No. 5025/R/85.

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice.

Wednesday, 5th February, 19
1986

Before:

LORD JUSTICE LAWTON

MR. JUSTICE MARS-JONES

and

MR. JUSTICE MICHAEL DAVIES

Reference by the Home Secretary under Section 17(1)(a) of The Criminal Appeal Act 1966

R E G I N A

v.

ERNEST ADOLPHUS CLARKE

(Transcript of the Shorthand Notes of Marten Walsh Cherer Limited, Pemberton House, East Harding Street, London EC4A 3AS. Telephone Number: 01-583 7635. Shorthand Writers to the Court).

MR. H. POTTS Q.C. and MR. G. LOWE appeared on behalf of the Appellant.

MR. B. WALSH Q.C. and MR. A. LODGE appeared on behalf of the Crown.

J U D G M E N T

(As approved by Judge)

LORD JUSTICE LAWTON: This case comes before the court pursuant to a reference made by the Secretary of State, dated 12th August 1985, under section 17 of the Criminal Appeal Act 1968, which requires us to treat the reference as if it were an appeal notwithstanding that already there has been an unsuccessful application for leave to appeal. It follows that it is our statutory duty to apply the provisions of section 2(1)(a) of the 1968 Act which read as follows:

"Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think - (a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory". I stress the words "under all the circumstances of the case".

The appellant was convicted at Newcastle-upon-Tyne Crown Court on 13th June 1969 of the murder of a 16 year old girl named Eileen McDougall. The particulars of offence alleged that the murder had taken place between 17th and 24th January 1970. The appellant inevitably was sentenced to life imprisonment.

He applied for leave to appeal against his conviction. That application was refused by this court on 15th May 1981. On the hearing of that application it was submitted that the conviction should be quashed on two grounds: first, that the case should never have been left to the jury as the evidence showed that the appellant had no case to answer; secondly, that on the totality of the evidence the conviction was unsafe. On the hearing of the application in May 1981 no point was made that one of the exhibits, nanely Exhibit 26, ought never to have been admitted in evidence as it was irrelevant to the issues before the court.

After the refusal of the application on 15th May 1981 various persons became concerned about the conviction. They included the appellant's legal advisers, the British Section of the International Commission of Jurists, known as "Justice", and the British Broadcasting

Corporation. The concern arose because there were grave doubts about the relevance of Exhibit 28. It was thought that the prosecution had relied strongly on that exhibit to show a connection between the deceased girl and the appellant. Subsequent enquiries and examinations of the exhibit had shown that it could not have had any connection with the girl.

On 24th June 1979 some workmen employed at a fuel and chemical storage site in South Shields were cleaning out a large tank numbered one which normally contained just under a million gallons of petrol. In the course of their work they discovered a plastic bag and a package covered with canvas bound up with a kind of tape called gland packing. Out of the plastic bag fell part of a torso of a woman. In the package covered with canvas was the head of a woman. The police were informed and investigations started.

As the result of brilliant pathological, scientific and police work it was discovered that those parts of the body which had been found were of a young girl called Eileen McDougall. She had last been seen alive at about 7 a.m. on Sunday, 18th January 1970. The records showed that at the time of her disappearance she was 16 years of age, having reached that age in October 1969.

The uncontroverted facts about her were these. She had been born and bred in South Shields. She had left her home in December 1969 and had gone to Maidstone. Her brother brought her back to South Shields. She came back on Friday, 16th January 1969. She was unwilling to go back to stay with her mother. On the Friday night, the Saturday and up to the Sunday morning she was undoubtedly in South Shields. She was seen there by various friends and relatives. She had spent part of the night of Saturday and Sunday in the bed of a young man called Aitken. She had gone to his home at about 2 o'clock in the morning. She had attracted his attention. He had admitted her into the house. She had to leave at

7 a.m. in the morning because the young man's father became aware that she was in the house.

During that weekend she had been inadequately clad for cold weather. When she went to Aitken's house at about 2 a.m. on the Sunday morning she was wet. She had to put on her wet clothes when she left the house at about 7 a.m. As she did not want to go home to her mother's, she clearly on that Sunday morning required somewhere to shelter. It was a cold and wet day. The inference is that having left Aitken's house at about 7 a.m. she went somewhere to look for shelter. One of the problems in the case is: where did she go? She was never seen again after 7 a.m. In our judgment, the jury were entitled to infer that she had met her death on that Sunday.

