

Thursday, 25th June 2009

SEAN FRANCIS MURPHY (continued)

1 (1.50 pm)

2 MR MOYNIHAN: Just to close the chapter we were talking  
3 about earlier on, this question of another expert  
4 opinion, if I could ask please that there be a letter  
5 put up on screen, CO4063, and, again, it may be  
6 necessary to put up more than one page.

7 If I can explain to others who are looking at this,  
8 the question had been raised by the Inquiry team with  
9 Crown Office of the question that we were just  
10 discussing before lunch about the conclusion of the  
11 matter in relation to Mr Kent and this is the response  
12 that was received. If I can ask you just to read that  
13 please. **(Pause)**

14 A. Yes, thank you, I've read it just now.

15 Q. Thank you.

16 It is the last paragraph on the first page with  
17 a reference to the Advocate Depute?

18 A. Yes, that's my involvement.

19 Q. That would be you, yourself?

20 A. Yes.

21 Q. It says that you carried out or you considered the  
22 papers afresh.

23 A. Yes.

24 Q. Do you accept that?

25 A. Yes.

1 Q. It also is the case that you considered that further  
2 evidence was not required.

3 A. For the reasons I mentioned earlier on this morning.  
4 Can I just clarify one thing. When it says I considered  
5 the papers "afresh" it's possible that some of the  
6 correspondence you've referred me to today would have  
7 been in the Crown Office file but when I considered it  
8 afresh I have to be honest, I probably didn't read most  
9 of that. I would have read the precognition because by  
10 that time in a sense I would assume it had been, what  
11 one would think of as put to bed and ready to go. So I  
12 considered the evidence available to me and took the  
13 decision in the light of that.

14 As I say, this correspondence may well have been  
15 available to me -- probably was -- but I wouldn't have  
16 gone through all the earlier processes again.

17 Q. I don't wish to overtax your memory. The question I was  
18 asking you and debating at length with you before lunch  
19 (namely, whether the Crown might instruct an independent  
20 cross-check), do you have any recollection that you  
21 yourself considered that possibility?

22 A. When I said I would have considered seeking it in  
23 support, there is an element of cross-checking that as  
24 well. I'm not sure I can completely separate the two in  
25 that sense. There would have been an element of that.

1 But, as I say, I had sufficient material before me to  
2 proceed with the perjury trial that I was instructed to  
3 proceed with and so that was the basis of the decision.

4 Q. That is fine. That closes that particular chapter for  
5 my purposes.

6 That letter happened to mention Malcolm Graham.

7 A. Yes.

8 Q. I have already asked you about that, about the fall-back  
9 position.

10 I want to move on to another individual who you have  
11 mentioned and been asked some detailed questions about  
12 in your statement and that's Mr Swann. You deal with  
13 Mr Swann in paragraphs 28, 33 and 35 --

14 A. I'm sorry, what was the first number?

15 Q. 28.

16 A. Thank you.

17 Q. 33 and 35. Perhaps if I indicate to you and then give  
18 you a chance to check the paragraphs as required.

19 What I'm going to go on to ask you about is your  
20 knowledge of Mr Swann's involvement as an expert witness  
21 for Ms McKie, not Mr Asbury for Ms McKie.

22 A. Yes.

23 Q. If I understand your statement correctly you say that  
24 you did not know of Mr Swann's involvement before the  
25 McKie trial started, you did know of his involvement by

1 the end of the trial?

2 A. I'm pretty sure that's right, yes.

3 Q. And where you're uncertain is at what point during the  
4 course of the trial you first learned of Mr Swann?

5 A. Yes.

6 Q. With that in mind -- and I've had the benefit of  
7 something being drawn to my attention that we will look  
8 at -- but one of the points I was asking that underlay  
9 the questions of you is that when you cross-examined  
10 Ms McKie, you asked her about knowledge of any other  
11 expert before Mr Wertheim and she said she did not know  
12 of one.

13 A. Yes.

14 Q. The question that was being asked of you is whether at  
15 that time of that cross-examination you knew of the  
16 involvement of Mr Swann yourself?

17 A. The answer to that I think must be no because she  
18 answered the question in the negative and I didn't  
19 challenge it further, as I recall. If I had had firm  
20 material to contradict what she'd just said to me I  
21 would have -- I'm pretty certain I would have put it to  
22 her.

23 So what I think I did know, if I could  
24 perhaps explain, there are two aspects of this which  
25 might be or might not be of significance so perhaps if

1           you'd like me to explain. My position was that I  
2           believed the defence had commissioned somebody else to  
3           examine Y7 and that that person had confirmed, was  
4           believed to have confirmed, the SCRO position about the  
5           mark. I did not know, I think, who that person was or I  
6           would have put it to her.

7           The assumption in paragraph 28 here is that it was  
8           Peter Swann. I'm not 100 per cent convinced that that  
9           is right because, having subsequently come across  
10          another piece of paper, I was given a list of people --  
11          sorry, let me start again to try and explain the  
12          background to this so I'll try to make it as least  
13          confusing as possible.

14          On one of the occasions when I spoke to the SCRO  
15          officers, Mr Stewart and Mr Macpherson, and I think it  
16          may have been the occasion when we were at court looking  
17          at the defence productions or it may have been the  
18          earlier occasion but I suspect certainly it  
19          was discussed on the latter occasion, it was indicated  
20          to me, as I recall, by them that the word on the  
21          grapevine, as it were, amongst the fingerprint people  
22          was that the defence had got somebody else to look at it  
23          but they did not know at that stage who it was.

24          I'm pretty certain I asked them to let me know if  
25          that came to light. As I've made you aware, I think, I

1 have -- I think I mentioned in passing in the statement  
2 as well I found with my notes a piece of paper naming a  
3 couple of people, including Peter Swann, as being  
4 possibly the people that the defence had spoken to. I  
5 think that that was provided to me prior to the end of  
6 the trial but I'm pretty certain after I had  
7 cross-examined Ms McKie because, bear in mind after that  
8 we have the lengthy chapter of evidence of the two  
9 American fingerprint experts and there were days, in  
10 fact, between her evidence and the end of the trial, as  
11 I recall.

12 So I'm fairly certain if I had had that information  
13 in front of me at the time of the cross-examination it  
14 would have been put to her and it wasn't; so I think I  
15 must have received that afterwards.

16 But a considerable time after all of this was over,  
17 I received a letter from Iain Bradley asking for the  
18 return of the what I think was called the Ashbaugh  
19 report. I was asked about that when the statement taker  
20 came and I have no recollection about that chapter at  
21 all, but the letter from Mr Bradley dealing with  
22 Ashbaugh report also makes reference to a person called  
23 Peter Thorne who had apparently come forward and  
24 indicated, although I don't know the manner in which  
25 this had happened, that he had been consulted by the

1 defence as well about it. He's not one of the people  
2 who was named to me before the end of the trial.

3 Q. If you can, because you mentioned this to me yesterday,  
4 you have with you today that piece of paper with the  
5 three names on it; is that correct?

6 A. Yes. If you bear with me I'll find it. The first two  
7 are in somebody else's hand and the third has been added  
8 in my own handwriting.

9 THE CHAIRMAN: Is the last one is your handwriting? Just  
10 could you identify for us which name is in your  
11 handwriting.

12 A. Would it help if I simply read out the text.

13 THE CHAIRMAN: Yes.

14 A. The piece of paper is a lined sheet that says on it:

15 "Independent experts who looked at McKie case (1)  
16 Peter Swann -- ex-super or chief super highly  
17 respected", and then a telephone number is given and  
18 then in a different colour of ink and possibly in a  
19 different hand it says:

20 "Defence both", and there's an arrow pointing to the  
21 second name which is number 2, Mike Heron, and it says:

22 "Ex-DI now thought to be working in some capacity  
23 with Fiscal in Dundee."

24 Then two lines underneath there is in my hand the  
25 number 3 and it says:

1 "Malcolm Johnson ex-DI Edinburgh IB may have been  
2 asked as well."

3 I would interpret that as being somebody else has  
4 obviously written the first two names and has handed it  
5 to me and I've been told the third verbally and added it  
6 on to the end. But, as I say, I can't confirm when that  
7 happened other than the fact that if I had it in front  
8 of me at the point when I was cross-examining her I  
9 would almost certainly have used it so I presume it must  
10 have been later.

11 MR MOYNIHAN: If you --

12 THE CHAIRMAN: If you display it someone might recognise  
13 their handwriting.

14 MR MOYNIHAN: Sir, I think the reason for not displaying it  
15 is the reference to a telephone number.

16 THE CHAIRMAN: No, no, a redacted version in due course, we  
17 could do that.

18 MR MOYNIHAN: I was going to suggest if Sheriff Murphy just  
19 leave that paper with us.

20 A. Yes.

21 THE CHAIRMAN: If the Sheriff leaves it behind, if he  
22 wouldn't mind ...

23 MR MOYNIHAN: We could otherwise have displayed it here just  
24 now.

25 What I want to do is I will take you to the

1 cross-examination of Ms McKie and then I will come back  
2 to a passage that has been drawn to my attention where,  
3 in fact, Mr Swann's name was mentioned by you at an  
4 earlier date so I will ask you how that came about.

5 First of all, the reference to Ms McKie is SG0294  
6 and it begins at PDF page 84. It is the PDF page rather  
7 than the transcript page.

8 THE CHAIRMAN: I see.

9 MR MOYNIHAN: I think the passage begins at line 14. You  
10 were asking was she anxious, consult solicitors, and  
11 then if we go to the next page, page 85, line 11:

12 "Can you tell the ladies and gentlemen how many  
13 people were asked to look at the print Y7 for the  
14 Defence before Mr Wertheim? She says:

15 "I have no idea."

16 "Well, was it one, was it more than one?"

17 "You would need to ask my Counsel about that.

18 "Is this not a matter that you would have been  
19 anxious to know about?"

20 "Mr Findlay assured me he would do the job properly  
21 and to trust him and that is what I did.

22 "At what stage did you first meet Mr Findlay?"

23 "I can't remember the date or approximately the  
24 number of months ago.

25 "Right.

1 "This matter has gone on for two years?

2 "Yes.

3 "And certainly from the point of your arrest you  
4 would have instructed solicitors?

5 "Yes.

6 "Did you instruct solicitors before that?

7 "Yes.

8 "At what stage did you instruct solicitors?

9 "Within about a fortnight of my fingerprints being  
10 identified.

11 "Oh right, way back in 1997?

12 "Yes.

13 "And at that stage your solicitors would have  
14 started to look into things?

15 "I don't now if they did at that point because it  
16 wasn't really clear what was going to happen. Right.

17 "Well, at what stage do you think your solicitors  
18 started to look into things?

19 "I don't know. You will need to ask my solicitors.

20 "Do you seriously not know whether the print was  
21 shown to anyone before Mr Wertheim?"

22 She says:

23 "I don't know who has examined the fingerprint."

24 You asked:

25 "Do you know if anybody has?"

1 She says:

2 "I don't know who has."

3 Then you ask:

4 "Do you know if anybody has, regardless of their  
5 identity?"

6 To which she says:

7 "I don't know. You would need to ask my solicitor  
8 that.

9 "Well, did you not ask your solicitors?"

10 "Sorry?"

11 "Did you not ask your solicitors how things were  
12 progressing?"

13 "Yes.

14 "And was there no discussion at any stage of other  
15 people looking at the fingerprint?"

16 "Well, there was discussion about, obviously, the  
17 fingerprint people looking at the fingerprint but they  
18 don't discuss with me day-to-day who, what and why.

19 "So you don't know whether or not anybody else  
20 looked at the print. Is that your evidence?"

21 "No, I don't know."

22 You then go on:

23 "Isn't the truth of this matter, Ms McKie, that at  
24 one stage you did, in fact, go into the **locus** for a  
25 look ..." and you move on.

1                   So is that the passage, as you recollect it, in  
2                   cross?

3       A.     That was the passage I had in mind, yes. Obviously,  
4                   this means before Mr Wertheim and so on looked at it,  
5                   yes.

6       Q.     But are you indicating that had you known Mr Swann would  
7                   have been instructed you would specifically have put the  
8                   name rather than simply leaving it did she know of  
9                   anyone?

10      A.     If I'd had the material I'm pretty certain I would have  
11                   put it, yes, but, as I say, I can't remember when I was  
12                   given this piece of paper.

13      Q.     If we go back to page one of that particular document,  
14                   PDF page 1, we see that that examination occurred on  
15                   11th May 1999.

16      A.     Yes .

17      Q.     What I want to turn to now is a transcript of 7th May,  
18                   so some four days earlier, SG0529. Go to page 3 of  
19                   that. So we are looking at the trial on Friday  
20                   7th May 1999, so some four days earlier.

21      A.     Yes.

22      Q.     Go to the next page.

23                   We are going to look now at the examination of  
24                   Mr Macpherson, one of the Fingerprint Officers, and if  
25                   we go please to page 63, PDF page 63 -- if I take you

1 back to page 60, this is cross-examination by

2 Mr Findlay.

3 A. Yes.

4 Q. If I, in fact, go on to the next page, and the next

5 one ... PDF page 63 it is, Mr Findlay at the top of

6 page 61 of the original transcript:

7 "When was the last time that SCRO was challenged

8 over a fingerprint?"

9 Mr Macpherson says he doesn't believe that they've

10 ever been challenged.

11 A. Yes.

12 Q. At lines 11 and 13 he mentions that independent experts

13 have looked at their work in the past.

14 A. Yes.

15 Q. "But they don't challenge it", there's no answer and

16 then there's a question about a danger in that situation

17 of intellectual arrogance can creep in?

18 Do you see that?

19 A. Yes.

20 Q. Then at that particular point your re-examination begins

21 and you pick up immediately that point of absence of

22 challenge, so you say:

23 "You say that SCRO, to your knowledge, has not been

24 challenged. Do you mean in court?

25 "Yes.

1 "You said that the defence would have people looking  
2 at your work?"

3 He says:

4 "Absolutely, yes.

5 "How does that come about?" And if we could put the  
6 page on the right, put it to the left and bring up the  
7 next one.

8 "Well, there is ex-heads of bureau who are now  
9 independent fingerprint consultants who offer their  
10 services."

11 Then you will see:

12 "Have you heard of a Mr Swann doing such work in  
13 Scotland?"

14 "Yes.

15 "Did he used to work in SCRO?"

16 "No", and then it goes on.

