more open to distortion and external influence. Also the person being identified will undergo changes in his appearance that will make him less recognisable.
- In the present case the earliest identification was many months after the crucial incident in the shop. The final line-up and identification in court was over 10

years later. It does not take a research team of psychologists to point out that unless the person in question was extremely well known to the witness, or had come to the attention of the witness in highly emotional circumstances (such as, for example, may have been in the case for a concentration camp guard), or had some very distinct features, such as a scar or tattoo then it is rather unlikely that he would still be clearly recognised.

- The subsequent other positive identifications suggests that his memory for the person was not distinct.
- It is possible that any identifications were influenced by unconscious transference.
- His eventual selection of Mr Megrahi is likely to have been primed by the police procedure.
- Having been primed, the identification that Mr Gauci made in court could have been influenced by the previous experience of picking Mr Megrahi from photographic line-ups.

Therefore Mr Gauci's identification of Mr Megrahi could have been influenced by a range of known psychological processes that the US courts now recognise as having been influential in previous miscarriages of justice<sup>74</sup>.

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<sup>74</sup> A number of much publicised cases illustrate the serious danger of wrongful convictions and the impact of the fallibility of eyewitness testimony throughout the legal process. For example (detailed in the Australian Law Reform Commission Report of 1985, in '18: Eyewitness Testimony'); *Beck's Case* – one of the most notorious English cases was that of Alfred Beck, who was picked out in identification parades by 12 women, served seven years, and then was released. As the offences continued he was again picked out by four women in a line-up, was convicted, and was awaiting sentence when the real culprit was finally apprehended. Beck's case led to the establishment of the English Court of Criminal Appeal in 1908; *Slater's Case* – Another notorious case was that of Oscar Slater, who served 18 years for murder owing to a wrongful identification. Two persons identified Slater as the man leaving the house after a murder, and 12 others identified him as having earlier kept watch on the house, but only after witnesses had seen him in custody before identifying him. Slater's case led to the establishment of the Scottish counterpart of the Court of Criminal Appeal in 1926; *Dougherty's Case* – In 1972 Luke

## SUMMARY OF TESTIMONY EVALUATION

Examination of the evidence in detail and the underlying memory processes implied by the different components of this evidence, calls into question the likely validity of Mr Gauci's testimony on when the alleged incident occurred, the purchases made, the behaviour of the customer and who the customer was (identification evidence). Consideration of this in sum does lead me to doubt the basis of Mr Gauci's memory in a single, actual incident.

This supports my general opinion that, in the absence of any particular salient characteristics, a witness would not be anticipated to have a clear memory for one particular incident out of many, ten months later.

Mr Gauci has been prepared to show considerable commitment to providing this evidence not only through his initial preparedness to get involved, the time he has spent with police and his willingness to go against the wishes of his family who did not want him to help the police, but also in terms of risking his fundamental credibility, both in his own and the eyes of others. The psychological theory of cognitive dissonance would suggest that, to balance these costs, Mr Gauci would feel compelled to provide evidence that was important in allowing police to secure a

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Dougherty was charged with shoplifting after two witnesses independently picked out his photograph from a police album and identified him as one of a term of shoplifters. He was also identified in the dock during the trial. Although he had an alibi, and no trace of either accomplice was found, Dougherty was convicted and sentenced to fifteen months imprisonment. The sentence was affirmed on appeal. Dougherty's case was taken up by 'Justice', an association of Lawyers concerned with the fair administration of justice. Acting on a submission from Justice the Home Secretary exercised his power to refer the case to the Court of Appeal for further consideration. The Court ordered Dougherty's immediate release on bail, and ultimately quashed his conviction; *Virag's Case* – In 1969 Laszlo Virag was charged with thieving from parking meter coin boxes, using a fire arm to resist arrest and wounding a police officer with intent to cause grievous bodily harm. Of 14 witnesses, eight identified Virag in a line-up; five of these eight were police officers. Three witnesses picked out someone else and the remaining three made no identifications. Identification evidence was the only evidence led against him. One police officer testified in court that 'his face is stamped on my memory.' Although Virag had an alibi, did not drive a car – the culprit had been involved in a car chase with police – and smoked a brand of cigarettes different from the brand smoked by the culprit, he was convicted and sentenced to ten years in prison. Whilst Virag was in prison, a second man was arrested and charged with thieving from parking meters. Further investigations indicated that it was he who had committed the earlier offences. Virag received a pardon. As a result of the wrongful convictions of Dougherty and Virag the Devlin Committee on evidence of identification in criminal cases was established.

conviction. Although he would honestly try to remember an event from the past, that the police now drew attention to, as time went on he would be more open to unwitting influence and priming in what he came to believe happened.