Mr. Potts on behalf of the appellant submitted that there were other possibilities: that she might have left South Shields altogether on that day; she might have gone anywhere on that day. We find it inconceivable that she left South Shields on that day. She went somewhere on that day, and it is likely that she went to somebody who knew in South Shields. The appellant was someone whom she knew. She knew not only where he lived with his three young children but she also knew where he worked. On 19th January 1970 he was working at the Velva Liquids site in South Shields. That site was about three-quarters of a mile away from where he lived. Somehow she must have got, either dead or alive, to the Velva Liquids site.

This site has a number of tanks. Some are very large. No. 1 tank is one of the larger ones. There are a number of smaller tanks which contain not fuel oil but chemicals of one kind or another. The site adjoins the sea-wall and there is a jetty from the site into the sea, or more accurately the estuary of the River Tyne. The jetty is one against which ships can tie up to discharge fuel into the tanks. The evidence was that the water on the sea side of the jetty is about 32 fee

deep and generally there is a strong tide.

We have looked at a number of photographs of this site. It is clear from them that it is full of pipes and equipment of one kind or another. It must be difficult for anybody who does not know the site intimately to find his way around. The jury had a view of the site. They had that view after they had heard the prosecution suggest that whoever put the body into No. 1 tank must have had an intimate knowledge of the site. The jury were in a far better position than this court to size up the probabilities of that submission by the prosecution. In our judgment it is inconceivable that whoever put the body in No. 1 tank did not have an intimate knowledge of the site and how to get from ground level onto the top of No. 1 tank. Whoever put the body in that tank had to get onto the top of it. Access to the top was by a complicated way which included the use of a catwalk. It was not, it is clear from the evidence, a matter of just getting up a ladder at the side of the tank. Further, whoever put the body into the tank must have known at or about the time it was put in that access to the interior of the tank could be gained from its top.

There was another aspect of this matter which was of considerable importance and relied upon by the prosecution. When the torso and head were examined by the pathologist it was discovered that the bottom part of the body at the waistline had been severed from the top half. The bottom part would be the pelvic region which would have the legs attached to it. The pelvic region and the legs have never been found. They might have been thrown into the estuary; but articles of that kind when thrown into the sea when there is a strong tide often turn up on the shore not far away. Nothing of that kind happened with the pelvic region and the legs.

The head had been cut off. That is not an easy thing to do

because the spine has to be severed in the neck region. An attempt had been made to cut down the mid-line of the front of the torso. The inference was that whoever had cut the torso had intended to divide the torso into two parts. The attempt had not been successful. It is fairly easy with a sharp knife to cut the front of a torso, but it is difficult to deal with the back because of the presence of the spine. The evidence from the pathologist was that the cutting had been done with a sharp knife, probably by someone used to using a sharp knife. Then, for some reason, the cutting had not been taken any further. The reason probably on the evidence was that whoever cut up the body wanted to do the job quickly, and appreciated after severing the pelvic region and the legs and the head that cutting up the torso was going to take time. Obviously anyone cutting up a torso does not want to be disturbed, still less to be discovered doing it.

The prosecution submitted at the trial and in this court that the reason for dismembering the body and cutting up the torso was that it was the intention of the murderer, whoever he was, to burn the body. If the cutting up was done on the Velva Liquids site, getting rid of the body was comparatively easy because there was a boiler on the site with a furnace underneath it. At all material times, including Sunday, 18th January 1970, the boiler was working and the furnace was alight. The appellant later, in 1979 when he was interrogated by the police, himself suggested that anyone who wanted to get rid of a body on the site would put it in the furnace. Investigations showed that the pelvic region and the legs would go into the boiler through the aperture but the torso would not unless it was cut in two. The evidence showed that an attempt had been made to cut it in two. It had not been successfu After that whoever was the murderer had deposited it in No. 1 tank through the opening on the top.

This was very odd behaviour on the part of the murderer because

in the ordinary way if for some reason he had killed a young girl on the site, and he was a stranger to her, the obvious thing to have done was to take the body down to the jetty and throw it in the water where it would have been carried either upstream or out to sea according to the state of the tide. If the murderer were unknown to the girl and unknown to her friends there would be nothing to identify him with the murder. The prosecution invited the jury to say that the reason why the murderer dismembered the body in the way he did, was because he appreciated that if the body were found, he might be associated with the dead girl. In our judgment that seems to be a logical deduction from the behaviour in dismembering the body.

Another feature of this case which is worth mentioning is that the dismembering of the body seems to have been done on the site. The reason for saying that was that there were found embedded in the torso particles of clinker which were on the site. The inference was either that the torso had been put on top of clinker when it was being cut up or alternatively there was clinker in the plastic bag when the torso was put in. As I have already recounted, the pathologist's opinion was that whoever had dismembered the body had done so with a sharp knife and was used to handling such a knife.