17 A. Yes.

18 Q. There is a reference to Mr Swann in the context of an  
19 independent expert checking SCRO work that's a few days  
20 earlier.

21 A. Yes.

22 Q. Does that prompt the possibility you may have known  
23 of Mr Swann's involvement for Ms McKie before this?

24 A. With respect, I don't think so because if I had known  
25 that specifically I would have put it to her. I think

1            what I was aware of that he was the sort of or he was  
2            one of the people who had done that in other cases is  
3            what, I think, this means. If I'd had -- you see the  
4            difficulty was I wanted to know who the defence had used  
5            before the trial and they were saying to me there was  
6            somebody but we're not sure who it is and I couldn't put  
7            something on the basis of rumour.

8                       So, with respect, I think clearly I was aware  
9            Mr Swann was a former or a fingerprint expert who had  
10           done this sort of thing but I still don't think I was  
11           aware that he'd actually been approached by the  
12           defence -- specifically, in this case I mean.

13    Q.    So, if I understand you correctly, that earlier -- the  
14           second passage I've looked at is earlier so in the  
15           re-examination of Mr Macpherson your recollection would  
16           be that you know of some people who did this sort of  
17           work and Mr Swann was one?

18    A.    Yes, and it may even have been that he had been  
19           suggested to me as a possibility in this case, but I  
20           suspect I had no confirmation he was the person or I  
21           would have put it to Ms McKie.

22    THE CHAIRMAN:    I was going to ask you that. If you had had  
23           a note there were three possibilities on the note and  
24           you couldn't have put any one of them firmly to the  
25           witness.

1 A. What the note actually says, Sir Anthony, is independent  
2 experts who looked at the McKie case, which appears to  
3 suggest by that time it was confirmation. What I  
4 suspect is I was aware he was someone who did that type  
5 of work but I did not know or could not -- it may have  
6 been rumoured but not confirmed that he looked at Y7.

7 THE CHAIRMAN: And the note is firmer --

8 A. Yes, that's why I say I think the note appears to me to  
9 be firmer than what I think this was meant to reflect.

10 MR MOYNIHAN: You indicate that when it came to  
11 cross-examination of Ms McKie where she said she did not  
12 know of anyone who thought it improper to put a specific  
13 name to her without you yourself having had  
14 confirmation?

15 A. Absolutely. I may even have been told we think it's  
16 Mr Swann but unless I was told it was Mr Swann I  
17 wouldn't have put it.

18 Q. If I close this chapter by the fact, as you know, and  
19 you mention in your own evidence, that the notes of the  
20 meeting that you had with the SCRO officers later in May  
21 after the trial --

22 A. No, with respect, it was -- sorry, not those officers  
23 but with SCRO personnel, yes, indeed.

24 Q. -- indicates that you had a knowledge of three officers  
25 and a Mr Swann as well, that you had had knowledge of

1 Mr Swann?

2 A. Yes.

3 Q. First of all, is the fact you found this slip of paper  
4 with three names now the explanation for the reference to  
5 three?

6 A. I think that must be. That would certainly seem, to my  
7 mind, logically to tie in.

8 Q. So far as the accuracy of the note of the meeting with  
9 the fingerprint personnel later, if it infers you knew  
10 before cross-examination of Ms McKie that Mr Swann had  
11 been instructed on her behalf, would that note now be  
12 regarded by you as inaccurate?

13 A. I have a number of reservations about what the minutes  
14 of that meeting say about Mr Swann. It says, for  
15 example, I had had contact with him and I had spoken to  
16 him. That simply isn't right. So my position remains  
17 the same. If Peter Swann had been confirmed to me as  
18 the defence expert at the time of the cross-examination  
19 I'm fairly certain, if I had chapter and verse, I would  
20 have put that to Ms McKie. That is what makes me think  
21 this must have been confirmed later. I could be wrong  
22 but I can't see me having that ammunition and not using  
23 it when I got that answer.

24 Q. I have two other topics to raise with you, one short and  
25 one slightly longer.

1                   The short one, perhaps I'll take. The Inquiry has  
2                   some information from a Professor Espie, who is a  
3                   professor of clinical psychology, and what I want to  
4                   do -- though this is perhaps more a matter for legal  
5                   submission -- I will just run this by you to see what  
6                   your reaction to it is. Mr Espie, as a clinical  
7                   psychologist, was instructed for a medical opinion on  
8                   Ms McKie's medical state before the trial, not  
9                   necessarily related to the trial, perhaps relating to  
10                  disciplinary proceedings.

11                 He concluded that she was fit, not suffering from  
12                 any medical conditions. He also concluded from his  
13                 discussion with her, that lasted up to about an hour,  
14                 that there was no psychological indication that she was  
15                 lying in any respect and, indeed, he concluded that she  
16                 was telling the truth.

17                 One of the issues that's been raised is whether the  
18                 opinion of Professor Espie to the effect that Ms McKie  
19                 was telling the truth, whether that information should  
20                 have been communicated to the prosecution and perhaps  
21                 might have had a bearing on the prosecution's attitude  
22                 to the prosecution of Ms McKie.

23         A.    Yes.

24         Q.    Do you have any reaction to the relevance, either as a  
25                 matter of general comment or a matter of law, the

1           relevance of such an opinion from Professor Espie?

2       A.    There are difficulties about presenting evidence of that  
3           sort in Scots law. The one case which springs to mind  
4           immediately is the case of **Grimmand**, in which I was  
5           involved as an advocate, a totally different context but  
6           essentially the truth or falsehood of a particular  
7           statement made by a witness in our law is a matter to be  
8           assessed by the jury and we have a traditional  
9           reluctance to do what the Appeal Court, I think, called  
10          not in **Grimmand** but another case called **Oath Supporting**.  
11          In other words, we have a traditional reluctance to  
12          accept expert evidence of that sort.

13       Q.    So if, as the suggestion would seem to be,  
14           Professor Espie's expression of opinion was communicated  
15           to his opposite number in the Police Medical Service but  
16           lay there and did not get passed on to the prosecution  
17           authorities, do you think, just from your knowledge of  
18           the system, it would have made any difference had  
19           Professor Espie's opinion been communicated on?

20       A.    That would be pretty unlikely because the Crown  
21           decisions to prosecute or not to prosecute would be  
22           based primarily on what we thought was the available  
23           evidence and evidence in relation to the veracity of a  
24           witness as a concept as opposed to the veracity in  
25           relation to a particular fact is a matter that we

1 traditionally are reluctant to accept as valid  
2 testimony.

3 Q. In fact, we have seen earlier, if I just recollect the  
4 Deputy Crown Agent's note, that some of the background  
5 to this proceeded on the basis that Ms McKie did  
6 present, indeed, as he said, as a credible witness?

7 A. When I mention the case of **Grimmand** this case has been  
8 to most recently explored in Scots law in relation to  
9 expert testimony supporting the reaction of children who  
10 have been abused. That was the context in which both  
11 the **Grimmand** case and the Cosgrove Commission considered  
12 it and, as I say, there is a traditional reluctance to  
13 accept that in our law as a form of testimony that's  
14 admissible.

15 Q. I have used the wrong expression about the Deputy Crown  
16 Agent. It wasn't that she was credible; it was that she  
17 was plausible.

18 A. Yes.

19 Q. So, based on your experience, Professor Espie's opinion,  
20 you think, is unlikely to have had a bearing on matters  
21 for the reasons you have explained?

22 A. Yes.

23 Q. I think we can take that up further with the -- I have  
24 the Steer(?) encyclopaedia but I might read **Grimmand**.

25 A. With two Ms.

1                   The Cosgrove Commission changed the law because the  
2                   Crown weren't allowed to lead evidence as to a pattern  
3                   of reaction by children on the basis that it was what  
4                   was described as oath helping. It also was considered  
5                   by the Appeal Court sort of **en passant** in relation to an  
6                   Anderson appeal in an abuse case, but if I sat down and  
7                   thought about it long enough I might remember the name  
8                   of that one but I can't off the top of my head.

9       Q.    I might ask Miss Carmichael to do some research because  
10           I'm obviously not good enough at it.

11                   If we move on --

12    A.    Sorry, if it's of interest, I think my own sister, who  
13           is a research neuro-psychologist and is a forensic  
14           expert witness in England and Wales wrote a dissertation  
15           on that subject, in fact, about three years ago.

16    Q.    We will follow that up.

17                   The final topic I wanted to ask you about, again  
18           within your statement, is the question of illustrative  
19           material and the chartings that were done.

20                   I want to begin with something that picks up your  
21           observation that these are illustrative. They were used  
22           for demonstration purposes.

23                   We have evidence from an English expert, a man  
24           called Mr Shepherd -- if I bring up FI0082 -- I will not  
25           go to the specific paragraph necessarily but if I

1 understand correctly what Mr Shepherd is saying -- the  
2 particular page doesn't matter. It just up there if we  
3 need to go there -- Mr Shepherd is saying that if  
4 illustrations are used -- there's nothing on that  
5 screen, it's just there for me if I need to.

6 Mr Shepherd says that in English practice if any  
7 witness were to produce an illustration of fingerprints,  
8 then it would be an individual illustration and not a  
9 joint illustration.

10 In this particular case the Scottish Criminal Record  
11 Office staff produced joint illustrations; is that  
12 correct?

13 A. In the sense of there was one that would be spoken to as  
14 opposed to the sort of agreed illustrative document  
15 rather than each of the -- do you mean each of the  
16 individual four who looked at the print would produce  
17 their own illustrative document?

18 Q. Yes.

19 A. No, that's not commonly done here.

20 Q. That's exactly the point I wanted to ask you about, not  
21 just in this case but in general?

22 A. In general, that was not done at that time. I don't  
23 think current practice has changed.

24 Q. Did the fact that the four officers -- let us take it on  
25 this basis: they produced one joint illustration that

1           they have discussed and agreed amongst themselves. Was  
2           that common knowledge, that that's exactly what happened  
3           with these items?

4    A.   As I said to you, it was my understanding that it might  
5           have been possible for the four of them collectively to  
6           produce more than 16 points. So it follows from that  
7           there must be some agreement that these are the  
8           particular 16 that would be used for illustrative  
9           purposes or perhaps produced by one of the officers on  
10          behalf of them all.

11   Q.   Was that common practice in Scotland at that time?

12   A.   It's my understanding -- I don't know whether it is  
13          jointly agreed or if it's produced by one and agreed by  
14          the others or if they actually consult about what  
15          16 points to use but certainly it was my understanding  
16          that all fingerprints that got to court the Scotland had  
17          been checked four times and one common illustrative  
18          exemplar, in effect, was used, yes.

19   Q.   The reason for asking you about this matter in general  
20          practice is if I again play devil's advocate,  
21          Mr Shepherd looking at it from across the border in  
22          England where he would expect each expert to produce his  
23          own independent example, it would be, one, a factor from  
24          that perspective in suggesting there had been some  
25          collusion -- and I mean that in its full pejorative

1 sense -- some collusion among the experts here, the fact  
2 that they produced a joint report.

3 A. Yes.

4 Q. Have you any comment on that, viewing it from the  
5 Scottish practice?

6 A. If I could come into the same point from a slightly  
7 different angle, I thought one of the most telling  
8 points which Mr Findlay raised in cross-examination with  
9 the SCRO officers to suggest that the process wasn't  
10 quite as independent as one thought in general terms,  
11 was the fact that the way in which their procedures  
12 worked was such that by the time the second officer  
13 looks at the print and does his or her own comparison,  
14 he or she already aware that another officer considers  
15 it to be a match, not only that, considers it to be a  
16 match for a particular digit from the fingerprint form  
17 of the suspect and each successive person is in the same  
18 position or they wouldn't be looking at the print.

19 So he was raising the issue of collusion in almost a  
20 subliminal sense because they knew that that was the  
21 procedure that was followed. It seems to me to be  
22 perhaps an example of the same thing, that it is common  
23 agreement amongst them that there is a match and I don't  
24 know, as I say, whether one officer produces the actual  
25 comparison document and the others look at it or if it's

1 done by some kind of collective agreement. But  
2 collusion in that broad sense is happening in those  
3 circumstances, I think, fairly obviously.

4 Q. If one takes any other variable, the fact that the four  
5 experts agree a joint production --

6 A. Yes.

7 Q. Do you see anything sinister or untoward, given the  
8 Scottish practice, in that happening?

9 A. No, because I take it that they know what they're  
10 supposed to be doing and I take it that no-one would  
11 agree an illustrative material to go before the court  
12 where they disagreed, for example, with one of the  
13 points that one of their colleagues had produced.

14 Q. Again, just for the avoidance of any doubt --

15 A. I'm sorry, if I can qualify that slightly, I don't know  
16 what the actual process is by which they reach that  
17 agreement.

18 Q. Again, just for the avoidance of any doubt, the general  
19 practice, not just with McKie but the general practice  
20 in Scotland was for Fingerprint Officers to present one  
21 illustration on a joint basis?

22 A. Collectively, yes.

23 Q. If I move to a completely different angle myself in  
24 relation to this. You have had experience of using  
25 these illustrations in court.

1 A. Yes.

2 Q. And they, in fact, turned out to be less than helpful.

3 A. Yes.

4 Q. Can I ask you just in relation to terminology:

5 illustrative can mean a number of things. First of all,

6 I understand from your statement that it was very clear

7 the Fingerprint Officers were explaining to you they had

8 not arrived at their conclusion of identification by

9 reference to these chartings. The chartings were

10 produced afterwards as illustrations?

11 A. That was my understanding.

12 Q. Secondly, as illustration, they were not saying to you

13 that these points on the charts were the only 16 points;

14 they were simply produced as an illustration of

15 16 points?

16 A. That there were 16 points, yes; that's my understanding.

17 Q. The third point that I wanted to explore with you in

18 your preparation for the trial, had anybody suggested to

19 you that the illustrations that were produced were

20 anything other than an accurate recording of 16 points

21 in sequence and agreement?

22 A. No. The whole point is that's precisely what they are.

23 Q. Had anyone raised with you the fact that they were

24 produced on what we've come to call a charting PC in

25 that they were digitally prepared and that the machine,

1 in fact, produced an inaccurate reproduction of the  
2 points?

3 A. I don't recall that being raised because that would  
4 obviously have been a concern.

5 Q. But you don't recall them raising it with you?

6 A. No.

7 Q. But as you say in your statement --

8 A. Sorry, to be quite clear, it was made clear to me that  
9 these were not the actual materials that they had used?

10 Q. Yes.

11 A. That these were illustrative and that they had looked at  
12 their own images of the mark, yes.

13 Q. And, as you say, the material they would have used would  
14 also have been produced in court, the original  
15 photograph and the fingerprint form?