This all leads me to the view that the account he provides is constructed, unsuspectingly, in a desire to help police and may have been fed by an awareness of the seriousness of the case.

In my view, the account Mr Gauci provides is drawing on a variety of disparate recollections of different individuals, sales and customer behaviours, drawn together in an account underpinned by the recognised influences on memory.

## CONCLUSIONS

Any account of a relatively mundane event that happened once and is first called to mind a year or so after it happened, when there is no documentary evidence such as receipts to support it, is open to potential distortion. From what we know of the psychology of memory those distortions are likely to increase over the subsequent decade as various suggestions and explorations are conducted into the alleged event. These problems apply to all aspects of the event, including the subsequent identification of a person who was considered central to the event who had not been seen for a number of years.

The difficulty in relying on Mr Gauci's testimony is thus not only the weaknesses in his identification of the Mr Megrahi but also in whether the alleged episode in the shop ever occurred. That Mr Gauci remembers customers of about 50 years old of medium build and Arab ethnicity buying clothing in his shop seems quite probable but whether one such individual was a customer in late 1988 is less safe from the evidence he has provided.

A handwritten signature in black ink on a light-colored background. The signature is cursive and appears to read "David V. Canter".

#### STATEMENT OF TRUTH

I believe that the facts I have stated in this report are true and that the opinions I have expressed are correct.

Professor David V Canter

## **Annex A**

### **Reports Drawn Upon**

- A1: Statement of Anthony Gauci: 30<sup>th</sup> January 1990
- Statement taken by D.C. Crawford at Maltese Police Headquarters. Quote taken from page 1, 4<sup>th</sup> paragraph of statement.
- A2: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 3, 2<sup>nd</sup> paragraph of statement.
- A3: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 3, middle of 2<sup>nd</sup> paragraph of statement
- A4: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Initial statement made by Mr Gauci, taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Mr Gauci lists the items that the purchaser bought and the prices of each on page 10 of the statement.
- A5: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Initial statement made by Mr Gauci, taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 5, 3<sup>rd</sup> paragraph of statement.

- A6: Statement of Anthony Gauci: 5<sup>th</sup> March 1990
- Statement taken by D.S. Byrne and D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 1 and the 1<sup>st</sup> paragraph of page 2 of statement.
- A7: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 2, 3<sup>rd</sup> paragraph of statement.
- A8: Pages 9 and 10 of Transcript of Mr Gauci's Testimony in Court.
- This example is taken from the point in the proceedings where Mr. Campbell is asking Mr Gauci questions relating to the date that the clothing was purchased.
- A9: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 7, 3<sup>rd</sup> paragraph of statement.
- A10: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 7, final paragraph of statement.
- A11: Statement of Anthony Gauci: 5<sup>th</sup> March 1990
- Statement taken by D.S. Byrne and D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 3, final paragraph and page 4, first paragraph of statement

- A12: Statement of Anthony Gauci: 4<sup>th</sup> November 1991
- Statement taken by D.C.I. Bell at Maltese Police Headquarters at 1930hrs (location not specified). Quote taken from page 2, 3<sup>rd</sup> paragraph of statement.
- A13: Statement of Anthony Gauci: 4<sup>th</sup> November 1991
- Statement taken by D.C.I. Bell at Maltese Police Headquarters at 1930hrs (location not specified). Note added at end of statement by interviewing officer (bottom of page 3).
- A14: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 5, 3<sup>rd</sup> paragraph of statement.
- A15: Statement of Anthony Gauci: 30<sup>th</sup> January 1990
- Statement taken by D.C. Crawford at Maltese Police Headquarters. Quote taken from page 4, 2<sup>nd</sup> paragraph of statement.
- A16: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Items detailed throughout statement, which was taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'.
- A17: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 3, 2<sup>nd</sup> paragraph of statement.

- A18: Statement of Anthony Gauci: 25<sup>th</sup> September 1989
- Items detailed throughout statement, which was taken by D.C.I. Bell and Inspector Scicluna (location not specified).
- A19: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 5, 3<sup>rd</sup> paragraph of statement.
- A20: Statement of Anthony Gauci: 30<sup>th</sup> January 1990
- Statement taken by D.C. Crawford at Maltese Police Headquarters. Quote taken from page 4, 2<sup>nd</sup> paragraph of statement.
- A21: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 4, 5<sup>th</sup> paragraph of statement.
- A22: Statement of Anthony Gauci: 4<sup>th</sup> October 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 2, 1<sup>st</sup> paragraph of statement.
- A23: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 1, 4<sup>th</sup> paragraph and page 2, 1<sup>st</sup> paragraph of statement.