These being the inferences to be drawn, in our judgment incontrovertibly from the known facts which were never in issue, the question at once arises: who could have done it for the motive which I have indicated. Clearly whoever did it must have known his way around this site in a very detailed way. Many people came to the site -- tanker drivers and the like -- but they would not have known their way around it. Secondly, as I have already said, whoever did it obviously felt that unless the body was destroyed, or effectively hidden, there was a danger of being associated with it. Whoever did it must have been used to using

a sharp knife. Whoever did it must have had access to the materials in which the torso and the head were wrapped. Whoever did it must have been an active and agile man able to carry the torso up to the top of tank no. 1. The appellant fits all these characteristics. He did know the site intimately. He had worked there for about four years before 18th January 1970. He did know the deceased girl. He knew her in circumstances of which the prosecution suggested he may not have been proud. He admitted to the police, indeed boasted, that his sexual appetite was for young girls between the ages of 16 and 20. The deceased was 16. He boasted to the police that he had had sexual intercourse with the deceased's sister and one of her friends, not once, but on a number of occasions. He denied that he had ever had sexual intercourse with the deceased girl. On the other hand, he accepted, in the end, that she had come with her sister on more than one occasion to babysit for him. There was evidence that although the babysitting had stopped in September or October 1969, thereafter the deceased girl had gone to his house. There was also evidence that she was experienced in sexual matters, and that she had the reputation in South Shields of being what one of the witnesses called "a teaser", namely someone who would lead a man to think she was willing to have sexual intercourse and then, at a somewhat advanced stage of the preliminaries, refuse. That was just the sort of girl who, if the appellant had made an advance to her, might have refused his advances at an advanced stage resulting in his losing his temper. Also the appellant was used to using sharp knives. He said so in evidence. He had been a sailor. Clearly he was also an agile man, capable of carrying up the torso from wherever it had been cut up -- it looks as if it was at ground level -- to the top of this very large tank.

The prosecution's case was that when all these matters were looked

at, there was only one conclusion: nobody else but this appellant could have committed the murder.

It was suggested at the trial, and in this court, that outsiders, strangers to the site, could have done it. That we find unbelievable. The jury, having regard to their view, must also have been of that opinion. It was suggested that the murder might have been committed elsewhere. If it was, somebody had to carry the torso through the streets of South Shi Why take it to the Velva Liquids site? Why cut it up or wrap it up, as the case may be, on the Velva Liquids site? All these are factors which would seem to point to the appellant.

When the case was before this court in May 1981 the main point made on the appellant's behalf was that there was a danger that these points were not enough. It was said that the case ought not to have been left to the jury because of the weaknesses in the inferences to be drawn. Alternatively, even if it was left to the jury, the verdict was unsafe. This court in May 1981 rejected those submissions. We say at once there was nothing in the point taken in May 1981 about there being no case to go to the jury. Clearly there was. It was for the jury to draw the inferences which the prosecution were saying could be drawn from the evidence. As the evidence stood in May 1981 it would be difficult to say that on that evidence the verdict was unsafe or unsatisfactory.

The position today is different from that in May 1981. The reason is because of a complication which has arisen out of the prosecution putting in evidence an article of clothing which was Exhibit 28. The circumstances in which that article of clothing got into evidence must now be recounted in some detail.

As I have already said, on 24th June 1979 the torso was found. Within a day or two there was considerable publicity in the North-East of England about the finding of the torso. At that time the appellant

was living in Hull. He had left South Shields in September 1970. He had been sacked from his job at Velva Liquids at the end of January 1979. The reason he had been sacked was that he had written a letter to his employers complaining about the promotion of one of his workmates, a man called Embleton, to the post of foreman. He had said in the letter that he thought a man called Fenwick ought to have got the job. The inference is that in that letter he made some rude comments about Embleton which led the employers to take the view (understandably if there were rude comments in the letter) that there was no prospect of harmonious working between the appellant and Embleton in the future. It is only fair to the appellant to say that having been sacked at the end of January, which was about ten days after the girl disappeared, he continued to live in South Shields.

The police carried out their investigations with speed, as did the pathologist. It was a very difficult investigation indeed. In the course of it the police interviewed all the people who had worked day by day at the Velva Liquids site. They all told the police that they had not known the deceased girl. The appellant was the only member of the staff who had known her and was known by other people to have known her. The consequence of all this was that on 12th July 1979 the police went to Hull suspecting that the appellant was the killer. They took him into police custody. On that day and subsequent days they interrogated him. They did so with great fairness. No complaint of any kind at any stage of these proceedings has been made against the police about the manner in which they interrogated the appellant.