16 A. Yes.

17 Q. What I am taking up is the enlargements that they did  
18 use you understood were illustrative in the sense we  
19 have described.

20 A. Yes.

21 Q. It's whether anybody said, "Mr Advocate Depute, that  
22 photograph, in fact, is an inaccurate record of the  
23 16 points because the computer would just simply not  
24 accurately plot points"?

25 A. I have no recollection of ever being told they were

1 inaccurate. The point may have been made that the  
2 quality of what had been looked at at first instance was  
3 better but that's quite a different thing from saying  
4 it's inaccurate. If an expert had said to me, "The  
5 materials you are putting before the court are  
6 inaccurate", that would be the cause of grave concern.

7 Q. You would have been setting yourself up for a fall, in  
8 effect?

9 A. Exactly, yes. I would have said, "What's inaccurate  
10 about it?" So I've no recollection of that.

11 Q. Moving on from that though, the two points I wanted --  
12 two separate points -- you have explained quite  
13 carefully in your statement that, in fact, when the  
14 photographs were used in court the technology just  
15 proved to be quite inadequate.

16 A. Yes. At a certain stage of magnification the skin pores  
17 and so on become apparent and it becomes a much more  
18 confusing image but when one enhances it even more my  
19 recollection is some of the pixillating and so on was  
20 starting to come up and the lines became smudges and it  
21 was very difficult to see precisely what was going on,  
22 the definition wasn't good. But we'd never actually  
23 enlarged them to that extent before in a court in my  
24 experience.

25 Q. So, in other words, the fact that the term used in court

1 was "blobby", the fact they turned out to be blobby when  
2 enlarged was not something that had been anticipated?

3 A. That first arose from my recollection when a  
4 particular point was point was being put to one of the  
5 SCRO officers, I think Mr Stewart, the fist officer, by  
6 Donald Findlay and when it was enlarged to a certain  
7 point it became very indistinct and the word "blob" was  
8 used in cross, yes.

9 Q. If I can combine that with a separate point, you have  
10 also explained that in addition to the technology  
11 letting you down, in fact, it transpired that due to an  
12 absence of any experience of answering challenge the  
13 Scottish Criminal Record Office staff, the officers  
14 turned out to be less well able to explain themselves  
15 than their American counterparts.

16 A. That was my impression of what happened. They certainly  
17 were much less clear in their explanation and that was  
18 my attribution, that the Americans had more experience  
19 of this sort of thing whereas the SCRO people had never  
20 been challenged in cross-examination.

21 Q. You hint at one example and perhaps if I bring up the  
22 example I've found that illustrates or draws these two  
23 points together, the technology and the inability to put  
24 forward a reasoned explanation, it is SG0526.

25 This is the evidence of Charles Stewart. Mr Stewart

1           was your principal witness?

2     A.    Yes.

3     Q.    Within the transcript, if I go to page 125 please, PDF  
4           page 125. This is the cross-examination of Mr Stewart  
5           by Mr Findlay.

6     A.    Yes.

7     Q.    Perhaps if we put 125 and 126 up just now. We have  
8           spoken about the Galton points here and then if we drop  
9           the left-hand sheet and bring up 127 on the PDF and put  
10          it beside 126. Here we have an exchange at the foot of  
11          the original transcript page 174, an exchange between  
12          the witness and Mr Findlay beginning at line 20.

13    A.    Yes.

14    Q.    Mr Findlay: "So can you demonstrate to the ladies and  
15          gentlemen of the jury then are two clear  
16          characteristics?"

17                 It must be "can you demonstrate to the ladies and  
18          gentlemen of the jury two clear characteristics."

19                 "Yes, sir.

20                 "Can you? Look at the latent for us, please, and  
21          put that on screen. Again, the same places obviously 10  
22          and 11, please, Mr Stewart. So those are the  
23          characteristics that we've looked at earlier, 10 and 11,  
24          Mr Stewart, and just point them out can you so that we  
25          can locate them.

1 "That is 11 and that is 10. Yes.

2 "Where is the bifurcation anywhere there?"

3 The witness said: "The ridge comes along here, sir,

4 and seems to split and carries down there and carries on

5 there."

6 Mr Findlay says: "Where?"

7 "Well, I can see it, sir, I am afraid."

8 Mr Findlay begins to say presumably he can't but

9 then he's ably assisted from the bench and his Lordship

10 says:

11 "Well, I have a magnifying glass and I must confess

12 I have great difficulty seeing it. Can you point out

13 exactly where it is with the marker? Looking at it with

14 the magnifying glass, it is just a fudge?"

15 The witness: "The ridge goes up here, my Lord,

16 there and splits that way and that."

17 Mr Findlay says: "That is what you say you can show

18 to the jury?"

19 "Yes, sir."

20 Then Mr Findlay says: "You see, there are two

21 things here. We will just take a slightly flippant

22 example just to illustrate the point. An elephant walks

23 into this court and there is no point in me telling the

24 ladies and gentlemen of the jury it is in fact a cow

25 because it will never make it a cow. It will still be

1 an elephant. So there are two things here that you are  
2 doing. One is that you're looking at things that you  
3 say you can see, yes?

4 "That is correct, sir.

5 "But of course in fairness -- criticism but in  
6 fairness -- the test, the worth of your view of the  
7 matter is it is helpful if we can actually see something  
8 for ourselves because at a point the ladies and  
9 gentlemen of the jury have to decide this matter -- yes?

10 "Yes, sir."

11 Is that an illustration?

12 A. That's precisely the sort of thing, yes.

13 Q. So, first of all, even for the Court, the judge -- we  
14 don't have the jury's comment -- but the judge was  
15 saying he was having difficulty seeing the point.

16 A. Yes.

17 Q. Mr Findlay, in very colourful language, is making one of  
18 the points you are the officers are simply saying "it's  
19 my experience that", but they were unable to present  
20 reasons?

21 A. Effectively, they are listening to my iron in my  
22 judgment; that sort of thing, yes.

23 Q. Mr Findlay is quite dismissive of that. He's saying,  
24 "Your's saying it's an elephant and I can see a cow"?

25 A. Yes.

1 Q. "And you'll not persuade me otherwise."

2 That's only obviously a limited example.

3 Was that the type of thing that you are indicating  
4 actually happened?

5 A. That's exactly the sort of thing I was indicating and  
6 hoping to indicate in my statement was causing  
7 difficulty from the Crown perspective.

8 MR MOYNIHAN: I think, with a degree of comfort from me,  
9 that will conclude my questions, sir, and I am not under  
10 citation from this authority I'm under citation from  
11 another authority so if I may be permitted to depart?

12 THE CHAIRMAN: I will release you.

13 Just while it's in my mind following on from what  
14 you have just been asked, this is really what we're  
15 discussing, the quality of the presentation as opposed  
16 to the quality of the evidence.

17 A. Yes.

18 THE CHAIRMAN: But how did that compare with the way, for  
19 example, Mr Wertheim's points were demonstrated?

20 A. You will find this actually summed up quite neatly in a  
21 passage in Lord Johnson's charge to the jury where he  
22 contrasts the evidence of the SCRO officers with the  
23 response of the Americans where they appeared to be  
24 giving clear and perhaps more cogent and logical reasons  
25 for their conclusions which they had reached; whereas

1 the SCRO officers were saying, "To my eye, it looks like  
2 such and such", the Americans would say, "Well, I can  
3 see clearly this line, that line and it's generally  
4 accepted that such and such is not accepted as that  
5 characteristic". So there was more explanation in the  
6 evidence of the two American experts than there was, in  
7 general, with the SCRO officers.

8 I would say at this point though and I do accept  
9 responsibility, the presentation of the case and  
10 presentation of the evidence was effectively my  
11 responsibility and we were in what was uncharted  
12 territory for us here, in the sense we had never blown  
13 things up that big before or had been required to.

14 THE CHAIRMAN: Be that as the ultimate responsibility, it  
15 it's fair to put it that way, but Lord Johnson's  
16 observations maybe accord with your own view.

17 A. It accorded with my impression at the end of the day,  
18 yes.

19 THE CHAIRMAN: Are there applications to perhaps begin with  
20 Miss Galbraith.

21 MISS GALBRAITH: Thank you, sir. There are three points  
22 that I would propose to raise with this witness:  
23 firstly, briefly what Sheriff Murphy's views would have  
24 been on the prosecution of the case, had there been a  
25 clear indication at the outset of the true state of the

1 evidence; secondly, I would like to ask him about the  
2 meeting with the SCRO officers which we have already  
3 heard a little about --

4 THE CHAIRMAN: That's the pretrial --

5 MISS GALBRAITH: The pretrial meeting; and then, lastly,  
6 simply to address comments that may have been made or  
7 have been made by Mr Brown in the Inquiry.

8 THE CHAIRMAN: Yes. You can ask about those matters.

9 **Cross-examined by MISS GALBRAITH**

10 Q. Sheriff Murphy, you gave evidence in terms of your  
11 analysis of the case before starting the prosecution  
12 that the two crucial lines of evidence was, first, the  
13 fingerprint, Y7, and, secondly the eye witness evidence  
14 of DC Kerr.

15 A. Yes.

16 Q. I suppose to a lesser extent the timing of the placing  
17 of the fingerprint also featured in your analysis?

18 A. Yes.

19 Q. As you have explained, as the evidence transpired, the  
20 eye witness evidence of DC Kerr wasn't what you  
21 understood it to be?

22 A. Yes.

23 Q. And, similarly, the position with the placing of the  
24 fingerprint between the aluminium powder and the black  
25 powder wasn't what you had understood?

1 A. That was less an issue because it was possible either  
2 way for the print to have been placed before or after.  
3 As the evidence it came out it didn't entirely exclude  
4 the possibility of it being placed after, albeit it was  
5 perhaps not as strong a point as it otherwise might have  
6 been if the evidence of the Scenes of Crime people had  
7 been that it must have been planted after the aluminium  
8 powdering obviously that would have been better from the  
9 Crown perspective but it didn't entirely exclude it.  
10 But, yes, I accept, yes, that that was part of my  
11 analysis at the time, yes.

12 Q. But as the evidence turned out during the trial what you  
13 were ultimately left with the strand of evidence was the  
14 fingerprint, relying on the fingerprint?

15 A. Basically nothing else, yes, that is right.

16 Q. Had you known that that was the position that would be  
17 the position of the prosecution case at the outset can  
18 you say today what your view would have been in terms of  
19 continuing with the prosecution?

20 A. Well, the SCRO evidence would still have existed and  
21 would not have gone away. What I would say about that  
22 is that the question of possibly having that verified  
23 again independently would have been a much larger issue  
24 than it was for me and the critical factor there was the  
25 evidence of Mr Kerr. If that had not been there, I

1           can't say what I would have done because the difficulty,  
2           of course -- the decision to prosecute had been taken  
3           prior to my involvement and my role was to basically  
4           pick it up and run with it, but had the misapprehension  
5           about Mr Kerr's evidence not occurred I think I would  
6           have looked much more critically at the possibility of  
7           having it looked at independently. But I can't say what  
8           the outcome of that would have been so, you know, that's  
9           as much guidance as I think I can probably give there.

10    Q.    Indeed, with that in mind, may you have given  
11           consideration to perhaps delaying the start of the trial  
12           in order to give you an opportunity to look into that?

13    A.    Yes. When I said that I felt -- I didn't really feel  
14           under time pressure because, in the one sense, there was  
15           a little pressure to get it going because it hadn't  
16           started before, but if I had considered that a further  
17           review was necessary that would not have been a primary  
18           concern. I would have just said, "No, I want this  
19           before we start", yes.

20    Q.    Sitting now with our 20/20 vision looking back on the  
21           case, do you feel that you were given sufficient  
22           information and information of a high enough quality to  
23           enable you to prosecute the case properly?

24    A.    It depends what you mean by -- there was a sufficiency  
25           and the case did go to the jury, so there was a suitable

1 case that was presented. Some aspects of it could have  
2 been much better presented in retrospect and the  
3 critical issue here is the presentational one because  
4 we'd never had to do that before and it was a learning  
5 curve for all of us. That was new territory. I think I  
6 would have looked at the presentation in much more  
7 detail than I did if I had to do it all over again. But  
8 I can't say if my decision to go ahead as opposed to  
9 going back to our office and saying, "What are we doing  
10 here", would have been the same -- that's really  
11 something I can't answer because I don't know what the  
12 results of any independent analysis would have been  
13 since there seems to be fingerprint people giving views  
14 both ways subsequently.

15 Q. Can I ask you please about the meeting that you told us  
16 about shortly before the start of the trial.

17 A. Do you mean when we had the defence materials or the  
18 first meeting?

19 Q. Yes, the defence materials, when you met Charles Stewart  
20 and Hugh Macpherson. I think you have said as a result  
21 or during this meeting you were taking notes for  
22 cross-examination purposes?

23 A. Well, I would have taken some notes of what they said to  
24 me from which I would have made up some notes which I  
25 used for cross-examination and I've found my

1 cross-examination notes but I haven't found the original  
2 source material, I'm afraid.

3 Q. So it wasn't the cross-examination notes you were taking  
4 at the time. You subsequently considered the notes you  
5 had taken at the meeting and made up your  
6 cross-examination notes?

7 A. Yes, that would have been the process but, as I say, I  
8 don't have the notes of the original meeting. What I  
9 have is the sheets from which I asked the questions in  
10 court.

11 Q. You said earlier in evidence that the meeting had lasted  
12 for quite some time.

13 A. Yes. Because obviously they had to look at the  
14 documents and then tell me what they thought of it. So  
15 I can't remember the exact details but it's quite  
16 possible that I went upstairs and had lunch or something  
17 and came back and spoke to them. There would have been  
18 a period when they were looking at it when I wasn't  
19 there and then at a certain point I'd come back and they  
20 gave me their impressions.

21 Q. Can I ask you, Sheriff, do you recall giving a statement  
22 to officers from Tayside Police in around  
23 September 2000?

24 A. Tayside Police?

25 Q. It was in relation to an inquiry you may know as

1            Operation Alba in relation to this case when they asked  
2            you questions about the prosecution.

3        A.    I'm sorry, I don't.

4        Q.    It's also known as the Mackay Robertson Inquiry.

5        A.    The what, sorry?

6        Q.    Mackay Robertson.

7        A.    I'm sorry, I don't remember. Do you mean in relation to  
8            my role as Advocate Depute at the trial.