- A24: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 5, 1<sup>st</sup> paragraph of statement.
- A25: Statement of Anthony Gauci: 19<sup>th</sup> September 1989
- Additional statement taken by D.C. Crawford at Mr Gauci's shop, 'Mary's House'. Quote taken from page 1, 1<sup>st</sup> paragraph of statement.
- A26: Statement of Anthony Gauci: 26<sup>th</sup> September 1989
- Statement taken by D.C. Crawford at Maltese Police Headquarters. Whole statement discusses the cardigan.
- A27: Statement of Anthony Gauci: 30<sup>th</sup> January 1990
- Statement taken by D.C. Crawford at Maltese Police Headquarters. Quote taken from page 1, 4<sup>th</sup> paragraph of statement.
- A28: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 3, 2<sup>nd</sup> paragraph of statement.
- A29: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 5, 3<sup>rd</sup> paragraph of statement.
- A30: Statement of Anthony Gauci: 5<sup>th</sup> March 1990

- Statement taken by D.S. Byrne & D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 1, 2<sup>nd</sup> paragraph of statement.
- A31: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 6, 1<sup>st</sup> paragraph of statement.
- A32: Statement of Anthony Gauci: 30<sup>th</sup> January 1990
- Statement taken by D.C. Crawford at Maltese Police Headquarters. Quote taken from page 5, 1<sup>st</sup> paragraph of statement.
- A33: Statement of Anthony Gauci: 31<sup>st</sup> January 1990
- Statement taken by D.C. Crawford at Mr Gauci's shop, 'Mary's House'. Quote taken from page 1, 4<sup>th</sup> paragraph of statement.
- A34: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 10, additional paragraph at bottom of statement.
- A35: Statement of Anthony Gauci: 5<sup>th</sup> March 1990
- Statement taken by D.S. Byrne & D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 1, 4<sup>th</sup> paragraph of statement.
- A36: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 2, 3<sup>rd</sup> paragraph of statement.
- A37: Statement of Anthony Gauci: 19<sup>th</sup> September 1989

- Additional statement taken by D.C. Crawford at Mr Gauci's shop, 'Mary's House'. Quote taken from page 1, 2<sup>nd</sup> paragraph of statement.
- A38: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 3, 3<sup>rd</sup> paragraph of statement.
- A39: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Items detailed throughout initial statement, which was taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'.
- A40: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 6, 2<sup>nd</sup> paragraph of statement.
- A41: Statement of Anthony Gauci: 19<sup>th</sup> September 1989
- Additional statement taken by D.C. Crawford at Mr Gauci's shop, 'Mary's House'. Quote taken from page 1, 2<sup>nd</sup> paragraph of statement.
- A42: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 3, 3<sup>rd</sup> paragraph of statement.
- A43: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 4, 1<sup>st</sup> paragraph of statement.
- A44: Statement of Anthony Gauci: 1<sup>st</sup> September 1989

- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 5, 1<sup>st</sup> paragraph of statement.
- A45: Statement of Anthony Gauci: 19<sup>th</sup> September 1989
- Additional statement taken by D.C. Crawford at Mr Gauci's shop, 'Mary's House'. Quote taken from page 1, 1<sup>st</sup> paragraph of statement.
- A46: Statement of Anthony Gauci: 30<sup>th</sup> January 1990
- Statement taken by D.C. Crawford at Maltese Police Headquarters. Quote taken from page 1, 2<sup>nd</sup> paragraph and page 2, 1<sup>st</sup> paragraph of statement.
- A47: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 5, 3<sup>rd</sup> paragraph of statement.
- A48: Statement of Anthony Gauci: 21<sup>st</sup> February 1990
- Statement taken by D.C. Byrne (location not certain). Quote taken from page 2, 3<sup>rd</sup> paragraph of statement.
- A49: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 10, additional paragraph at bottom of statement.
- A50: Statement of Anthony Gauci: 21<sup>st</sup> February 1990
- Statement taken by D.C. Byrne (location not certain). Quote taken from page 2, 3<sup>rd</sup> paragraph and page 3, 1<sup>st</sup> paragraph of statement.
- A51: Statement of Anthony Gauci: 5<sup>th</sup> March 1990

- Statement taken by D.S. Byrne & D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 1, 4<sup>th</sup> paragraph of statement.
- A52: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 3, 3<sup>rd</sup> paragraph of statement.
- A53: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 3, 3<sup>rd</sup> paragraph of statement.
- A54: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 4, 6<sup>th</sup> paragraph of statement.
- A55: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 9, 2<sup>nd</sup> paragraph of statement.
- A56: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 5, 3<sup>rd</sup> paragraph of statement.
- A57: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 2, 3<sup>rd</sup> paragraph of statement.
- A58: Statement of Anthony Gauci: 10<sup>th</sup> September 1990

- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 2, 3<sup>rd</sup> paragraph of statement.
- A59: Statement of Anthony Gauci: 5<sup>th</sup> March 1990
- Statement taken by D.S. Byrne & D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 1, 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs of statement.
- A60: Statement of Anthony Gauci: 22<sup>nd</sup> February 1990
- Statement taken by D.C. Byrne (location not certain). Quote taken from page 3, 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs of statement.
- A61: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 5, 3<sup>rd</sup> paragraph of statement.
- A62: Statement of Anthony Gauci: 21<sup>st</sup> February 1990
- Statement taken by D.C. Byrne (location not certain). Quote taken from page 2, 3<sup>rd</sup> paragraph of statement.
- A63: Statement of Anthony Gauci: 5<sup>th</sup> March 1990
- Statement taken by D.S. Byrne & D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 1, 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs of statement.
- A64: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 3, 2<sup>nd</sup> paragraph of statement.

- A65: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 3, 2<sup>nd</sup> paragraph of statement.
- A66: Statement of Anthony Gauci: 30<sup>th</sup> January 1990
- Statement taken by D.C. Crawford at Maltese Police Headquarters. Quote taken from page 2, 2<sup>nd</sup> paragraph of statement.
- A67: Statement of Anthony Gauci: 13<sup>th</sup> September 1989
- Statement taken by D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 3, 2<sup>nd</sup> paragraph of statement.
- A68: Statement of Anthony Gauci: 25<sup>th</sup> September 1989
- Statement taken D.C.I. Bell and Inspector Scicluna (location unclear). Quote taken from page 3, 1<sup>st</sup> paragraph of statement.
- A69: Statement of Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 3, 1<sup>st</sup> paragraph of statement.
- A70: Statement of Anthony Gauci: 15<sup>th</sup> February 1991
- Statement taken by D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 2, 2<sup>nd</sup> paragraph of statement.
- A71: Statement of Anthony Gauci: 1<sup>st</sup> September 1989

- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 6, 2<sup>nd</sup> paragraph of statement.
- A72: Statement of Anthony Gauci: 25<sup>th</sup> September 1989
- Statement taken by D.C.I. Bell and Inspector Scicluna (location unclear). Quote taken from page 3, 1<sup>st</sup> paragraph of statement.
- A73: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 6, 2<sup>nd</sup> paragraph of statement.
- A74: Statement of Anthony Gauci: 25<sup>th</sup> September 1989
- Statement taken by D.C.I. Bell and Inspector Scicluna (location unclear). Quote taken from page 2, 5<sup>th</sup> paragraph and page 3, 1<sup>st</sup> paragraph of statement.
- A75: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 6, 2<sup>nd</sup> paragraph of statement.
- A76: Statement of Anthony Gauci: 25<sup>th</sup> September 1989
- Statement taken by D.C.I. Bell and Inspector Scicluna (location unclear). Quote taken from page 3, 1<sup>st</sup> paragraph of statement.
- A77: Statement of Anthony Gauci: 1<sup>st</sup> September 1989
- Statement taken by D.C.I. Bell at Mr Gauci's shop, 'Mary's House'. Quote taken from page 9, 2<sup>nd</sup> paragraph of statement.

- A78: Identification made by Anthony Gauci: 15<sup>th</sup> February 1991
- Statement taken by D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 2, 3<sup>rd</sup> paragraph and page 4, 1<sup>st</sup> paragraph of statement.
- A79: Identification made by Anthony Gauci: 14<sup>th</sup> September 1989
- Statement taken by D.S. Armstrong at Maltese Police Headquarters. Quote taken from page 1, last paragraph and page 2, first paragraph of statement.
- A80: Identification made by Anthony Gauci: 10<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 6, 5<sup>th</sup> paragraph of statement.
- A81: Identification made by Anthony Gauci: 5<sup>th</sup> March 1990
- Statement taken by D.S. Byrne & D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 3, 2<sup>nd</sup> paragraph of statement.
- A82: Identification made by Anthony Gauci: 15<sup>th</sup> February 1991
- Statement taken by D.C.I. Bell at Maltese Police Headquarters. Details the identification of Mr Megrahi made by Mr Gauci on this date.
- A83: Identification Parade Report: 11<sup>th</sup> April 1999
- Conducted by D.C. Watson and D.I. Wilson at Camp Van Zeist in The Netherlands. Refer, in particular, to page B 2/3 of report.