In the course of that interrogation the appellant time and time

again denied that he had killed the girl. Nothing in the way of an admission came from him. But in the course of this long interrogation he did on a few occasions make some comments which were odd for an innocent man to make. He seemed to appreciate that the torso was that of Eileen McDougall before the prosecution revealed to him that it was. He also volunteered the information to which I have already adverted, that the sensible thing to have done for anyone who had killed the girl or the site was to put the body in the furnace.

Whilst the police were carrying out their investigations the appellant's former workmate Embleton started to dig a trench near tank No. 4 on the site. His employers saw him doing so and wanted to know why. As a result he made a statement to them. As a consequence of that statement they referred him to the police. He made a longish statement to the police, which can be put concisely in these terms. He said that shortly before the appellant was dismissed he (Embleton) had seen him behaving in an odd way near tank No. 4. He had been pouring some of the contents of that tank into a channel under it and he had been seen bricking up the end of that channel, seemingly to keep in the contents of the channel. He had also, for no reason at all that Embleton could see, filled up a trench which Embleton had started to dig. Embleton's view was that this conduct, which he said he had observed, was highly suspicious. The police also thought it was suspicious. They went to tank No. 4 and to the place where Embleton had said the appellant had filled up a trench for no apparent reason.

When the police went to tank No. 4 there seemed to be something odd about the brickwork at one end of the channel and it was full of a wax-like substance.

That wax-like substance, the scientific evidence later showed, had come from tank No. 4 and was a form of alcohol. Most of it seemed to have been what is known as stearyl alcohol, contaminated with traces of lauryl alcohol. There was a lot of it there. The police dug it out. There were five tons. When they went through this wax-like substance they discovered in it a number of pieces of cloth which were clearly rags and a woman's jumper which had been cut with a sharp knife down the back. That jumper was Exhibit 28. When they looked into the trench they found a girl's blouse there together with other bits of material.

The police sent the jumper (Exhibit 28) for examination by forensic scientists. It was discovered that it was impregnated with stearyl alcohol together with traces of lauryl alcohol. They called in a fashion expert who said the jumper was of a kind which was fashionable amongst young women in 1969 and was of a size which would have fitted the deceased girl. Up the back of it was a slit from top to bottom right in the middle of the back, which could have been the result of someone wishing to dismember the torso cutting it off the dead body. The prosecution took the view that the inference to be drawn from a combination of Embleton's evidence as to what he had seen the appellant doing and the finding of the jumper was some evidence to indicate, first, that the deceased girl had been wearing this jumper and, secondly, that the appellant had decided to hide it. That was what he had been doing, the prosecution had submitted at the trial, when he was seen by Embleton behaving in the way he did.

At the end of the appellant's interrogation the police referred him to this incident of suspicious behaviour. They had not at that time got all the information which they subsequently obtained about the jumper. The appellant denied that he had been doing anything of the

kind described by Embleton. So there was at that stage of the case a clear conflict of evidence between Embleton's recollection and the appellant's.

There was one piece of evidence, the significance of which does not appear to have been appreciated at the time. The police interviewed one of the directors of Velva Liquids, a Mr. Moon. He said that tank No. 4 had been filled with stearyl alcohol up to August 1969; thereafter lauryl alcohol. But the scientific evidence had been that it was impossible to say by scientific analysis when the jumper (Exhibit 28) had become impregnated with stearyl alcohol. The appellant's advisers retained a scientist to advise them. He agreed with the prosecution's experts that it was impossible by scientific evidence to say when the jumper had become impregnated. It does not seem to have been appreciated by anybody at the trial that if tank No. 4 had been full of stearyl alcohol up to but not beyond August 1969, then it was unlikely that the impregnation had taken place after August 1969.

At the trial the prosecution called Embleton. He gave evidence as to what he had seen the appellant doing in and around tank No. 4, and in relation to filling up the trench. He said that he could see no reason why the appellant was doing that which he recollected he had seen him doing. Of course his recollection was what he had seen 9½ years before. He had to accept that although the appellant had been doing something which was untoward, and wasteful from the employers' point of view, he had not reported it. When he was in the witness box he was vague as to when he had seen the appellant doing what he said he had seen. That was understandable having regard to the time which had elapsed; but his vagueness is striking. I quote from some of his answers. He was asked by Mr. Walsh

who was leading for the Crown: "Can you say from your recollection about how long before Ernie Clarke" -- that of course is the appellant -- "left Velva Liquids that these two incidents happened? (A) It's hard to say. It could have been two to three weeks time I would guess now but it's such a long time ago, you can't remember over every day things [illegible] you know precise what they're looked....." Mr. Walsh did not follow that answer, understandably. Embleton went on: "Sometimes you think it's a long time and at that distance in time it takes some thinking. It was not long before he packed up. (Q) It was not long. Can you be any more precise than that? (A) I cannot, sir, really." Then in relation to the trench he was asked when that had occurred: "The incident when the hole was dug by you and then Ernie said he filled it in, when did that occur in relation to Ernie's leaving Velva? (A) Occasion about a month I believe sir. (Q) A month when? (A) Month before he left" That was all very vague.