9        Q.    Yes.

10      A.    I have to say I don't recall that.

11      Q.    Can I ask you please to have a look at a document  
12          reference CO2036.

13      A.    That seems to be me all right, yes. I'm sorry, I don't  
14          mean to be facetious but that's my personal details.

15      Q.    I think, in fairness, the copy that we have isn't signed  
16          at the end, perhaps, in the way a statement would  
17          normally be so you may not have seen this recorded but  
18          do you recall having seen a statement like this before?

19      A.    No, I don't.

20      Q.    Does it assist you to remember when you gave this  
21          statement?

22      A.    The police have come to interview me two or three times  
23          about cases I've been involved in afterwards. I don't  
24          remember this one specifically, I'm sorry.

25      Q.    I think if I could ask you please to look at the second

1 page of this statement and on this page you mention the  
2 meeting we have been discussing that you had with the  
3 SCRO experts.

4 In particular, if we can have expanded, please, the  
5 third, fourth, fifth and sixth. I just want you to take  
6 a moment to look at that. **(Pause)**

7 A. Yes, thank you. I have read that, thank you.

8 Q. I think, in fairness, it gives broadly gives the same  
9 account of the meeting that you have given us this  
10 afternoon.

11 A. Yes. Yes, I think so.

12 Q. If we can see the top paragraph, the second sentence,  
13 you indicate that the meeting took place in a courtroom  
14 at the High Court in Glasgow:

15 "... and together we spent the best part of the  
16 afternoon going over the defence productions ..."

17 A. Yes.

18 Q. Then the only other point I would like to specifically  
19 mention is in the last paragraph. It states:

20 "They also told me that they would go away and  
21 examine the defence productions more closely and report  
22 back with anything further of relevance."

23 A. Yes.

24 Q. That would be correct?

25 A. That would be my standard procedure when I'd spoken to

1 an expert witness, I'd always say that, yes. They told  
2 me -- I would always ask an expert to do that, if  
3 anything else comes up contact the Fiscal immediately.

4 Q. With that in mind, can I put to you comments that were  
5 made by both Mr Macpherson and Mr Stewart regarding that  
6 meeting and just ask for your comment on that.

7 Firstly, if you look at the Inquiry statement given  
8 by Mr Macpherson, which is FI0055. If you go to PDF  
9 pages 39 and 40, if we could have both pages up, please,  
10 and if we look at paragraph 172, Mr Macpherson states:

11 "Again, prior to **HMA v McKie** we spoke to a  
12 representative from the Crown, I believe it was Mr Sean  
13 Murphy. It was a brief discussion regarding the fact  
14 that there was an expert disagreed with our opinion on  
15 mark Y7. I don't recall a discussion about the basis  
16 for our opinion or looking at any production books,  
17 et cetera, with the Crown representative. I believe we  
18 were shown Mr Pat Wertheim's enlargement of mark Y7 with  
19 a brush stroke through it, which had a clear plastic  
20 overlay attached to it. There was no discussion about  
21 the best way to present my evidence. Charles Stewart  
22 had discussions with the Procurator Fiscal."

23 A. Yes.

24 Q. Can I ask you just generally for your comment on  
25 Mr Macpherson's account of this meeting?

1 A. This appears to be a reference to the second meeting  
2 because, obviously, it refers to having Pat Wertheim's  
3 materials. So I think that must be the court meeting.  
4 There doesn't seem to be any reference to the initial  
5 discussion is my first reaction.

6 Q. That is correct. My understanding is that was the  
7 meeting we have just been talking about, that you  
8 mentioned in your Mackay Robertson statement; is that  
9 right?

10 A. Yes, yes.

11 Q. Whereas your understanding of this meeting is that it  
12 took some time, the best part of an afternoon?

13 A. Well, yes, because, as I say, I remember them coming  
14 with magnifying equipment and having a good look at the  
15 defence materials. Yes. It's not something that -- it  
16 wasn't a -- my recollection is it was not a brief  
17 discussion, although I mean, I don't know, that may be a  
18 confusion or joining together of the two meetings  
19 because the first meeting may have been more general.  
20 But, no, certainly there would be no point -- well, let  
21 me put another way. My recollection is the day we  
22 looked at the defence materials we were all there for  
23 some time, yes.

24 Q. Similarly, can I ask you to look at Mr Stewart's account  
25 of this meeting. His statement is at FI0036 and, again,

1 if we can have pages 55 and 56 please.

2 At paragraph 264 Mr Stewart explains discussions  
3 with the Crown. He says:

4 "I was not told about the defence expert's opinion  
5 and productions until a day or so before I was due to  
6 give evidence. I was called down to court to meet with  
7 the Advocate Depute, Sean Murphy, and I think Ian  
8 Bradley, the Procurator Fiscal. It was at this point I  
9 became aware that the defence was going to be based on  
10 mis-identification as opposed to wrongful making of the  
11 mark. It was also at this point that I became aware the  
12 defence had consulted with two experts, Mr Wertheim and  
13 Mr Grieve. I was briefly shown the defence productions  
14 although I was not given the opportunity to examine them  
15 in detail.

16 "I was not asked for any advice by the Advocate  
17 Depute in respect of the case. I cannot remember any  
18 meetings with the Advocate Depute before the trial,  
19 apart from the one I referred to above. Accordingly, I  
20 cannot remember having any discussions with the Advocate  
21 Depute, for example, as to how fingerprint evidence  
22 should be addressed or about how the Crown fingerprint  
23 evidence should be displayed or in respect of  
24 difficulties with charted enlargements."

25 A. Yes.

1 Q. Once again, that would seem to give a different account  
2 of the meeting.

3 A. I would make a number of comments about that. First of  
4 all, I don't accept that was the only meeting with  
5 Mr Stewart because I have a specific note of going up to  
6 SCRO and the date in my statement.

7 So far as his reference to being briefly shown the  
8 defence productions and not given the opportunity to  
9 examine them in detail: the whole point of bringing them  
10 down to the court was so that they could look at the  
11 materials and it really was a matter for them how long  
12 they needed to spend with them. I'm not the expert, so  
13 I find that a little strange as a reaction because the  
14 idea was to allow them as much time as they wanted to  
15 look at them and to go through it with me."

16 Going on the second paragraph, I'd make a number of  
17 comments about that. As I've mentioned I seem to have a  
18 clear written reference to an earlier meeting. With  
19 regard to the question as to how fingerprint evidence  
20 should be addressed, broadly speaking, in very general  
21 terms, although I haven't got specific notes of it that  
22 was pretty much my recollection as to what the first  
23 meeting was about because, in fact, Mr Stewart was the  
24 first of the SCRO officers to give evidence and if one  
25 looks at the transcript, as I think is available to you

1 all, I didn't actually go to the McKie case for quite  
2 some time. There was a lengthy what we described  
3 amongst ourselves in the Crown team as a tutorial on  
4 fingerprints, there was an explanation as to how  
5 fingerprints are gathered and represented and so on.  
6 That was all presented on the basis, my recollection is,  
7 on the basis of the earlier discussion we had and it was  
8 only after much general discussion about fingerprint  
9 evidence and how marks were recovered and examined and  
10 so on that we actually got on to Y7 at all, so I don't  
11 accept that.

12 Now, the last part of the position is a little more  
13 complex because with regard to how Crown fingerprint  
14 evidence should be displayed or in respect of  
15 difficulties with charted enlargements, I certainly  
16 accept that. I did not discuss either of those things  
17 with them in advance because we didn't really realise  
18 that the physical difficulties about enlargement were  
19 present until it actually happened at the trial. So I  
20 agree that wasn't the subject of any prior discussion.

21 Q. If I can lastly ask you about comments that have been  
22 attributed to you by Les Brown, is that a gentleman  
23 that --

24 A. Les Brown, the Fiscal?

25 Q. Not, not Les Brown the Fiscal. He is a retired police

1 officer who has given evidence to the Inquiry.

2 A. Oh, right.

3 Q. There is a comment that has been attributed to you that  
4 I would just like to ask you about.

5 A. Sure.

6 Q. And comment on, I'm sorry.

7 A. Yes.

8 Q. He suggested that there was an incident during the trial  
9 where you, after Officer Lees had given evidence, that  
10 you spoke to police officers outside the court and made  
11 a comment, "That's two that's committed perjury".

12 A. Sorry? Me?

13 Q. Yes.

14 A. I'm sorry, please go ahead.

15 Q. It's really just to ask you, Sheriff Murphy, if that  
16 happened.

17 A. There is a reference at the meeting that we had  
18 afterwards to two people, because obviously the whole  
19 Crown position was if Ms McKie had committed perjury one  
20 of the logging officers must also have committed  
21 perjury. I have absolutely no recollection of making  
22 any such to remark to a police officer and I can't think  
23 how I would come to be discussing the case with a police  
24 officer.

25 Q. The meeting you are referring to, that included the SCRO

1 officers?

2 A. Yes, there's a reference there to two people been lying  
3 but ... but that would be a quite inappropriate mark, in  
4 my view, for an Advocate Depute to make. I have no  
5 recollection of that. Is the suggestion I spoke to a  
6 court officer or I spoke -- how do I come to -- I don't  
7 understand the context.

8 Q. It may simplify matters if we have a look at the  
9 statement of what he said.

10 A. Yes, indeed.

11 Q. The document number is FI0017 and if we go to page 10 of  
12 that, this is Mr Brown's statement to the Inquiry.

13 THE CHAIRMAN: 46A.

14 MISS GALBRAITH: It's paragraph 46A which we see is headed  
15 "Comments of Advocate Depute: Sean Murphy."

16 A. The first point is this remark appears not to have been  
17 made to him but to be relayed to him by other people.  
18 Is that ...?

19 Q. Yes, that is perhaps a common theme.

20 A. I'm sorry, I have no recollection of that and I would be  
21 quite surprised if I had made a remark of that sort. I  
22 don't understand why I'd be speaking to a number of  
23 police officers outside court after Mr Lees had given  
24 evidence. My recollection is that Mr Lees gave evidence  
25 on the same day as Mr Kerr because they were regarded as

1 a package at that point in the trial. Of course, after  
2 Mr Kerr's evidence the position was quite different. I  
3 have to say I have absolutely no recollection about that  
4 and I'm quite surprised that that is suggested, yes.

5 MISS GALBRAITH: Thank you, Sheriff Murphy. I have no  
6 further questions.

7 THE CHAIRMAN: Yes. We normally take a short break at this  
8 stage but I should say that I don't want anybody to feel  
9 under pressure of time but I do intend to complete  
10 Sheriff Murphy's evidence this afternoon. So if we stop  
11 now for ten minutes and we will resume at 3.10.

12 **(3.00 pm)**

13 **(A short break)**

14 **(3.12 pm)**

15 THE CHAIRMAN: I am going to ask Mr Macpherson next, do you  
16 have any questions?

17 MR MACPHERSON: I do have one issue I would like to raise in  
18 relation to the view taken about police evidence and it  
19 relates to a document that was put to the Sheriff but  
20 not fully explored, if I may.

21 THE CHAIRMAN: Certainly, yes.

22 **Cross-examined by MR MACPHERSON**

23 Q. Sheriff, if I could ask you to have a look again at, I  
24 think, what is called the Crown precognition in the case  
25 which is a document, reference CO2561.

1 I think you told us that these were the papers that  
2 you received.

3 A. Yes. That's the analysis of the evidence. Yes, that  
4 would be in the papers I received, yes.

5 Q. If I just take you to the first two paragraphs of that  
6 page. It reads there:

7 "The witnesses in this case are all basically  
8 credible. In general, they are police officers and  
9 legal persons associated with the court proceedings.  
10 Problems arise with the reliability we normally expect  
11 from police evidence, in particular in relation to the  
12 actual sequence of events. Obviously, none of the  
13 officers involved in the murder inquiry expected this  
14 case would arise from the investigation of the death of  
15 Marion Ross. The officers correctly concentrated their  
16 efforts on finding the murderer and not especially on  
17 the actions of their colleagues, in particular Shirley  
18 Cardwell.

19 "To this extent, the evidence given by the police  
20 witnesses in connection with the events of 8th and  
21 14th January 1997 will inevitably be of the standard  
22 provided by civilian witnesses in similar circumstances.  
23 It cannot be of the usual standard expected of police  
24 officers. The deficiencies in the standard of evidence  
25 should not have any material bearing on the proof of the

1 case."

2 That was the view of the person presenting the case  
3 to you?

4 A. Yes.

5 Q. Was that essentially a view you formed yourself once you  
6 had an opportunity to prepare the case?

7 A. Actually, to be honest, some of the content of that  
8 statement I would have treated with a pinch of salt from  
9 the very beginning.

10 The difference between the evidence of police  
11 witnesses and civilians in general terms is the police  
12 officers very often make near contemporaneous notes  
13 because that's what they're trained to do in normal  
14 circumstances, whereas civilians tend to be relying on  
15 memory or early statements but, to be perfectly honest,  
16 I didn't attach any great significance to those views.  
17 I would simply look at what evidence was available to me  
18 and I didn't draw any significant difference between the  
19 standard of evidence in this and any other case. You  
20 have to evaluate what's in front of you.

21 Q. Would it be fair to say that you agreed that the quality  
22 of the evidence available about timings, in particular  
23 between these two dates, was not perhaps as much as you  
24 would like?

25 A. I'm sorry, between which two dates? I don't follow.

1 Q. Between 8th and 14th January 1997?

2 A. I'm sorry, I see what you mean, yes.

3 The aspect of the evidence which gave me most  
4 concern in terms of its quality was actually the log  
5 keeping as time went on because that was an ideal or the  
6 system that had been laid down by the Senior  
7 Investigating Officer was an ideal that was  
8 substantially departed from on various occasions. That  
9 was the primary difficulty but as far as the rest of it  
10 was concerned -- there was also the additional  
11 difficulty in that when one is dealing with a trial  
12 relating to fairly recent events, particularly a custody  
13 trial, one would expect officers and others to have a  
14 reasonable recall. By the time you get to a perjury  
15 situation you are a considerable time down the line from  
16 the original events and, as is indicated here, the  
17 emphasis is different. So things like Mr Kerr's  
18 recollection of when it was he saw Ms McKie in the  
19 canteen and so on were never likely to be terribly  
20 accurate because of the passage of time and so on but  
21 one was alert to those. Those were my main concerns  
22 but, as I say, I had my own views about these matters  
23 based on what I had in front of me.