- A84: Photo I.D.: 14<sup>th</sup> September 1989
- Statement taken by D.S. Armstrong at Maltese Police Headquarters. Quote taken from page 1, last paragraph and page 2, first paragraph of statement.
- A85: Photo I.D.: 26<sup>th</sup> September 1989
- Statement taken by D.C. Crawford at Maltese Police Headquarters.
- A86: Freeze-Frame Identification: 2<sup>nd</sup> October 1989
- Identity of person or persons conducting identification not specified. Took place at Maltese Police Headquarters.
- A87: Photo I.D.: 6<sup>th</sup> December 1989
- Details of I.D. provided by the statements of D.C.I. Bell and D.C. Crawford of this date.
- A88: Identification of Abu Talb from Newspaper Article: 5<sup>th</sup> March 1990
- Statement taken by D.S. Byrne and D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 3, 2<sup>nd</sup> paragraph of statement.
- A89: Photo I.D.: 31<sup>st</sup> August 1990
- Statement taken D.C.I. Bell at Maltese Police Headquarters.
- A90: Identification made by Anthony Gauci: 10<sup>th</sup> September 1990

- Statement taken by D.C.I. Bell and D.S. Byrne at Maltese Police Headquarters. Quote taken from page 6, 5<sup>th</sup> paragraph of statement.
- A91: Identification made by Anthony Gauci: 15<sup>th</sup> February 1991
- Statement taken by D.C.I. Bell at Maltese Police Headquarters. Details the identification of Mr Megrahi made by Mr Gauci on this date.
- A92: Statement of Anthony Gauci: 13<sup>th</sup> September 1990
- Statement taken by D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 2, 2<sup>nd</sup> paragraph of statement.
- A93: Statement of Anthony Gauci: 4<sup>th</sup> November 1991
- Statement taken by D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 1, 3<sup>rd</sup> paragraph of statement.
- A94: Statement of Anthony Gauci: 21<sup>st</sup> February 1990
- Statement taken by D.C. Byrne (location unclear). Quote taken from page 2, 3<sup>rd</sup> paragraph.
- A95: Statement of Anthony Gauci: 15<sup>th</sup> February 1991
- Statement taken by D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 2, 2<sup>nd</sup> paragraph of statement.
- A96: Statement of Anthony Gauci: 15<sup>th</sup> February 1991
- Statement taken by D.C.I. Bell at Maltese Police Headquarters. Quote taken from page 2, 3<sup>rd</sup> paragraph and page 3, 1<sup>st</sup> paragraph of statement.

## **Annex B**

### **Report on Identification Experiment for Lockerbie Case**

The principle aim of the detailed experiment was to establish whether a picture of Mr Megrahi that was presented to Mr Gauci in an actual photo identification line-up (re: the positive identification of Mr Mergrahi by Mr Gauci on the 15<sup>th</sup> February 1991) was more likely to be selected than any of the other 11 fill-ins presented in that particular line-up and thus whether the line-up might have been biased towards Mr Megrahi. This was assessed by asking 56 respondents which of the 12 individuals pictures they thought was most likely to be the person responsible for the Lockerbie bombing, and simply tallying the number of occasions on which the picture of Megrahi (located in position no. 8 in photospread) was selected. The proportion of instances in which Mr Megrahi was identified was subsequently compared with those for each of the other 11 line-up members.

A second reason for the presented work was to determine if the interviewer knowing which member of the line-up the suspect is might influence the identification responses gained: There is considerable research detailing the impact of non-verbal cues and feedback from those conducting line-ups or identifications on the selection of suspects (summarised in G.L. Wells & E.F. Loftus (Eds.) '*Eyewitness Testimony: Psychological Perspectives*'. Cambridge: Cambridge University Press). Line-up administrators may inadvertently communicate to a witness their knowledge of the suspect, which may influence the subsequent identification(s) of that witness. This could be relevant in the present case as, although we do not have details of the exact line-up procedures employed, we know that the police administering the line-up that Mr Gauci took part in regarded Mr Megrahi as the suspect and viewed the successful outcome him being selected.

The influence of the line-up administrator on witness identifications can be tested using a double-blind procedure, where the experimenter does not know who the suspect is and consequently does not have any expectations as to the outcome of the identification. In the present experiment two different line-up administrators were used – one who knew that Mr Megrahi was in position 8 and who was told that he was the man responsible for the Lockerbie bombing, and another who had no knowledge about the presence of Mr Megrahi or the composition of the line-up. Cross-tab frequencies and chi-square analysis was used to establish whether more respondents selected Mr Megrahi from the line-up in the 'suspect known' condition, where the line-up administrator believed Mr Megrahi was responsible and might inadvertently be communicating knowledge of this, than in the 'suspect not known' condition.

## **Methodology**

### *Line-Up Administrators:*

2 interviewers or 'line-up administrators' were used, one who knew that Mr Megrahi was the suspect and was located in position 8 and one who knew nothing about the composition of the line-up. The instructions given to each were as detailed below.

Each line-up administrator was provided with; an instruction of what to tell participants; a sheet containing the photographs from the line-up, numbered sequentially, which they showed to respondents and asked them to make their selection from; and a table in which to record the responses provided.