When Mr. Potts came to cross-examine Embleton he appreciated (as one would expect) that if this evidence about Exhibit 28 had any relevance at all, it only had relevance if that which Embleton said he saw the appellant doing had been done by the appellant between 18th January and 27th January 1970 which was the last day upon which the appellant had worked at the Velva Liquids site. That is obvious. The prosecution were asking the jury to infer that after the appellant had dismembered the body he tried to hide Exhibit 28. Mr. Potts dealt with Embleton's evidence in a way which one would expect from a skilled advocate. He tied him down. The first matter to which Mr. Potts directed his attention was whether Embleton and the appellant had been working on the same shift. Mr. Potts knew, for a reason to which I shall refer later, that there was shift-working at this site and that about the relevant time Embleton had not been working on the same shift as the appellant. The following cross-examination took place:

"(Q) So it is during a shift on which you were both working? (A) Yes, sir

A Again, Mr. Potts, being a skilled advocate, did not want any possibility of misunderstanding, so he underlined it: "(Q) It was. You were on the same shift? (A) Yes, sir. (Q) So the incident when you saw him

B running off liquid which became wax - an incident that occurred on the same shift? (A) Same shift, sir." So there cannot be any doubt that at that stage of his evidence Exbleton was saying that these two suspicious incidents had occurred when they were working on the same shift.

C Then there was another pointer to the accuracy of Exbleton's evidence which was known to Mr. Potts. In his evidence in chief he had mentioned another workman at a time when he started to observe what he said was the appellant's suspicious behaviour. He asked him

D this question: "You had just come on shift. There was somebody else then working that day, was there not? (A) Yes". Then a little later: "(Q) There was somebody working on the site with him? (A) There was someone on the site, yes." Having tied down Exbleton in that way to

E working on the same shift as the appellant and somebody else working there too, Mr. Potts produced, forensically, his ace of trumps. There was a time book kept at Velva Liquids which had to be filled in by the men coming on and going off work. That time book showed a state of affairs

F consistent with the prosecution's case on this issue. It showed that on Sund 18 January, which was the day upon which the prosecution were alleging that the girl had been murdered, the appellant was the only member of the staff on duty, certainly after 8 a.m., and probably from 7 a.m.

G The foreman Mr. Peterson had been there the night before when a ship had been discharging its cargo but he may not have stopped there after the ship had stopped discharging, which was 9.30 p.m. on the Saturday night. Certainly Mr. Peterson would not have been there after 8 a.m.

H when the ship left. So on that Sunday the appellant was the only member of

the staff at the site. That helped Mr. Potts in one way, but it helped the prosecution in another, because the inference was that if the deceased girl had been killed on the site on the Sunday, had there been other people working there, there would have been a grave risk of discovery. But if the appellant was working by himself and he was not due to come off duty until 2 p.m. he would have had some time, but not over-much time, to dismember the body. The prosecution were making the suggestion that when he started to dismember the body and found it was going to be more difficult than he had thought, and was taking some time, that was when he decided he had better hurry up and get rid of the body before anyone else came on duty. And come on duty at about 2 p.m. Embleton did, but they were clearly not on the same shift.

Mr. Potts then took Embleton through the other days before the appellant left the premises for the last time. Day by day Mr. Potts revealed to the jury that during the vital period Embleton and the appellant had never been on the same shift together. It seemed to follow that Embleton must have been talking about incidents which had happened before 12th January. If he had been talking about such incidents, Exhibit 28, the woman's further, had nothing whatsoever to do with this case.

In re-examination Mr. Walsh asked Embleton whether there were any occasions on which he had got to work early so as to overlap with the appellant. Embleton said that he sometimes got to work about twenty minutes to half an hour before his proper time for starting work. If he did so get to work, he might have found the appellant there. But he gave no details. It was unsatisfactory evidence.