24 Q. It was really Mr Kerr's evidence that I was thinking  
25 of --

1 A. Yes.

2 Q. -- as you would imagine. You said Mr Kerr's evidence

3 was -- his recollection was not as accurate as it might

4 have been because of the passage of time?

5 A. Yes.

6 Q. And that was the position effectively throughout the

7 preparation and the presentation of the trial?

8 A. Yes.

9 Q. I think we can understand how there may have been an

10 assumption from the fact that the log recorded Mr Kerr

11 leaving at 1.15, that if he says he saw Detective

12 Cardwell while he was there, it was before 1.15?

13 A. Yes.

14 Q. And I can appreciate why you would want that to be

15 checked and it was important that you did.

16 A. Yes.

17 Q. And I suppose it is possible, is it not, that the same

18 misapprehension may have carried through that checking

19 process?

20 A. I don't know exactly what went wrong because my

21 instruction was that someone was to speak to him again

22 with the log, my junior's copy of the log.

23 It appeared to me that, from recollection, the log

24 seemed to record a fairly accurate sequence of arrivals

25 and departures by him in the previous two days. He was

1           one of the officers in charge of seizing and relaying  
2           productions to the lab. They were being laid out as the  
3           Scenes of Crime Officers were identifying them in a room  
4           at the back of the house and were being uplifted and --  
5           so he would have been in and out. It seemed to me his  
6           arrivals and departures appear to be been recorded  
7           fairly regularly and the impression the log gave was he  
8           basically had finished as far as the house was concerned  
9           at lunchtime on Saturday and had not been back and I was  
10          really looking for confirmation as to what time it was  
11          prior to that but certainly my understanding of the  
12          response I got was that it had been on the Saturday  
13          morning.

14        Q.    I suppose it might have been that what whoever it was  
15          that went to check that established was that Mr Kerr  
16          said, "If the log says I left at 1.15, I left at 1.15"?

17        A.    I can't comment on that other than the fact that was the  
18          whole purpose of the exercise, yes, and that's why I  
19          thought that I'd got an accurate response, which turned  
20          out to be erroneous.

21        Q.    I take it you are not saying Mr Kerr had expressly, as  
22          far as you are aware, told the person checking that he  
23          knew he had been there before 1.15?

24        A.    Well, he had been there before 1.15. That wasn't in --  
25          the question was his return on the Saturday afternoon.

1 He gave a very detailed and extremely plausible  
2 situation as to how all that had come about, which I was  
3 hearing for the first time in his evidence and that was  
4 the annoying aspect of it because I'd asked for it to be  
5 checked and I got back what turned out to be an  
6 ambiguous response that was not accurate.

7 Q. During the trial he gave evidence he had been there in  
8 the afternoon?

9 A. Oh yes. He was in and out the place several times and  
10 he gave a very specific explanation in relation to  
11 they'd run out of production bags and he was scrounging  
12 shoe boxes from a shoe shop in Kilmarnock and using them  
13 to transport door handles back to the station and he  
14 said logging officers had got fed up with noting it  
15 because he was in and out so often.

16 Q. I think he gave very similar evidence to the Inquiry  
17 here.

18 A. Yes.

19 Q. Was he uncertain at the trial as to precisely when he  
20 might have seen Detective Cardwell?

21 A. Yes, in terms of exact hours and minutes but he put it  
22 at approximately the time when he knew she was  
23 legitimately there to collect the log and so,  
24 effectively, seemed to be confirming he'd seen her at  
25 that time. I can't remember precisely what he did say

1 about timings but it was so much in frame that it tied  
2 in with the surrounding evidence about that.

3 Q. Because one potential discrepancy that arises in the  
4 evidence is, I think, in your statement to the  
5 Inquiry and here you say that his evidence at the trial  
6 was that he had seen her there at 5.00.

7 A. That's my recollection. If you have his evidence in  
8 transcript and he said 4.00 or 5.30, that would be  
9 right. That was my sort of guesstimate of my  
10 recollection of what he'd said but that might not be  
11 accurate. What I am clear about is it did coincide with  
12 the evidence that suggested that that had the time when  
13 she'd been there to switch the logs over or to take the  
14 log away for photocopying.

15 Q. What he said in the Inquiry here was really he didn't  
16 remember the particular time, some time in the  
17 afternoon, he couldn't be specific about the time and he  
18 rather doubted that he could have suggested any  
19 particular time, hour of the day?

20 A. Do you not have a transcript of his evidence?  
21 Unfortunately, I would have been asking questions at the  
22 time so it's not something I would have noted.

23 Q. I don't have a transcript of his evidence in the trial,  
24 in the McKie trial. There is a note by a police officer  
25 who was watching the trial which I can refer you to,

1           although of course not a document you are familiar with  
2           or has particular authority. But perhaps if I can say  
3           this: his evidence in this Inquiry was that he didn't  
4           recall giving you a specific time although he would  
5           probably have agreed to any particular time that might  
6           have been put to him.

7        A.    I don't think I would have specifically put a time to  
8           him because I was apprehensive -- he didn't know when it  
9           was other than the fact he thought it was before 1.15  
10          but what I would say is, quite clearly, our initial  
11          impression or our anticipation as to what -- our  
12          expectation as to what his evidence would be was  
13          completely different from what it actually was and 5.00  
14          is my broad recollection but if I could put it this way,  
15          his evidence was so consistent with the time when she  
16          was there with DS Shields to change the log that we  
17          regarded that matter as ended from that point on and it  
18          wasn't evidence of any independent sighting on another  
19          occasion, if I can put it that way. Whatever was said  
20          about timing was so approximate to that sequence of  
21          events that that was no longer an decisive part of the  
22          Crown case in terms of what ... as a sighting at any  
23          other time.

24        Q.    I don't have a transcript of his evidence in the McKie  
25           trial but is it possible that the time of her attendance

1           might have emerged in the course of his evidence anyway  
2           so, in effect, might that have been put to him, he might  
3           be aware she arrived at a certain point and saying, "If  
4           she was there at that point then I saw her"?

5        A.   My recollection is that the log did not actually record  
6           her arriving to take the log away or coming back and  
7           returning it. So we would have been basing that on  
8           whatever Ms McKie may have said at interview and on the  
9           evidence of DS Shields, who was her driver and, in part,  
10          on the position of Mark Lees and I mean, I simply can't  
11          remember -- it would not be surprising if the timings  
12          had been a little different from each other but broadly  
13          within the same time period but whether my recollection  
14          of 5.00 is accurate or not it was sufficiently  
15          approximate with the other evidence to be -- it was  
16          pretty apparent to us he seemed to be talking about the  
17          same time and that was not what we were expecting him to  
18          come out with. So as an issue we regarded that as  
19          really dead water from that point as an independent  
20          sighting.

21       Q.   I presume that as soon as Mr Kerr accepted that he had  
22           been there in the afternoon --

23       A.   Yes, once he accepted that, it became pretty obvious  
24           that things were not as we thought they were, yes. And  
25           whatever timing he gave or what he said about that, as I

1 say, tallied sufficient for it to be pretty much a dead  
2 letter and the issue then became as to whether, if  
3 Officer McKie had been in another time, if it had been  
4 some other time or whether she had actually been in  
5 during that visit at some point but that seemed a little  
6 difficult in the sense that -- although that was I think  
7 part of the Crown presentation ultimately because, of  
8 course, Detective Sergeant Shields was sitting outside  
9 and any opportunity would have been remarkably short.

10 Q. Again, just on the same point, as I've said, Mr Kerr's  
11 evidence to this Inquiry was that he was never at any  
12 stage able to name a time at which he saw her. However,  
13 clearly, in examination the point can be tested in this  
14 Inquiry and perhaps in the trial it might be tested by  
15 what he was doing, what he was listening to on the  
16 radio, there was a football match perhaps starting, it  
17 is possible to speculate about times that way and I  
18 think that's what did happen in this particular inquiry.

19 I just wonder, if he says he was never able to  
20 identify a specific time is that perhaps consistent --

21 A. That could well be right. He might have said something  
22 like teatime and I've had that in my head as 5.00 by the  
23 time I've come to give this statement 10 years on. But  
24 that could be right; I just can't be sure. But what I  
25 am certain of is its proximity to the other events was

1           such that it became obvious he was likely to be talking  
2           about the same visit.

3       MR MACPHERSON:   No further questions.

4       THE CHAIRMAN:   Mr Holmes, do you have any application?

5       MR HOLMES:   Yes, sir. There are three matters I would like  
6           to cover briefly. Firstly, there is the procedure in  
7           1999 at a time when Ms McKie's trial took place.

8       THE CHAIRMAN:   The procedure?

9       MR HOLMES:   The High Court procedure.

10      THE CHAIRMAN:   Oh, yes.

11      MR HOLMES:   Secondly, there was the time of Mr Swann's  
12           discovery and, thirdly, there is the meeting that took  
13           place between SCRO and Crown Office after the trial.

14      THE CHAIRMAN:   Yes, you can ask about all three.

15      MR HOLMES:   Thank you, sir.

16                               **Cross-examined by MR HOLMES**

17      Q.   Sheriff, if I can just ask, you have explained a little  
18           bit about the procedure for High Court trials at the  
19           time, they were organised into sittings of two weeks and  
20           I think you said there were somewhere between six and  
21           eight cases in each two-week sitting?

22      A.   It varied enormously depending on the size of the cases  
23           but something of that order, usually, yes.

24      Q.   Can you explain, you wouldn't bring all the witnesses in  
25           for all six or eight trials on any given day, would you?

1 A. Goodness, no. The procedure was this: having received  
2 the papers, the Advocate Depute would determine the  
3 sequence or running order of the trials within the  
4 sitting and on the first day of the trial you would  
5 bring in whatever witnesses you thought would be  
6 required for day 1 of the first trial.

7 You would also instruct that perhaps the first three  
8 or four witnesses for the second trial should be brought  
9 in and that was known as the back-up, so that if for any  
10 reason the first trial could not start you could empanel  
11 a jury and start the second trial and go back to the  
12 first one later.

13 The third occasion -- the third reason which you  
14 would bring witnesses in, if you had, from looking at  
15 the papers, a suspicion that some witnesses might be  
16 rather reluctant to turn up you might give an  
17 instruction that civilian witnesses for a certain case  
18 were to be brought in for what was called witness check  
19 purposes, to see if somebody you thought might be  
20 reluctant had actually shown up or not in answer to the  
21 citation, in which case you could take certain  
22 procedures if they hadn't turned up at the start of the  
23 sitting. But broadly speaking, you would bring in day  
24 1's witnesses for the first case and a couple from the  
25 back-up case.

1 Q. So on any given day on which you were due to start the  
2 trial you would have witnesses available for two trials.

3 A. I'm sorry, I didn't catch that.

4 Q. On any given day when you were due to start the trial  
5 you would have witnesses available for two trials so  
6 that if the first trial had to be adjourned there was no  
7 loss of court time.

8 A. Usually -- that didn't always happen -- but usually that  
9 was the idea in those days, yes.

10 Q. You have explained also that your papers would be sent  
11 to you by round about ten days in advance of the  
12 sitting?

13 A. The standard was for them to arrive ten days. I've  
14 obviously had these a little earlier because of the  
15 meeting with SCRO on the 30th.

16 Q. That's what I was about to ask. There were advance  
17 notice cases and you said this was one of them?

18 A. Yes.

19 Q. Are you able to say why this was an advance notice case?

20 A. Yes, it was pretty unusual because, first of all, a  
21 police officer was being prosecuted; secondly, it was  
22 perjury, which is unusual, and that involves, quite  
23 often, extra preparation time because you would have to  
24 look at the transcripts of the original trial in part  
25 and so on and so it wasn't what one might call a run of

1 the mill case. So one would expect that to be flagged  
2 up to the Deputy in advance.

3 I can't be sure about this but it is possible also  
4 that, having been told I was to do it, I asked for the  
5 papers early. I don't know and I'm not claiming that I  
6 did but from time to time one could ask for papers early  
7 if, for example, you wanted to do something like have a  
8 meeting with the SCRO. But I suspect in this case it  
9 was the other way about, that the papers were given to  
10 me in advance and I was given some extra notice but I  
11 can't say when I'm afraid. Other than that, I must have  
12 had them before, in advance of the SCRO meeting on the  
13 30th.

14 Q. It is clear from the parts of the precognition that we  
15 have looked at already that this would be regarded as a  
16 trial of some importance?

17 A. Yes.

18 Q. The consequences to fingerprint evidence were realised  
19 at an early stage?

20 A. Yes, absolutely.

21 Q. Is it also fair to say that on occasions where there  
22 have been trials that are of particular importance that  
23 perhaps the trial itself will be assigned a separate  
24 sitting?

25 A. That would really only happen, not so much on the

1 importance but on the volume. If a case had something  
2 like 250 witnesses it might well be assigned a separate  
3 sitting.

4 What would tend to happen in a trial of particular  
5 importance is that it would be -- the papers would be  
6 sent to the Deputy at an earlier stage than normal but  
7 special sittings would only be for cases with an  
8 extraordinarily large volume of witnesses.

9 Q. Has it been known for trials of particular importance to  
10 be conducted by a Law Officer?

11 A. Oh, yes. That's probably much less common now than it  
12 was in days gone by but, oh yes, that was certainly the  
13 case at one time.

14 Q. When you refer to "days gone by" would that include the  
15 period we're talking about?

16 A. **(Pause)**. I can't remember how many cases. Certainly, I  
17 do remember the Lord Hardy, who was Lord Advocate at  
18 this time, always did one or two sittings a year, which  
19 is not current practice. I cannot remember if when  
20 Colin Boyd was the General he followed the same practice  
21 but I certainly remember Lord Hardy did that. But, yes,  
22 particular cases but really more in the Appeal Court  
23 than at trial level would be specifically conducted by  
24 an officer, yes. That was certainly the case at this  
25 time that officers dealt with certain appellate matters.

1 Q. It is not something that to your recollection was  
2 considered in this case?

3 A. If it was, I wasn't aware of that and I don't think it  
4 was.

5 Q. Do you have a copy of your statement in front of you?

6 A. Yes, I do.

7 Q. In paragraph 2 of your statement I think you say that  
8 Crown Office encouraged you to begin in the trial?

9 A. I'm sorry? Yes.

10 Q. It's towards the end of paragraph 2. It says:

11 "I also remember being encouraged by Crown Office to  
12 start the trial in the sitting of April 1999."