### *Instruction given to Line-Up Administrator in 'Suspect Not Known' Condition:*

'On the sheet that you have been given are photographs of 12 men, one of which is believed to be the man responsible for the Lockerbie bombing. What we would like you to do is to ask people to look at the pictures and decide which of the people they think is most likely to be the man who did it. Please record the number that each respondent picks as the most likely culprit on the sheet provided.'

### *Instruction given to Line-Up Administrator in 'Suspect Known' Condition:*

'On the sheet that you have been given are photographs of 12 men, one of which is the man believed to be responsible for the Lockerbie bombing. This is the man in position number 8. What we would like you to do is to ask people to look at the pictures and decide which of the people they think is most likely to be the man who did it. Please record the number that each respondent picks as the most likely culprit on the sheet provided. Hopefully most people should correctly identify the suspect from the line-up.'

### *Respondents:*

56 individuals each viewed the line-up and selected the picture of person that they thought was most likely to be the man responsible for the Lockerbie bombing. The ages of the respondents ranged from 18 to 63.

### *Instructions given to Respondents (by 'Line-Up Administrators'):*

‘One of the men pictured here is thought to be the person responsible for the bombing of the plane over Lockerbie in Scotland, in 1988. Could you please look at all of the pictures and pick the one of the man that you think that it is?’

### Results and Conclusions

Of the 56 respondents, 15 (27%) selected Mr Megrahi (photograph number 8) from the line-up. This proportion was higher than for any of the line-up members.

However, Table 1 (below), which shows the frequencies of the responses in the two different line-up administrator conditions, highlights the fact that all of the respondents who selected Mr Megrahi came from the ‘Suspect Known’ condition. The implications of this are discussed below.

Table 1: Frequencies in Photo I.D. Study

		SuspectID		Total
		Someone other than Suspect was Selected from Line-up	Suspect was Selected from Line-up	
Condition	Interviewer Did Not Know Who Suspect Was	20	0	20
	Interviewer Knew Who Suspect Was	21	15	36
Total		41	15	56

NB: If the selections of the respondents in the ‘Suspect Unknown’ condition are considered then the picture of Mr Megrahi was not selected at all, which suggests that the line-up was not biased towards Mr Megrahi; i.e. that he was no more likely to be selected than any other line-up members purely on the basis of the picture used.

The findings presented suggest that the knowledge of a line-up administrator has a significant effect on the likelihood that a target suspect will be selected:

Table 2. shows the chi-square analysis of the number of occasions in which Mr Megrahi was selected from the line-up in both the ‘Suspect Known’ and ‘Suspect Not Known’ conditions. There was a significant difference between the two

conditions in this respect, with almost half of those in the ‘Suspect Known’ condition selecting the picture of Mr Megrahi from the line-up. As stated previously, none of those in the ‘Suspect Not Known’ condition selected his picture.

Table 2: Chi Square Analysis

	Value	df	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	11.382(b)	1	.001		
Continuity Correction(a)	9.357	1	.002		
Likelihood Ratio	16.183	1	.000		
Fisher's Exact Test				.000	.000
Linear-by-Linear Association	11.179	1	.001		
N of Valid Cases	56				

In summary, the primary conclusion from the present study is that whilst the photographic line-up composition does not appear to have been biased towards Mr Megrahi, the knowledge of the suspect by the person administering the line-up has been shown have a significant impact on the identifications made. Those who were asked to make their selection by the administrator in the ‘Suspect Known’ condition did pick the picture of Mr Megrahi far more frequently, suggesting that the administrator did in some way communicate their knowledge and beliefs, providing subtle cues that the respondents picked up on.

This point should be taken into consideration when examining the reliability of the identifications made by Mr Gauci throughout the Lockerbie enquiry.