We do not know from reading the transcript what effect this evidence of Embleton had upon the jury. He had thought it right to go to the police with his information. He had clearly got it into his head that

what he had seen the appellant doing had some relevance to the enquiries which most people in South Shields knew were going on. There was a possibility that during the important period from 18th to 27th January 1970 he might have been there at the same time as the appellant. In our judgment it was all very weak evidence indeed. It seems to us that the probabilities are that the jury were far from satisfied about this evidence. Mr. Potts submitted to the judge in the presence of the jury that the evidence about Exhibit 28 was irrelevant. The judge was not willing, presumably because of what Embleton had said about the overlapping, to withdraw the evidence from the jury. Mr. Walsh regarded the evidence as of some weight. He told us in this court that he had not played it as his main card in any way in his final speech to the jury. He said that he had about six points in all. Five of them were concerned with what he submitted to the jury were the inferences which had to be drawn that the appellant was the only person who could have committed this murder. Mr. Potts, we feel confident, with his usual skill, would have reminded the jury that unless they were sure about the accuracy of Embleton's evidence, the finding of Exhibit 28 had nothing to do with the case at all.

Then the learned judge came to sum-up, which he did very fairly indeed. At no stage of this case has any serious complaint been made about the summing-up. There was one very minor matter which was referred to in the hearing before this court in May 1981 but which has not been repeated here. It is necessary now in some detail to consider how the judge dealt with the evidence relating to Exhibit 28. I will read a number of extracts from the summing-up which occur at pages 43-46 of the transcript. The learned judge reminded the jury of what Embleton had said in evidence. Then he said: "He was then referred, as you would have expected, to the chart which is Exhibit 33 and is a convenient extract from the time book kept at Velva. Look at Exhibit 33." We have looked at Exhibit 33.

It shows in graphic form the periods when the appellant was on duty, when Embleton was on duty and when others were on duty. On the Sunday it is clear that no one was on duty except the appellant. The learned judge went on: "He said the incident could not have occurred on Sunday the 18th or Monday the 19th, but the incidents did take place. Pressed, he said, looking at the chart, 'It must have been before the 18th January and the digging of the hole was after the other two incidents, the bricking up did happen and I did find him running off liquid.'" Then he made some further comments about the details of what Embleton had said. The learned judge ended as follows: "That was his evidence; not every word, but I hope I have given you the highlights" -- then come these very important words--"of course, unless the bricking up occurred between the 18th and 27th January those incidents you will say are of no consequenc That was a very clear warning to the jury. He went on: "Embleton is talkin about incidents which did not deserve report. It is an estimation after a 9½ year lapse - further you would not attach any significance to the needless bricking up and the needless flooding if the sifting of the flooded wax revealed nothing of consequence, but, did the sifting reveal anything of consequence? This is a matter for you". Then he referred to Exhibit 28 in detail. He reminded the jury that Exhibit 28 had been found with other pieces of cloth which were clearly rags and he went on: "You might, or you might not, think that finding rubbish even a cast-off lady's garment or the leg of a trouser, or even a man's garment, because one was found in the trench, is of no great consequence, but, is it? It is a matter for you."

Then, later, on page 45 he dealt with this matter in these terms: "The case was opened that it was cut down the front". He was referring of course to Exhibit 28. "There is a difference, of course, between what was opened and what was proved. The garment was cut down the back and

"you may conclude in a straight line from the presumed position of the label to the bottom of the garment. Is that of any significance? Yes, says the defence, because Mrs. Cooper said this was not a garment that would be worn back to front; therefore, says the defence, the cut is not of any significance. The highest the evidence goes, you may think, regarding connecting the jumper with Eileen is like this: well, it would have fitted her and was the sort of garment in fashion, worn by young peopl at that time, namely 1969 and 1970. Of course, the garment would have fitted thousands of sixteen year olds in 1970. It would be worn no doubt by hundreds and hundreds, possibly thousands, of young girls round about that time; however, you will want to come to a conclusion and you might think the best approach is to look at all the circumstances. If you say to yourselves: we believe Embleton and we disbelieve Clarke, you might say: why did Clarke brick up and why did he flood?"

With hindsight, it might have been better if the judge had said: "There are two questions, first, do you accept Embleton's evidence about seeing the defendant's behaviour; if you do, go on to ask yourselves whether you accept that this behaviour occurred between 18th and 27th January 1970?"

The final matter to which we refer on the judge's directions about Exhibit 28 is at page 46 of the transcript where he was referring to the appellant's defence: "The defendant's evidence is that he has no recollection about his filling of the hole. Of course, he denies that he flooded underneath tank 4. He denies emphatically that he did any bricking up, but if Embleton is to be believed that is one of the fundamental matters. You may think that Embleton was suddenly curious once the defendant had been arrested to start to dig the hole at the site where you were yesterday, or the day before, and until he was stopped by the management. You decide what to believe, what to believe about anything found, whom you believe, whether there is any significance in what you accept from a particular witness."