13 A. Yes.

14 Q. Can you say who it was at Crown Office that encouraged  
15 you to do so?

16 A. I think in fact it was specifically relayed to me by  
17 Iain Bradley as the Sitting Manager having come from  
18 Crown Office. So remember that once the sitting had  
19 started I would have been conducting trials. I think  
20 basically the message was relayed to me by him but I  
21 can't remember what the original source was. But,  
22 again, I mean, I do accept this is not absolute. If I  
23 had decided that I wanted to adjourn and do something  
24 else that was my decision. That would have been my  
25 decision. But, yes, I do remember quite commonly if

1 something had gone off before we would be encouraged to  
2 conduct it in the second or subsequent sitting.

3 Q. Absolutely. As you said earlier on, except in certain  
4 circumstances where you are looking at taking a plea in  
5 a murder or rape, the decision would be for the Depute  
6 at court whether to begin a court or whether to --

7 A. No, pleas to a lesser charge in murder and rape had to  
8 be referred to an officer but once the trial had started  
9 it was the responsibility of the Depute conducting the  
10 trial whether to accept any plea that was offered in a  
11 trial.

12 Q. But I understood from what you said earlier that, except  
13 in those circumstances, any decision as to the conduct  
14 of the case ultimately rested with the Depute at court?

15 A. Yes, absolutely that is the correct. That's why I say  
16 that although I'd made that remark, ultimately it was my  
17 decision and my shout to go ahead in that sitting and  
18 that that was my responsibility.

19 Q. Are you able to say how it was that you were encouraged  
20 to begin the trial?

21 A. It would simply have been something along the lines of  
22 Iain saying to me that, "We really want to get this  
23 started" or, you know, the Crown Office or Home Depute  
24 or DC, somebody is anxious to get it started because  
25 it's gone off before -- something of that. I don't mean

1 to make too much of it. It was something along those  
2 lines was presented to me but I can't remember precisely  
3 the language in which it was couched.

4 Q. Do you recall having any impression at the time as to  
5 why?

6 A. Yes, my impression was that because it had been  
7 adjourned from a previous sitting and also the Crown, as  
8 much as the defence, were anxious to get a result on  
9 this matter one way or the other.

10 Q. At the time was it common for cases to be adjourned more  
11 than once?

12 A. I'm sorry ...?

13 Q. Was it common for cases to be adjourned more than once?

14 A. I can't hear what you're saying after the word  
15 "adjourned".

16 Q. Was it common for cases in 1999 to be adjourned more  
17 than once?

18 A. Common ... how do you define "common"? It was not  
19 unknown, it happened more often than we wanted it to,  
20 yes.

21 Q. Prior to the reforms --

22 A. Yes, absolutely --

23 Q. -- it was much easier to obtain an adjournment if you  
24 wanted to?

25 A. Yes, that's completely right.

1 Q. I will move on to when you first discovered the  
2 involvement of Peter Swann, if I can. At paragraph 9 of  
3 your statement you say that you have no note of any  
4 meeting with officers of SCRO during the trial.

5 A. Yes.

6 Q. So any meeting that you had would have referred to the  
7 one on 30th March or to the one that you have described  
8 immediately prior to the trial?

9 A. Yes. Now, it is possible once we were into the defence  
10 case that either information was being passed on to me  
11 or they were speaking to the Fiscal. It's possible that  
12 one of them asked to speak to me, you know, in the midst  
13 of, for example, Mr Findlay's examination-in-chief of  
14 Mr Wertheim to raise some point they thought was  
15 important, but I have no note of that and no  
16 recollection of it other than I have some notes that  
17 were obviously passed on to me by one of the SCRO  
18 officers in the course of the trial, but after the  
19 evidence in the course of the defence case, I think.

20 Q. Whether they did or did not speak to you earlier on or  
21 during the trial, you record at paragraph 28 that you  
22 did not know of Peter Swann's involvement prior to the  
23 trial.

24 A. Yes. As I mentioned earlier, my recollection was that  
25 SCRO had said to me that they's heard, you know,

1 effectively gossip or chat amongst fingerprint people  
2 that the defence had been to somebody, but I didn't know  
3 who it was.

4 Q. If the statement in paragraph 28 is correct, you did not  
5 know prior to the trial, what I'm asking is that it  
6 cannot have been at either the meeting at the end of  
7 March or the meeting after receiving Mr Wertheim's  
8 productions that you learned of Mr Swann's involvement;  
9 would that be right?

10 A. I think that that's right or if they had mentioned his  
11 name it would have been in terms that were so vague that  
12 it's not something I could rely on and I'm pretty  
13 certain, first of all, that they did tell me they were  
14 aware the defence had spoken to somebody and I'm pretty  
15 certain also that I'd asked them to let me and the  
16 Fiscal know when they had chapter and verse on that but  
17 also I'm pretty certain that they didn't at that stage.

18 Q. Whilst it is clear from your evidence that it hadn't  
19 been intimated to you, clearly someone must have known  
20 that Peter Swann had been involved because he would have  
21 needed access to the productions in order to carry out  
22 an examination of the photographs, would he not?

23 A. I can't answer that because it depended on materials had  
24 been disclosed to the defence at that stage they could  
25 have given to him. So I just don't know. It depends on

1            what exercise he'd carried out.

2        Q.    If he had examined materials that had been produced, if  
3            he had examined the productions, then he would have had  
4            to obtain permission from the Fiscal at the High Court  
5            in Glasgow to have a look at those, would he not?

6        A.    If he had gone to look at the actual mark the answer to  
7            that is yes, but remember the defence were provided with  
8            copies of productions for the previous trial diet and I  
9            don't know what materials had been provided there.

10            Bear in mind also that the ones that the jury get  
11            are kind of copies of the ones that we've got and our  
12            copies are often sometimes a little bit better. So I  
13            just don't know. But certainly -- I do agree -- if he'd  
14            wanted to carry out the sort of exercise that Pat  
15            Wertheim eventually carried out, he certainly would have  
16            required permission of access to the materials.

17        Q.    At paragraph 28 you also say that you did not know the  
18            identity of the expert. You did not know that the  
19            expert was Peter Swann before the start of the trial.  
20            Were you aware before the start of the trial that an  
21            expert had confirmed SCRO's findings?

22        A.    That was my understanding because that was what I  
23            understood the SCRO officers to be telling me; that they  
24            knew that somebody had looked at it and confirmed their  
25            position.

1 Q. In fairness to the defence, that's a perfectly  
2 legitimate practice for them to indulge in?

3 A. Yes, of course.

4 Q. Shop around for experts as much as they want.

5 A. It goes a little bit further than that because my  
6 recollection is prior to -- and, again, I can't remember  
7 the name -- but there was an abuse case in Derek Hogg  
8 was involved when the defence got an expert in and the  
9 Crown in fact sought to obtain copies of the defence  
10 expert's report because the defence decided not to use  
11 him.

12 Prior to that point -- and the court eventually, I  
13 think allowed that -- but prior to that point, it was a  
14 bit of a gray area as far as we were concerned in terms  
15 of the propriety of the Crown seeking access to a  
16 defence report. But there's nothing wrong with the  
17 defence seeking a report. Of course not.

18 Q. Was there any point at which you suspected at the start  
19 of the trial that is what had happened?

20 A. I'm sorry, that what had happened?

21 Q. That the defence had previously been to another expert  
22 and hadn't liked what they had been told so were now  
23 instructing Mr Wertheim?

24 A. It's a little bit different from that because at some  
25 stage -- and I can't remember when this is but I suspect

1           it was round about shortly after the trial had  
2           started -- I was told informally by someone on the  
3           defence team how they'd come to come across Pat  
4           Wertheim, that initially they'd gone to speak to him on  
5           the subject of plant because he was giving a lecture or  
6           a seminar of than subject, I think in Liverpool, and he  
7           had been asked to look at it. Having coming up to look  
8           at it with the plant idea in mind, he then said, "This  
9           isn't her print. It's not a match" and that's what led  
10          to it all.

11                 But, again, there's nothing illegitimate in any of  
12          that. It's a perfectly valid exercise for the defence  
13          to carry out at all levels.

14    Q.    Absolutely. It wouldn't have been revealed to you at  
15          that stage, though, that Mr Swann had been involved  
16          because you didn't know prior to the start of the trial  
17          about Mr Swann?

18    A.    I can't be sure in this instance. My understanding was  
19          that somebody had looked at it for the defence and that  
20          SCRO's understanding was that person had confirmed their  
21          finding. I don't think I knew who that person was. If  
22          Mr Swann's name had been mentioned, it had not been  
23          mentioned in terms that were firm enough for it to be  
24          something that I felt I could rely on at that stage, if  
25          I can put it that way. Bear in mind at this stage this

1 is gossip or, you know, hearsay.

2 Q. Indeed, although from the fact that the defence  
3 productions were coming to you now fairly late in the  
4 day, and from the fact the defence expert was not one  
5 who was commonly in use here, did you have any suspicion  
6 that perhaps other experts had been exhausted before  
7 Mr Wertheim was instructed?

8 A. I'm not sure if I really gave it that much thought or  
9 attention. I was aware, as I mentioned, that there had  
10 been cases of mis-identification and challenge in the  
11 United States and it may have been a logical place to go  
12 if that's what he wanted to do, but I can't recall how  
13 much I thought any of that through at the time. But it  
14 didn't unduly actually surprise me.

15 Q. Had you been aware that Mr Swann had been instructed  
16 prior to the experts who eventually appeared and that he  
17 would confirm SCRO's findings, it would have  
18 considerably strengthened the Crown case, would it not?

19 A. Yes, subject to the remark I made a little earlier that  
20 at this stage we weren't sure of the propriety of  
21 seeking out a defence expert the defence had elected not  
22 to use. The matter is now settled but hadn't been  
23 argued at that point is my recollection --

24 Q. Your evidence --

25 A. But put it this way: it might have strengthened the

1 Crown case but of course the American evidence would  
2 still have been the same.

3 Q. Yes, agreed.

4 In any event, you may have been aware that an  
5 expert had previously been instructed but you had no way  
6 at that stage of verifying?

7 A. That's pretty much what it was. We were fairly sure  
8 that had been done. I mean, it's the sensible thing for  
9 the defence to do; so we were fairly sure that it had  
10 been done but we didn't know who it was I think was  
11 broadly speaking, the position.

12 Q. Would a cautious approach not have been to adjourn the  
13 case in order to allow the Procurator Fiscal to  
14 investigate who this defence expert was?

15 A. I don't know what you mean by a cautious approach. By  
16 that time we had the SCRO position and we had the  
17 American position and I thought I had the eye witness  
18 placing Ms McKie inside the hall or, you know, coming  
19 into the place at a time she shouldn't have been there.

20 So yes, that's a possibility but it wouldn't have --  
21 it wouldn't have completely changed the landscape.

22 THE CHAIRMAN: You didn't know if Ms McKie was going to say  
23 whether there had been another expert or not. I mean,  
24 it might well have come out in cross-examination.

25 A. Yes. She might very well have said, "Yes, we had three

1 people; it was so and so and so and so" or five people  
2 or something. But that would not have made any  
3 difference to the presentation of the case because --

4 THE CHAIRMAN: Yes, but it's an element of hindsight that  
5 she declined to say that there was any other expert and,  
6 therefore, it didn't come out exactly who that was.

7 A. Yes, that is right and I didn't have -- I'm pretty  
8 certainly I didn't have the material to challenge that  
9 statement or I would have done so at that point.

10 THE CHAIRMAN: Which you would have done had you known --

11 A. That's what makes me think I must have got the details  
12 later, yes.

13 THE CHAIRMAN: I think, Mr Holmes, we have explored this  
14 topic fairly closely. Thank you.

15 MR HOLMES: Indeed, sir. I am quite happy to move on to the  
16 final topic which is the meeting on 21st May 1999.

17 A. Yes, this is the one with Frank Crowe as DCA and that  
18 took place at the SCRO offices?

19 Q. That's correct. In fact, I think the minutes are  
20 available. They are document CO0034.

21 Can I ask: was it common to debrief with Crown  
22 witnesses in this way after a trial?

23 A. Not with all Crown witnesses but it was in certain  
24 categories of case. I always did it in cases  
25 involving SCDA or SDEA and then SCDDA officers, as it

1 became, always had a debrief on what had happened at the  
2 trial. Here this was an exceptional case because of the  
3 fingerprint issue and basically the outcry or fall-out  
4 it from the case. This was exceptional.

5 Q. That probably answers my next question which is: there  
6 was a good reason for having a debrief in this case  
7 because --

8 A. Oh yes. All I'm saying is it's not unique to this case.  
9 I had debriefs in other cases but this particular one  
10 arose directly because of the public profile of the case  
11 and the concerns about identifications thereafter.

12 Q. Certainly the indication from the precognition is that  
13 there have been concerns about the impact of fingerprint  
14 evidence in general prior to the case. Were there still  
15 those concerns in place after the case?

16 A. Well, I think it was considerably amplified after the  
17 case.

18 Q. If we look at page 5, please, Mr Crowe expresses an  
19 opinion on page 5. It is the paragraph immediately  
20 after the bullet points where he says that the long-term  
21 credibility of the SCRO witnesses or he notes the  
22 long-term credibility of the SCRO witnesses:

23 "Mr Bell, who was there, added that the SCRO require  
24 policy direction for those going to court and stressed  
25 that the integrity of the SCRO experts and that the

1 fingerprint system was sound."

2 A. Yes.

3 Q. So the people who were present at that meeting are, even

4 after the trial, still expressing faith in those who

5 were involved?

6 A. Yes, broadly speaking, yes. At that point, we were

7 still -- it was being regarded in general terms as what

8 we might call a one-off.

9 Q. There is one part of this I should give you the

10 opportunity to comment upon which is that it is noted in

11 here that you had some contact with Mr Swann.

12 A. Yes.

13 Q. I think you said earlier on that that's not correct.

14 A. I think I covered that in my statement. That did not

15 ever actually happen.

16 My role there basically was to give some explanation

17 or guidance to the SCRO people of my impression of the

18 case as the Advocate Depute. The policy issues were

19 really why the DCA was there because that was his remit

20 and it was reported that I'd had some sort of contact

21 directly with Mr Swann. That's not correct. I think

22 what I may have said is or what I must have said is that

23 the Crown had contact with Mr Swann. But that's not

24 something I am responsible for personally. It would be

25 done by the Procurator Fiscal.