Report prepared: 13<sup>th</sup> October 2006

## Annex C

### Tables of Inconsistencies in the Testimony of Anthony Gauci

**Table 1: Inconsistencies in Mr. Gauci’s Evidence from Initial Statement (01.09.89)**

Initial Position (01.09.89)	Contradictions
<p>Items Bought</p> <p>Anglia jacket, 2 pairs of trousers, 3 pairs of pajamas, 1 umbrella, 1 baby-gro, 1 woollen cardigan (A16).</p>	<p>(10.09.90 – A17)</p> <p>About three weeks ago I was cleaning boxes out in the shop and I remember that they had contained a slalom shirt and a blue and white light denim (texture) material shirt. I know that I sold you shirts like these and I now remember that the man who bought the clothing also bought a slalom shirt and a blue and white striped shirt.</p> <p>(25.09.89 – A18)</p> <p>Checked trousers, Herring-Bone trousers, pajamas, baby-gro and the jacket and umbrella</p> <p>(no cardigan)</p>
<p>Cost of Items</p> <p>Man paid in cash; Maltese pound notes – “I think it was 56 Maltese pounds” - Paid in Maltese 10 pound notes ‘and I gave him 4 pounds change’ (A19)</p>	<p>(30.01.90 – A20)</p> <p>“I have also remembered that the man who bought all of the stuff spent 77 Maltese pounds (142.59p), he gave me 8 x 10 Maltese pound notes and I gave him 3 Maltese pounds change. I think I said it was only 56 Maltese pounds before”.</p>
<p>Baby-Gro</p> <p>Blue-coloured with a sheep’s face on it, the type with boots (material covering the feet). (A21)</p>	<p>(04.10.89 – A22)</p> <p>Hands over a baby-gro which has a lamb on the front with a full body; “The baby-gro is from the original order from Big Ben. I accept that the lamb motif on the front were probably all the same”</p> <p>(10.09.90 – A23)</p>

	<p>I have been asked about the baby-gro that I sold the man which I initially thought only had a lamb's face motif on the front. When I was later interviewed I was shown a pink baby-gro with a full body motif of a lamb. At this time I accepted that this was probably the design of the baby-gro that I had sold the man. I can confirm that I am fairly certain that the baby-gro I sold the man had a full body lamb motif.</p>
<p>Cardigan</p> <p>Tartan, large size, red and black</p> <p>"The cardigan would have fitted this man. It was a two colour cardigan with big imitation leather, brown coloured buttons. I think six buttons" (A24).</p>	<p>(19.09.89 – A25)</p> <p>"One of [the items] he bought was a cardigan, different from the one I have already described but was beige or maybe darker colour. It is the same as the one that you now have except that it is not blue".</p> <p>(26.09.89 – A26)</p> <p>On 26<sup>th</sup> September 1989 I was shown two photographs of a brown coloured woolen article (cardigan) with a Puccini label. I can identify the cardigan as being the same as the one I sold to the man.</p>
<p>Shirts</p> <p>(not first statement, but earliest available example)</p> <p>(30.01.90 – A27)</p> <p>"That time when the man came, I am sure I did not sell him a shirt."</p> <p>"That man didn't buy any shirts for sure."</p>	<p>(10.09.90 – A28)</p> <p>"About three weeks ago I was cleaning boxes out in the shop and I remember that they had contained a slalom shirt and a blue and white light denim (texture) material shirt. I know that I sold you shirts like these and I now remember that the man who bought the clothing also bought a slalom shirt and a blue and white striped shirt."</p>
<p>Man Leaving and Returning to the Shop</p> <p>"He walked out of the shop with the umbrella which he opened up as it was raining. About 15 minutes later the same man came back into the shop. He was not carrying anything else that he had bought elsewhere" (A29).</p>	<p>(05.03.90 – A30)</p> <p>I now remember that when the man left my shop he walked downhill in Tower Road towards the seafront. At that time it was raining.</p> <p>About fifteen minutes later I was standing near the shop front when I saw a white Mercedes taxi driving up Tower Road. I could see that the man who had bought the clothing was seated in the front passenger seat of the taxi. I went back inside the shop, but before I did so I saw the taxi pull into the curb. I then saw the man get out of the front passenger seat and start walking towards my shop. I went to get his parcels and he came into the shop".</p>

<p>Description of Taxi</p> <p>White coloured Mercedes taxi. “I cannot recall anything in particular about the white Mercedes. This type of car is used as a taxi in Malta. I assume the man got into the taxi, it was an old type” (A31).</p>	<p>(30.01.90 – A32)</p> <p>“I can’t remember much more about the taxi, it was an old type Mercedes with the taxi sign on the inside of the windscreen”.</p> <p>(31.01.90 – A33)</p> <p>“I mention yesterday about the taxi sign on the Mercedes. The taxi sign was on the roof right above the windscreen, and not inside as I said yesterday”.</p>
<p>Man Getting Taxi</p> <p>‘I can’t state that the man entered the taxi, I can only say that he walked towards the car’ (A34).</p>	<p>(05.03.90 – A35)</p> <p>“I handed over the two parcels and the man left the shop walking back up the road to the taxi. He put both parcels on the back seat of the taxi before climbing back in to the front passenger seat. The taxi then drove off up Tower Road”.</p> <p>(10.09.90 – A36)</p> <p>“I asked if I could carry the parcels to his car and he said he had a taxi. The man then walked up to the taxi and he got into the front seat behind the driver. I can’t say anything more about the taxi, it’s just as I described to you, the old type”.</p>