As I have already commented, it is impossible to know what view the jury took of Embleton's evidence, save to say that the probabilities are that they did not think very much of it. If they did not think very much of it, the tie with Exhibit 28 disappears. We infer from the way the judge summed-up to the jury about Exhibit 28 that he was very alive to the difficulties the prosecution had in connecting Exhibit 28 with the appellant having regard to the unsatisfactory state of Embleton's evidence. The jury, having had the benefit of speeches from learned counsel and a very clear and fair summing-up from the judge, found the appellant guilty.

It was only after the decision of this court in May 1981 refusing the application for leave to appeal that the appellant's advisers appreciated much more fully than they had done before that the evidence of Mr. Moon (the general manager of Velva Liquids), supplemented by some records which Velval Liquids kept, proved beyond any doubt that Exhibit 28 could not have had anything to do with the appellant, for this reason. Although Mr. Moon's recollection had been that tank No. 4 contained stearyl alcohol up to August 1969, the records showed that it in fact had contained stearyl alcohol only up to April 1969, and that the tank had then been cleaned out. It had been left empty until about August 1969 when it had been filled with lauryl alcohol. As Exhibit 28 had been impregnated with stearyl alcohol and there were only minute traces of lauryl alcohol on it, the inference clearly was that Exhibit 28 had been impregnated before April 1969. It therefore followed that it could not have been put in the channel between 18th and 27th January 1970.

There was a further piece of evidence which came to light. It had always been the appellant's case both when interrogated by the police and in evidence that what were found were rags of a kind which the men working at this site used. It was a site where men were liable to get grease and dirt on their hands and from time to time they had to

wipe off the dirt from their hands, and their employers supplied them with rags to do so. The subsequent enquiries showed that Velva Liquids did in fact buy rags for use by their employees. They bought them from a firm which bought up old clothing and then cut it into rags suitable for use on an industrial site. When they got an article like a jumper, they always cut it down the back so as to make one large piece of material. When they so cut it, they used a machine, and the cut was a very clean one indeed. There can be no doubt now, having regard to the scientific evidence and the evidence which came from the rag merchants, that Exhibit 28 was part of rags supplied by the merchants to Velva Liquids for the use of their workmen and that it had got underneath the tank before April 1969.

It is understandable in those circumstances that the appellant's advisers were concerned. They were of the impression -- indeed it is the way Mr. Potts conducted the case -- that the main plank of the prosecution's case had been that the appellant had hidden Exhibit 28 under tank No. 4. The reason it was suggested that it was the main plank was -- and these are Mr. Potts' words -- "It was the only piece of evidence in the case which positively connected the appellant with the deceased girl".

It is against that background that we have had to consider the legal issue in this case. Before we do that, it is only right to call attention to a representation which was made to the Secretary of State which led him to make the reference. In the reference letter the Secretary of State says:

"The representations on Mr. Clarke's behalf since his appeal have rested on two main grounds: (i) that the evidence of Mr. Dalgliesh, a cellmate on remand, that Mr. Clarke had confessed must have influenced the jury and been prejudicial to Mr. Clarke, despite the fact that the

"court had been told Mr. Dalgliesh (who was not called to give evidence) was not a reliable witness, and despite the fact that the trial judge, in summing-up, instructed the jury to disregard his evidence". The second ground dealt with Exhibit 28.

I have not mentioned Dalgliesh's evidence before in the course of this judgment for very good reason. It was never relied upon by the appellant's advisers before this court in May 1981 and it was not relied upon in this court by Mr. Potts. We knew about it. However, the reason it was not relied upon by Mr. Potts was this. When the case was opened by Mr. Walsh at the Newcastle Crown Court he had told the jury that he would be calling Dalgliesh who had been in prison at Durham, sharing a cell with this appellant, and that whilst they were together the appellant had confessed to having committed the murder. Long before the time had come for Dalgliesh to be called as a witness, the appellant's legal advisers had discovered that he was a man whose mental balance was in grave doubt. These facts were brought to Mr. Walsh's attention. Mr. Walsh, as one would expect of him, decided that in the circumstances he would not call Dalgliesh. Mr. Walsh told Mr. Potts and the two of them worked out what was to be done. Mr. Potts in this court has told us frankly that he had a choice of action. He could have asked the judge to discharge the jury and start again. The probability is that his application would have been acceded to by the judge. Alternatively, he could have a frank statement made by Mr. Walsh to the jury in terms approved by the judge, which would make it clear that in no circumstances were the prosecution seeking to rely upon what Mr. Walsh properly had opened to the jury. Mr. Potts, for good forensic reasons, with which we agree, decided that the better course was for the prosecutio

to make a statement in front of the jury and to leave it there. That was done. The statement was made in the clearest possible terms and from then on Baigbiesh went out of the case altogether. As I have already said, in this court that has not been made the subject matter of any complaint, nor has it been put forward as a ground for allowing this appeal.