1 Q. Do you know anything about any contact that the Crown  
2 might have had with Mr Swann?

3 A. I'm sorry, I didn't catch the beginning of that.

4 Q. Do you know anything about any contact that the Crown  
5 may have had with Mr Swann.

6 A. I was asked about that at the point when my statement  
7 was being taken and some things were put to me about him  
8 saying that someone had phoned up and made yes or no  
9 answers and, I have to say, I've got no recollection of  
10 that. I must have known by the time of this meeting  
11 that someone had spoken to him, but it certainly was not  
12 me personally and would not have been me personally  
13 because, once this trial was over, I moved on to the  
14 next sitting, as it were, and would not have been  
15 attempting to contact him at that stage.

16 So I must have been told in order to have said that  
17 at the meeting but, I mean, I must have said that the  
18 Crown had subsequently had contact with him but that's  
19 something simply I'd have been briefed on probably  
20 before this meeting, possibly even by Frank Crowe  
21 himself. I can't recall.

22 Q. I think you were asked at this meetings, according to  
23 the minutes anyway, by one of the officers who was  
24 present whether fingerprint evidence lost the case and  
25 you expressed the view at the time it did not?

1 A. I think what -- yes, that was Ms McBride, as I recall,  
2 and I think what I said was that it wasn't fingerprint  
3 evidence alone because of course the other eye witness  
4 evidence that I thought I had evaporated mid-trial.

5 Q. Does that remain your view today?

6 A. Pardon?

7 Q. Is that still your view?

8 A. Yes, it's a combination of the two things, yes.

9 MR HOLMES: Thank you.

10 THE CHAIRMAN: Thank you very much. Miss Grahame?

11 MISS GRAHAME: There are six points I would like to clarify  
12 and raise with Sheriff Murphy: The first regarding his  
13 awareness of the defence on 30th March when he met with  
14 the SCRO officers; secondly, in relation to the evidence  
15 he had from Mr Kerr in terms of the statements and  
16 precognition; one very small point regarding procedure  
17 that's arisen relating to fixing of trials and the  
18 changes that were made; fourthly, in relation to Mr Kent  
19 regarding the timing and outcome of the meeting and  
20 asking him to clarify one answer which he gave in  
21 examination-in-chief; fifthly, potential evidence from  
22 the indictment in the case I would like to put to  
23 Sheriff Murphy for his comment; and, finally, in  
24 relation to Mr Swann and a relationship with the McNamee  
25 case. That was also brought out in

1 examination-in-chief.

2 THE CHAIRMAN: Very good.

3 **Cross-examined by MISS GRAHAME**

4 Q. Thank you.

5 Sheriff Murphy, the first issue I'd like to cover  
6 with you is your awareness of the defence position and  
7 at the time that you met with SCRO originally on  
8 30th March 1999.

9 You said in your evidence earlier today that you  
10 thought you knew about the defence  
11 being mis-identification of Y7 and I'd like you to  
12 comment on one or two things. I will show you those if  
13 I may.

14 If we hear evidence later that the first time the  
15 issue of mis-identification of Y7 arose was when  
16 Mr Wertheim took photographs of the prints and then  
17 looked at those and then came to a conclusion on that  
18 regarding mis-identification, and if we take it that he  
19 took those photographs on 30th March 1999, and in that  
20 regard you recall looking at a document earlier today  
21 which appeared to be his handwritten notes, would it not  
22 appear to be the case that you did not know on  
23 30th March what Mr Wertheim's conclusions would be  
24 regarding mis-identification and, in particular, you  
25 didn't know that mis-identification of Y7 was an issue

1 that would be raised at the trial?

2 A. I can't recall precisely but my understanding is the  
3 trial had been adjourned in order for the defence to  
4 produce reports from the American experts. I did not  
5 know, obviously, the detailed content of those reports  
6 but we certainly knew that they were challenging the  
7 SCRO identification because that was the whole purpose,  
8 as I understood it, of waiting for these reports.

9 Whether I knew it was mis-identification, I'm not  
10 sure that I'm applying that notion retrospectively now  
11 but I certainly think that I did. I could stand to be  
12 corrected but Mr Wertheim was originally, as I  
13 understood it, consulted in relation to whether or not  
14 it could have been planted and, as a result of his  
15 enquiries into that, decided that it had been a  
16 mismatch. Now, whether the day he came to photograph Y7  
17 in Glasgow on 30th was the beginning of that or if he'd  
18 reached that conclusion at an earlier stage and was, you  
19 know, gathering materials, I couldn't say.

20 Certainly I was aware, as I say, that we hadn't  
21 started last time because we were awaiting reports from  
22 the Americans. That was assumed to be some sort  
23 of challenge or was known to be some sort of challenge  
24 to SCRO. But I certainly think that we must have known  
25 it was a mismatch but we didn't know what the grounds

1           were for saying that. But I accept I could be wrong  
2           about that looking at it now. But, insofar as I can  
3           recall, I think we knew some sort of challenge and  
4           presumably a mismatch was what it was.

5    Q.    So does your answer depend on whether the first date  
6           that Mr Wertheim looked at the productions and at some  
7           point thereafter came to a conclusion was 30th March or  
8           not?

9    A.    Well, all I'm saying is that I could be wrong about  
10           that. My impression was that we knew that there was a  
11           challenge on the basis of mismatch but whether that's me  
12           adding that at an earlier stage than we actually were  
13           aware of that, I don't know.

14                 But the way that that could be determined one way  
15           and another is if you knew that Mr Wertheim had reached  
16           that conclusion before when he came to examine the  
17           materials in that way or not, that would give a  
18           different answer because if he hadn't reached that  
19           conclusion by that time I must be wrong and I accept  
20           that.

21   Q.    Can I also ask you about your statement to the Mackay  
22           Inquiry?

23   A.    Is this the 2000 one?

24   Q.    Yes, CO2036 and it is paragraph 2 and 3 on page 2.

25                 Would you just take a moment to read paragraphs 2 and 3,

1 please.

2 A. **(Pause)** Yes, thank you.

3 Q. Was that the information that you provided to the Mackay  
4 Inquiry?

5 A. It obviously must be. I don't remember the date at this  
6 remove of 16th April for the meeting, but that certainly  
7 looks correct.

8 Q. That would be the Friday prior to the start of the trial  
9 against Ms McKie?

10 A. Was that 16th April?

11 Q. The Friday 16th was 16th April.

12 A. Right.

13 Q. And the trial started on 21st April which was a  
14 Wednesday, the following Wednesday.

15 A. Right. Well, my recollection in 2000 would be much more  
16 accurate now in terms of dates; so I'll accept that as  
17 correct.

18 Q. So based on what's written here, some time round Friday,  
19 16th April 1999 you had a meeting with Donald Findlay  
20 and he outlined at this time what the defence's angle  
21 was to be as regards fingerprint evidence and that this  
22 was to be on a mismatch, as you referred it?

23 A. Yes.

24 Q. Moving on, can I ask you to look again at Charles  
25 Stewart's statement, FI0036.055, page 55 of the PDF,

1 paragraph 264. Again, just take a moment to reread  
2 that. You have already looked at it today.

3 A. **(Pause)** Yes.

4 Q. This is a reference to the second meeting which you have  
5 given evidence on already.

6 A. Yes, that's right.

7 Q. Do you see in line 4 he says:

8 "It was at this point I became aware that the  
9 defence was going to be based on mis-identification as  
10 opposed to wrongful making of the mark."

11 A. Yes.

12 Q. Do you have any comment to make on that?

13 A. Well, that's consistent with the date that you've just  
14 shown me on the 2000 and leads me to wonder if my  
15 assumption about the earlier meeting on 30th is actually  
16 inaccurate. In which case it looks rather as if I  
17 simply went along on SCRO on that date to go over their  
18 position and confirm what they were going to be saying.

19 Q. When you say that, you mean on 30th March you went to go  
20 over the position?

21 A. The first meeting that I had with the SCRO officers  
22 predates the information you've just given me about the  
23 meeting with Mr Findlay and, if that's right, while  
24 anything I may have known about misdirection or so would  
25 not have been in any detail even if I have knew that.

1           So it may be, to come back to what you we're asking a  
2           few minutes earlier, that I am wrong about that and I  
3           didn't know it was mis-identification at the time when I  
4           first met the SCRO officers, which means that I've just  
5           basically gone up to see the experts, as would be my  
6           normal practice prior to a trial where expert evidence  
7           was likely to be significant.

8        Q.    And it was in the second meeting of SCRO that you raised  
9           the question of mis-identification, by which time you  
10          had notification of the defence position on that?

11       A.    Putting those together, there would appear to a  
12          consistency on that which is perhaps more accurate than  
13          my earlier recollection. I accept that.

14                We did know that we were waiting on reports from  
15          American experts by the time of the first meeting on  
16          30th but, putting this all of this together, there is I  
17          say a consistency about that which I would accept is  
18          better than my off-the-top-of-my- head recollection  
19          without that guidance.

20        Q.    Moving on to just a small matter I wonder if you could  
21          clarify, Sheriff Murphy: we have heard that a trial is  
22          or was at that time fixed to a sitting?

23        A.    Yes.

24        Q.    The McKie trial was fixed to a sitting in April 1999?

25        A.    Yes.

1 Q. There had been a previous trial date which had  
2 been adjourned on the basis the defence weren't ready?

3 A. Certainly, yes.

4 Q. Could you explain how the procedure in relation to the  
5 fixing of trials has changed now insofar as if the  
6 defence were not ready and awaiting reports, when the  
7 trial would be fixed?

8 A. Well, in terms of the pretrial procedure in the High  
9 Court the landscape has changed out of sight since 1999  
10 because trials are no longer assigned to sittings.

11 What happens now is that a petition is served, as it  
12 always was; an indictment is served but the indictment  
13 does not give notice of a trial diet which is what it  
14 did do in 1999. The notice of appearance attached to an  
15 indictment in 1999 would give notice to the accused of  
16 when the sitting was. It now gives notice of something  
17 called a preliminary hearing and the trial diet is fixed  
18 at that preliminary hearing once it has been established  
19 that all parties are in a position to proceed and there  
20 is, in effect, a preparatory checklist which is gone  
21 through by both sides prior to the preliminary hearing  
22 which is presented to the court in written form so that  
23 the judge is aware of the state of preparation.

24 It is possible now for preliminary hearings to be  
25 continued and for a trial diet to be fixed at a later

1 stage once everyone's ready, but that's completely  
2 different from what we did in 1999.

3 Q. I would like to move on to ask you some questions in  
4 relation to Mr Kerr.

5 A. Yes.

6 Q. You have been asked about the information you had been  
7 in the precognition in relation to Mr Kerr.

8 A. Yes.

9 Q. I would like you to look for me please at three  
10 documents. Could we look, first of all, at CO2594.  
11 This is a two-page document and perhaps we could have  
12 both pages on the screen. Would you just take a moment  
13 please, Sheriff Murphy, to read through those?

14 A. **(Pause)** Yes, thank you. I've read those two pages.

15 Q. Do you see this is a statement dated 10th April 1997  
16 self-dictated by Mr Kerr?

17 A. Yes.

18 Q. He does recall seeing DC Cardwell on Friday 10th or  
19 Saturday 11th January 1997 but there's no further detail  
20 in that statement regarding when he saw her.

21 A. Yes. Well, with respect, he's talking about seeing her  
22 there at the police station not at the **locus**.

23 Q. Yes.

24 A. Yes.

25 Q. And there's no further information there regarding

1           seeing her at the **locus** on Saturday at 5.00 or in the  
2           afternoon?

3       A.   Well, or any other time -- that's correct.

4       Q.   Would you look please at CO2593. We see this is a  
5           statement 12th July 1997 of James Kerr. I wonder if we  
6           could look at pages 4 and 5. If we could have them both  
7           on screen and again take just a moment to read through  
8           those.

9       A.   **(Pause)** I don't seem to be able to read the bottom  
10          part of it here.

11   THE CHAIRMAN:   Can you move it up?

12   MISS GRAHAME:   Just read what you can, Sheriff Murphy. I'm  
13          going to focus on page 5, the first paragraph.

14   THE CHAIRMAN:   It's been cut off unfortunately.

15   A.   Yes, I've read that. Thank you.

16   MISS GRAHAME:   Page 5, the first two paragraphs, Mr Kerr  
17          appears to state at this time at some time in the  
18          afternoon he was working in the bedroom.

19   A.   Yes.

20   Q.   He was going to the living room to get some bags and he  
21          saw DC Cardwell standing in the porch.

22   A.   Yes.

23   Q.   Then he goes on to say toward the end of the second  
24          paragraph that he glanced at DC Cardwell, he never  
25          thought anything about it:

1 "Then I returned to the bedroom to continue my work.

2 I did not see DC Cardwell enter the house and I did not

3 see her in the porch when I came back from collecting

4 the bags."

5 A. Yes.

6 Q. Then he moves on to the next day.

7 A. Yes.

8 Q. So, again, there's no mention of seeing her in the

9 afternoon on the Saturday, 11th January.

10 A. Well, with respect, it's not clear whether this is meant

11 to be 11th January or not. That was part of the

12 difficulty and that's why I had him spoken to because

13 he's given, in fact, three statements and it's not clear

14 from any of them exactly when this was.

15 Q. Do you see page 4 in the second paragraph that it

16 begins:

17 "On Saturday 11th January 1997"?

18 A. Yes, that's right.

19 Q. And then he continues to explain what he had seen that

20 day?

21 A. That's right. So this looks like a Saturday afternoon

22 sighting.

23 Q. And then towards the middle of that page he talks about

24 being off duty on Sunday, 12th January.

25 A. Yes.

1 Q. And then he goes on to further events after that.

2 A. Yes.

3 Q. So it would appear that this was about Saturday, 11th  
4 January?

5 A. That's what this is about, yes.

6 Q. There's nothing in here that suggests he saw her at 5.00  
7 in the afternoon?

8 A. No, but we had a great difficulty about all of his  
9 timings because this is all done without the log and we  
10 also had some doubts about his discussion about arrival  
11 at Kilmarnock Police Office that day because we thought  
12 that might have been Friday rather than Saturday because  
13 of the officers he mentions and so on.

14 Q. Can I ask you now to look at a precognition, please,  
15 CO2592. We've heard this is a precognition taken by  
16 Denise Greaves from James Kerr.

17 A. Right.

18 Q. Would you look, please, at pages 4 and 5. Could we have  
19 them both on the screen and, again, just take a moment  
20 to read through those, please.