**Table 2: Inconsistencies in Mr. Gauci’s Evidence from Court Testimony / Facts of the Prosecution’s Case**

<p><b>Testimony</b></p>	<p><b>Contradictions</b></p>
<p>Day/Date (Prosecution)</p> <p>He was able to tell [prosecutors] that he remembered a particular sale about a fortnight before Christmas 1988. His recollection was that the Christmas lights were just being put up. It was midweek, possibly Wednesday.</p>	<p>(19.09.89 – A37)</p> <p>“At Christmas time we put up the decorations about 15 days before Christmas, the decorations were not up when the man bought the clothing.”</p> <p>(10.09.90 – A38)</p> <p>‘It was a weekday, there were no Christmas decorations up as I have already said, and I believe that it was at the end of November’.</p>

<p>Items Bought (Prosecution)</p> <p>Amongst the items which the witness remembered selling were two pairs of Yorkie trousers, two pairs of striped pajamas, a tweed jacket, a baby-gro, two slalom shirts, two cardigans (one brown, one blue) and an umbrella.</p>	<p>(01.09.89 – A39)</p> <p>Anglia jacket, 2 pairs of trousers, 3 pairs of pajamas, 1 umbrella, 1 baby-gro, 1 woollen cardigan.</p> <p>(3 pairs of pajamas rather than 2, and only one cardigan. No shirts)</p>
<p>Height of Purchaser (Prosecution)</p> <p>He was below six feet ... he wasn't small.</p>	<p>(01.09.89 – A40)</p> <p>[The man was...] '6 foot or more in height'.</p>
<p>Day/Date (Court Transcripts)</p> <p>...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.</p> <p>I remember that there were Christmas lights.</p>	<p>(19.09.89 – A41)</p> <p>"At Christmas time we put up the decorations about 15 days before Christmas, the decorations were not up when the man bought the clothing."</p> <p>(10.09.90 – A42)</p> <p>'It was a weekday, there were no Christmas decorations up as I have already said, and I believe that it was at the end of November'.</p>
<p>Pajamas (Court Transcripts)</p> <p>He [the purchaser] bought two pairs [of], Striped [pajamas].</p>	<p>(01.09.89 – A43)</p> <p>In his original testimony Mr Gauci states that he sold the man 3 pairs of pajamas</p>
<p>Cardigans (Court Transcripts)</p> <p>The man bought two cardigans 'One was blue. The other one was a brownish colour.'</p>	<p>(01.09.89 – A44)</p> <p>In his original statement, Mr Gauci said that the man only bought 1 cardigan, and that it was 'Tartan, large size, red and black'. "The cardigan would have fitted this man. It was a two colour cardigan with big imitation leather, brown coloured buttons. I think six buttons".</p> <p>(19.09.89 – A45)</p> <p>"One of [the items] he bought was a cardigan, different from the one I have already described but was beige or maybe darker colour. It is the same as the one that you now have except that it is not blue".</p>

<p>Pullovers (Court Transcripts) Mr Gauci says that on the occasion the man bought the clothing he also bought 2 pullovers (?)</p>	<p>At no other point in his testimony does Mr Gauci say that the man who bought the clothing from him on the occasion in question bought a pullover.</p>
<p>Shirts (Court Transcripts) Mr Gauci says that on the occasion the man bought the clothing he bought two 'Slalom' shirts</p>	<p>(30.01.90 – A46) 'That time when the man came, I am sure I did not sell him a shirt.' 'That man didn't buy any shirts for sure.'</p>
<p>Mans Exit and Return to the Shop (Court Transcripts)  Q: After you made the sale to the Libyan man, did he leave the shop? A: Yes. He ordered a taxi from the Strand I think it's from the ferries he got it. He went downwards. He went down the hill. Q: So do I understand you to say that he left your shop to go to the taxi rank to get a taxi? A: Exactly. Q: And he came in the taxi to collect the clothing? A: Yes.</p>	<p>(01.09.89 – A47) "He walked out of the shop with the umbrella which he opened up as it was raining. About 15 minutes later the same man came back into the shop. He was not carrying anything else that he had bought elsewhere". (21.02.90 – A48) "He left the shop after having made the purchases and turned right down Tower Road. At that time he had the umbrella raised and open. When he returned to the shop he had come from the same direction but the umbrella was down because it had almost stopped raining and it was just drops coming down".</p>
<p>Taxi (Court Transcripts)  I took the things myself to the taxi.</p>	<p>(01.09.89 – A49) 'I can't state that the man entered the taxi, I can only say that he walked towards the car'. (21.02.90 – A50) "He walked towards the Mercedes taxi which was parked about 20 yards from the shop. I did not see him get into it. He had told me that he had a taxi waiting, and I assumed this was it". (05.03.90 – A51) "I handed over the two parcels and the man left the shop walking back up the road to the taxi. He put both parcels on the back seat of the taxi before climbing back in to the front passenger seat. The taxi then drove off up Tower Road".</p>

## Annex D

### Bibliography on Eyewitness Testimony

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