The night before this appeal started Mr. Walsh told Mr. Potts that he was not going to seek in any way to rely upon the evidence relating to Exhibit 28. When Mr. Walsh's turn came in this court to put the Crown's case he made it clear in open court that he was not relying in any way on Exhibit 28 or on Embleton's evidence. What he did was to say that what lawyers call "the circumstantial evidence" was so strong in this case that a reasonable jury, properly directed, quite apart from Embleton's evidence and the finding of Exhibit 28, could only have come to one conclusion, namely that there was nobody who could have committed the murder other than the appellant, and he gave the various reasons to which I have already adverted: that it must have been somebody employed on the site; it must have been somebody who knew the deceased girl; it must have been somebody who was strong and agile; it must have been somebody who was working on the site alone and it must have been somebody who was used to using a sharp knife. And, submitted Mr. Walsh, all those matters did not depend on anybody's recollection. They were inferences to be drawn from the facts of the case which had never been in dispute. Members of the public, not learned in the law, are sometimes of the opinion that circumstantial evidence is weak evidence. That is not the view of those experienced in the administration of criminal justi Such evidence can be the most cogent evidence because it is not likely to

be contaminated by the frailties of human memory or the bias of witnesse
It does, however, have to be assessed in the right way. A jury must
carefully weigh the accused's denials. If, but only if, they reject the
should they consider the inferences to be drawn from the undisputed facts
Guilt should only be inferred if no inference other than guilt can
reasonably be drawn.

In this case the jury clearly did reject the appellant's denials.
There were a number of issues upon which the prosecution's witnesses and
the appellant disagreed. Mr. Walsh itemised six of them. Some were
important, some less important; but they were matters for the jury to
assess. Mr. Potts in his final submission accepted that the jury
did reject the appellant's denials.

In those circumstances the question for this court is whether
the appellant's guilt is an inference which is the only inference which
can reasonably be drawn from the undisputed evidence? A subsidiary questi
is whether the drawing of that inference was made so difficult for the jur
by the evidence relating to Exhibit 28 that the verdict should be regarded
as unsatisfactory? We divide that problem into the two constituent parts.
Had there not been any evidence about Exhibit 28 and had the case stood
fairly and squarely on what the prosecution said was the circumstantial
evidence, could this court have interfered? In our judgment, it could not
We accept, as did this court in May 1981, that it was inconceivable that
anybody other than the appellant could have murdered that girl and dis-
membered her body on that site. It is beyond reason that any stranger
could have done it. Having regard to the denials of all the other staff
that they knew the girl, it is also inconceivable in our judgment that any
other member of the staff could have done it. It was suggested by
Mr. Potts that the evidence is not all that clear about the other members
of the staff because all that the court has are their denials of knowledge

of the girl. But it is relevant for the court to remind itself that despi
A the very extensive enquiries and the publicity which this case has aroused,
particularly in the North-East, no one has come forward to say that there
is any evidence to show that any other member of the staff was acquainted
with the deceased girl. Evidence was tendered from the other members of
B the staff. Those who were called were not cross-examined and those who
had been conditionally bound over were not required by the defence to
attend to give evidence.

The difficulty in the case arises from the fact that, to use an
C expression used by the Bench in argument, the waters were muddied by the
introduction of the evidence relating to Exhibit 28. Did that make the
jury's task so difficult, particularly having regard to the fact that
in the passages in the summing-up to which I have referred Caulfield J.
D from time to time did leave the issue of credibility with regard to
Exhibit 28 to the jury?

Now that we have had the benefit of a detailed examination of
E the transcript of Embleton's evidence, it has become clear to us that
no reasonable jury could have relied upon Embleton's evidence as to the
date when the so-called suspicious behaviour had occurred. The learned
judge correctly directed the jury about that evidence, reminding them that
F unless they were sure that these incidents had taken place between 18th
and 27th January 1970, they had no relevance to this case.

We have given most anxious and careful thought to this problem.
We have come to the conclusion that the jury must have decided this case
G on the basis that nobody other than the appellant could have murdered
Eileen McDougall. We have looked at all the surrounding circumstances,
as we are bound by statute to do, and that is the only conclusion we can
come to. Accordingly the appeal is dismissed.

H MR. POTTS: My Lord, there is one matter. A legal aid certificate was granted in this case on 12th August, which was the date of the Home Secretary's letter. The position, I am instructed, is there was a great deal