

# The Fingerprint Inquiry | Scotland

## CHAIRMAN'S DECISION REGARDING THE POSITION OF SENIOR COUNSEL TO THE INQUIRY

Sir Anthony has issued a decision in the following terms:-

“This Decision is with regard to the position of senior counsel to the Inquiry.

On 21 April 2008 I appointed Mr G.J.B. Moynihan QC to be senior counsel to the Inquiry. Since then Mr Moynihan, together with Miss Ailsa Carmichael QC, has been working under my direction as to the lines that the inquiry is to follow.

In the course of gathering documents the Crown Office file in the case of *HMA v David Asbury* was received in the offices of the Inquiry on 23 January 2009. When it was read by Mr Moynihan on 28 January 2009 he found that as an advocate depute in 1997 he gave the instruction to indict Mr Asbury in the High Court and directed also that further inquiries should be made. Mr Moynihan informed me of this development at once and he advised me that he had had no recollection of being involved in the prosecution of Mr Asbury in this way nor did he have any present recollection of having been involved.

I decided that it was not in the public interest for the Inquiry or Mr Moynihan's role in it to be suspended while his position as senior counsel to the Inquiry was under review. There are considerable ongoing costs being incurred and I was anxious that the indicative date for the first public hearing should be met. I was prepared to appoint another senior counsel in place of Mr Moynihan, if it proved to me essential to do so. However I appreciated that this would cause delay and might not turn out to be necessary once I had considered the position in detail.

The terms of reference of the Inquiry are:

- to inquire into the steps that were taken to identify and verify the finger prints associated with, and leading up to, the case of *HM Advocate v McKie* in 1999, and
- to determine, in relation to the fingerprint designated Y7, the consequences of the steps taken, or not taken, and
- to report findings of fact and make recommendations as to what measures might now be introduced, beyond those that have already been introduced since 1999, to ensure that any shortcomings are avoided in the future.

At a procedural hearing of the Inquiry on 21 November 2008 I stated, in general terms, the issues that I was minded to examine though I made it clear that I would keep these under review. One of these issues was the identification and verification of the marks labeled Y7, Q1 2, QD 2 and XF.

At the preliminary stages of the case of *HMA v David Asbury* the evidence was that his mark XF had been found on a gift tag attached to a parcel in the home of the late Marion Ross. He had worked there in the past but the gift tag and contents of the parcel to which the tag was attached could not have been in her house at the time that he did this work. When he was asked during an interview if he had murdered Miss Ross he responded, after a pause of 38 seconds, that he had not. He also said that he had not been in Marion Ross's house since the work he was engaged on had been completed.

At Mr Asbury's home a quantity of money was found in a tin in his bedroom. Five days after the discovery of the body of Marion Ross was made public Mr Asbury disappeared from home overnight, leaving a note for his mother. He returned home the following day.

Subsequently in a voluntary statement Mr Asbury said that he had been in Miss Ross's house after the work had been finished and that this was about two or three days before she was murdered. The circumstances were that he thought his car had broken down and he called at Marion Ross's house to ask if he could use her telephone to call his mother to come and collect him. As he was about to use her telephone he realised that his car had not broken down but had run out of petrol and so he did not make the call. After this Miss Ross showed him round the extension he had helped to build earlier so that he could see it when painted and carpeted. He added that he had used the lavatory before leaving the house.

On the basis of this evidence an advocate depute (not Mr Moynihan) authorised the local procurator fiscal to apply to the court to have Mr Asbury fully committed for trial on a charge of murder.

After full committal by the Sheriff had taken place, evidence was obtained that the mark Q1 2 (on the tin, containing a substantial sum of money, found in the bedroom used by Mr Asbury) had been identified as that of the late Marion Ross. It was after this that the case was referred to Mr Moynihan, in his capacity as the duty advocate depute, and he directed that Mr Asbury be indicted for murder. In my view this cannot be regarded as a controversial decision as the evidence was *prima facie* now stronger than it had been when the earlier decision had been made by the Court to fully commit Mr Asbury for trial in solemn form. It is significant that at the trial of Mr Asbury leading to his conviction it was not disputed by the defence that the mark XF was his or that Q1 2 was that of the deceased Marion Ross. It was much later that a question first arose about the identity of Q1 2 and the mark XF has never been the subject of dispute.

By the time of Mr Moynihan's involvement the tin and money had been seized as productions. Y7 and Q1 2 had both been found and photographed and SCRO examiners had provided opinions that the donors of the marks were respectively Shirley McKie and Marion Ross.

While it could in no sense be decisive of the issue as to whether Mr Moynihan should continue as counsel to the Inquiry I decided that each of the core participants should be informed about the position and asked if they had any objection to Mr Moynihan continuing as Senior Counsel. It was appropriate to begin by informing Digby Brown, solicitors, as one of their clients, David Asbury, was potentially the person most

directly affected. The Crown Office file was given to the Inquiry under an obligation of confidentiality and I considered that all core participants, subject to the same obligation, should be offered an opportunity to inspect the relevant part of the file for themselves if they wished to do so.

All of the core participants other than those represented *pro bono* by Mr David Russell of Towells, solicitors, raised no objection. Mr Russell, on behalf of the core participants Mr Peter Swann and Mr Malcolm Ross, expressed a strong objection to Mr Moynihan continuing in the Inquiry. Although it was explained that it is envisaged that material from the Crown Office file will be put in the public domain in due course, Mr Russell declined to examine the file by reason of the constraint with regard to confidentiality. He has provided me with comprehensive written submissions in which he has asked for a public sitting with a number of witnesses that he named called to give evidence.

After careful consideration I have decided that such a public hearing would not assist me in arriving at a decision on this issue especially when I have had such an extensive written submission already from Mr Russell.

## **Decision**

Over eleven years have passed since Mr Moynihan had a part in the prosecution of Mr Asbury. While it might have been expected that the subsequent publicity surrounding the prosecution of Shirley McKie would have reminded him of his earlier role in the prosecution of Mr Asbury I accept that this did not happen. Given the way in which the Crown Office operated at that time with different advocate deputies looking at files at the various stages of a prosecution and the fact that he did not conduct the trial of David Asbury it is not surprising that he has no recollection of it. Since he had no such recollection he was under no duty to disclose it to me prior to his appointment.

In this Inquiry it is for me to inquire as well as to report and to decide who are to be and who are not to be called as witnesses; I direct the lines of inquiry to be followed; and I give instructions as to who should be interviewed as potential witnesses. The role of counsel to the Inquiry, important as it is, has to be seen in this context.

The issue to be decided by me is whether Mr Moynihan's involvement, as described earlier, in the prosecution of Mr David Asbury could vitiate the fairness and impartiality of the inquiry that I am undertaking if he continues in the role of senior counsel. The conclusion I have reached is that a fair minded person, who is neither complacent nor unduly sensitive or suspicious, knowing the relevant facts, would not consider that there is a real as opposed to fanciful possibility of this happening. Accordingly I have decided that Mr Moynihan should continue to act as senior counsel to the Inquiry.

Sir Anthony Campbell  
Inquiry Chairman  
16 March 2009