21 A. **(Pause)** Yes, thank you.

22 Q. Do we see on page 4 at the top that this is what he  
23 says, according to Denise Greaves, in relation to  
24 Saturday, 11th January 1997?

25 A. Yes, that's right.

1 Q. Turning to page 5, paragraph 1, he's noted by Denise  
2 Greaves as saying:

3 "In my opinion, it would have looked to her as if  
4 the examination of the hall had been completed. That  
5 examination would include the bathroom door. I think  
6 Shirley Cardwell was there about 1.30 pm. I left the  
7 locus about 3.00 pm-ish because of the backlog of  
8 productions. My reason for thinking that was the time  
9 was that the production room at Kilmarnock was along  
10 from the TV room and I recall that there was a rugby  
11 match on during the afternoon. I did not see Shirley  
12 Cardwell or speak to her after that."

13 A. Yes.

14 Q. So this would appear to suggest that he saw her at about  
15 1.30 in the afternoon on the Saturday but, in any event,  
16 he left the **locus** about 3.00 pm-ish and he did not see  
17 her after that?

18 A. Yes. I would make two comments about that. The first  
19 is that was inconsistent with the logging entries very  
20 obviously and, while his account of being at one end of  
21 the hallway and she being at porch is as I recall pretty  
22 much consistent with his evidence at the trial, the  
23 business about bagging something concerns me because my  
24 recollection was that the Saturday was when he was  
25 specifically engaged in the task of uplifting the door

1 handles and he talked about that at great length.

2 So there are some inconsistencies in my mind between  
3 this precognition and obviously what was said.

4 Q. Can I just ask you one thing about the documents we've  
5 looked at. Where were the documents that you had in  
6 advance of the trial within the precognition?

7 A. I'm sorry, I didn't catch all of that.

8 Q. Where were the documents that you had in advance of the  
9 trial within the precognition?

10 A. I'm pretty certain that they were. I thought I may have  
11 had three statements from him but it could have been two  
12 statements and a prec.

13 Q. But it's clear his position in evidence changed?

14 A. Actually, the position to my mind was inconsistent  
15 across these statements and that's specifically why I  
16 wanted him spoken to again.

17 Q. Did you ask the Fiscal to speak to him.

18 A. Well, I asked my junior to ask the Fiscal to speak to  
19 him; that's correct -- with the log. That was the whole  
20 point: with the log, yes.

21 Q. The response you received, was it from the Fiscal direct  
22 to you?

23 A. No, it was relayed by Mark, my junior.

24 Q. Was anything a response which was given to you such that  
25 you had concern that his position was different from

1 what you understood it to be?

2 A. I thought he clarified that he had seen her before he'd

3 left at lunchtime on Saturday. That was my

4 understanding.

5 Q. Is it fair to say that, as a result of Mr Kerr's

6 position being different in evidence, that your view of

7 the case changed?

8 A. Yes, I think that's correct.

9 Q. And his evidence was a significant part of the Crown

10 case.

11 A. His evidence -- you see, I wasn't unduly -- well,

12 unduly's not the right word.

13 That made a huge difference to the fingerprint

14 evidence because if the eye witness evidence had been as

15 we thought it was (in other words, that he had seen her

16 at the time when she should not have been there

17 legitimately), the fingerprint evidence became basically

18 corroborative of that and didn't stand alone. So it

19 made a huge difference.

20 Q. Once Mr Kerr's position in evidence was different the

21 fingerprint evidence did stand alone?

22 A. Yes, that's right. That's what happened.

23 Q. A suggestion has been made that it was you who said to

24 Mr Kerr as a closed question that he saw Shirley McKie

25 at 5.00 pm in particular, "Could it have been about 5.00

1 pm", ie the suggestion of the timing of 5.00 pm came  
2 from you, rather than Mr Kerr.

3 What comment do you have to make about that?

4 A. If you have a transcript I would accept that but I have  
5 some difficulty with that as a general term. I think  
6 Donald Findlay would have been straight on his feet if I  
7 had been suggesting a specific time to the officer.

8 THE CHAIRMAN: I think if this passage is available in?

9 A. Is it.

10 THE CHAIRMAN: I don't think it is. I think the witness is  
11 entitled to know that this isn't available on  
12 transcript.

13 MISS GRAHAME: The transcript is not available. This was a  
14 suggestion which was put by my learned friend,  
15 Miss Carmichael, in re-examination of Mr Kerr. It's not  
16 a suggestion which comes from a transcript of Mr Kerr's  
17 evidence.

18 A. Right, it's been suggested to me. I mean, I think, did  
19 I not suggest a timing of about 5.00 in my statement?  
20 But that's basically my best recollection, but I think  
21 it would have been quite wrong in the circumstances for  
22 me to have asked a closed question. I would be very  
23 surprised of that and I think, as I say, that would have  
24 been likely to prompt an objection. Unless we got to  
25 the stage where it's pretty obvious that he was talking

1 about the same time and I put the timings from someone  
2 else about when that had happened but that would be only  
3 after it had been become plain as a pike staff he was  
4 talking about the time when she had been up to swap the  
5 log documents. It would have been wrong to have asked  
6 that question in other circumstances.

7 Q. Sorry?

8 A. It would probably have been wrong to ask that sort of  
9 question in-chief, at that stage.

10 Q. Thank you. I would like to move on to ask you some  
11 questions in relation to Mr Kent.

12 A. Yes.

13 Q. Could we have his report, CO3876, page 4 of the PDF and  
14 it's paragraph 33. You've been referred to this  
15 earlier. Please take a moment to refresh your memory.

16 **(Pause)**

17 You gave an answer in examination-in-chief in  
18 relation to this paragraph which you didn't finish and  
19 I'd like to give you an opportunity to do so if you  
20 wish.

21 The evidence you gave in answer was not necessarily  
22 quite in relation to your reading of the paragraph 33.

23 I wonder if you could explain what your understanding of  
24 that paragraph is.

25 A. It looks to me like he's indicating that he is not a

1 fingerprint comparisons man. He's not a fingerprint  
2 expert in terms of the sort of experts who give evidence  
3 in court by conducting comparison exercises. In  
4 fairness to him, I think he made that pretty plain to me  
5 when I was speaking to him, that wasn't is field. But  
6 he seems to be suggesting that while he is not a  
7 fingerprint expert of that sort, it looks, on the face  
8 of it, to have such characteristics as would allow an  
9 appropriate expert to make an identification. That's  
10 what it seems to be saying but you would, with respect,  
11 have to ask him what he meant by that.

12 Q. In relation to the meeting which you had with Mr Kent,  
13 you said your statement you thought this took place  
14 between about 12th and 21st April, which would be  
15 between the start of the sitting and the start of the  
16 trial.

17 A. I think he'd come up for the trial and he was about at  
18 that time. I cannot remember precisely but it would  
19 have been some time during the sitting and possibly even  
20 at or about the start of the trial.

21 Q. Was anything said by Mr Kent to you at that meeting  
22 which caused you to have concern about the SCRO evidence  
23 on Y7?

24 A. My impression was more the other way that he was worried  
25 about it. I mean, I knew by this time -- I knew that he

1 was going to be challenged by the defence but his role  
2 appeared to be more of a monitoring one. He was there  
3 to give evidence in relation to the question of plant  
4 but his role appeared to be more of a sort of a  
5 monitoring one in terms of the Home Office concerns  
6 about, "Oh goodness, are we going to lose another  
7 fingerprint case in Britain". That was the impression I  
8 had rather than him expressing any direct concern about  
9 the SCRO.

10 Q. Thinking back, Sheriff Murphy, are you sure that you  
11 knew about the Wertheim defence, if I could call it  
12 that, at the time you spoke to Mr Kent?

13 A. If I didn't at the time I first met him I'm sure I would  
14 have had an opportunity to speak to him again before the  
15 Wertheim defence was put in in the trial because he was  
16 up observing what was going on at the start. So if I  
17 didn't know the first time I met him, I'm pretty certain  
18 we did know that was the defence before we got very far  
19 and certainly before the trial started, yes.

20 Q. Could I ask you to look at two paragraphs contained  
21 within FI0052, which is the statement from Mr Kent to  
22 the Inquiry.

23 A. Yes.

24 Q. I would like to look at paragraphs 27 and 29. I'm  
25 sorry, I've not looked at the PDF number. Could I have

1 pages 9 and 10 together.

2 Would you read, please, paragraphs 27 and 29?

3 A. Yes. **(Pause)**

4 27 and 28, did you say?

5 Q. 29, I said. **(Pause)**

6 A. Yes, thank you. I've read those.

7 Q. Do you see that he appears to be saying he formed no

8 view about the identification of Y7 --

9 A. Yes.

10 Q. -- up until Mr Wertheim went into court to give evidence

11 because the possibility that the Scottish experts had

12 made a mistake in identifying Y7 had never crossed his

13 mind and in 29 he talks about being quite puzzled at the

14 time about the fact he wasn't cross-examined by the

15 defence.

16 Does that help you recollect whether, when you spoke

17 to Mr Kent prior to the trial, whether you discussed

18 with him mis-identification of Y7?

19 A. I don't recall specifically discussing

20 mis-identification of Y7 with him because he wasn't that

21 type of fingerprint expert, but I certain would have

22 expected him to be aware that that was the defence line

23 by that stage because I understood he'd been talking

24 with the Fiscals and while he was there as an expert in

25 one area he was, kind of, monitoring the situation. So

1 I have to say that does surprise me but it's -- I'm  
2 rather surprised he says he formed no views -- of  
3 course, that's not his area but I'm a little surprised  
4 he seems to suggest he didn't know that was the defence  
5 position until he heard Pat Wertheim's evidence.

6 Q. Have you any reason to doubt what Mr Kent has said in  
7 these two paragraphs?

8 A. No, it just it surprises me because I think we were all  
9 pretty clear by the start of the trial that it was about  
10 mis-identification and I thought he was aware of that.

11 Q. Is it possible you didn't discuss that with Mr Kent?

12 A. I'm sorry?

13 Q. Is it possible you didn't discuss it with Mr Kent?

14 A. I don't think that's an area I would have discussed with  
15 him because he was there in relation to the question  
16 of plant. He wasn't there -- identification wasn't his  
17 field and I think he'd made that pretty plain.

18 Q. I would like to move on please. You've been asked what  
19 your view was on why Ms Climie, the indicter in Crown  
20 Office, was suggesting that another expert report be  
21 instructed in January 1998 prior to the petition.

22 If we hear evidence from Ms Climie that she did not  
23 suggest further examination based on any doubt that the  
24 SCRO experts had not correctly identified the mark to  
25 Ms McKie on the 16-point standard, as it was then

1 operating within SCRO, again, would you have any reason  
2 to doubt that?

3 A. That's a matter for her. I don't think I was even in  
4 Crown Office at the point when those discussions were  
5 taking pace. I joined in September '98.

6 Q. Finally, Sheriff Murphy, in relation to Mr Swann, if we  
7 accept that Mr Swann was instructed as a fingerprint  
8 expert on behalf of Shirley McKie for her trial and if  
9 you take it from me for the moment that Mr Swann gave  
10 evidence at the **McNamee** case, which is the English case  
11 referred to --

12 A. The IRA one that was mentioned, sure.

13 Q. -- earlier today and that he must have given evidence  
14 prior to December 1998 because that's when the judgment  
15 came out, can you clarify: presumably it would have been  
16 open to Mr Swann to raise the issue of the reliability  
17 of fingerprint evidence with Mr Findlay or part of the  
18 defence team?

19 A. I can't really comment on that. That's a defence  
20 matter. I don't know what took place between Mr Findlay  
21 and Mr Swann.

22 Q. But that is something that could have been discussed?

23 A. If they ever met. I don't know they ever did.

24 Q. Did Mr Findlay ever comment to you about an English case  
25 or issues of reliability regarding fingerprint evidence?

1 A. I'm pretty certain the person who spoke to me about the  
2 English case and alerted me to that was actually Terry  
3 Kent and not the defence, and I knew about American  
4 debates through Mark Denis. I don't think that those  
5 issues were ever raised with me by Donald Findlay. I  
6 knew there had been a recent English case where there  
7 had been a problem but I don't think I knew the details  
8 of the **McNamee** the case, yes.

9 MISS GRAHAME: Thank you very much.

10 THE CHAIRMAN: Is there any re-examination?

11 **Re-examined by MISS CARMICHAEL**

12 Q. There is one point sir, yes.

13 Sheriff Murphy, Miss Grahame sought to suggest to  
14 you that couldn't have known by the time of your meeting  
15 on 30th March of what I might call Wertheim defence.

16 A. Yes.

17 Q. And I think she suggested to you that Mr Wertheim had  
18 first come to a view on this matter on 30th March and  
19 that --

20 A. Yes. No, that he had gone to conduct the examination  
21 that would have led him to that view of the materials on  
22 that day, I think was what was being suggested.

23 Q. Yes. It may not be Miss Grahame's fault because she may  
24 not be aware of this material but I think we looked  
25 earlier on the screen -- and I wonder if we can do that

1           again -- at DB0170 and I think we may only have looked  
2           at page 13 of it but if you look at page 1 of that I  
3           think we see the first entry is actually 24th March 1999  
4           and we have Mr Wertheim meeting Angela McCracken and  
5           travelling to the High Court that day.

6    A.    Yes.

7    Q.    We may hear, it may be that there comes to be evidence  
8           from Mr Wertheim that it was on that date that he first  
9           became concerned about the correctness of the  
10          identification and for that reason he went on to take  
11          his own prints of Shirley McKie that day. I think I  
12          should perhaps also refer you to page 12 of this  
13          document, Sheriff Murphy, and --

14   A.    Yes, I have that.

15   Q.    I think at top of that page we see an entry for  
16          1700 hours on 29th March which appears to refer to a  
17          meeting with Mr Findlay at which there's been some  
18          discussion that two reports are needed, one positive for  
19          direct which, I think, might be an American term for  
20          examination-in-chief.

21   A.    Right.

22   Q.    And a negative one for cross-examination.

23   A.    Yes.

24   Q.    So we might take it that there are some indications that  
25          certainly prior to a meeting there had been indications,

1 at least within the defence team, that there are doubts.

2 A. Yes.

3 Q. Seeing those dates and the possibility of views having  
4 been expressed to Mr Findlay by the 29th, does that  
5 affect your position?

6 A. Not really, I think it probably comes to this: I cannot  
7 say with any certainty that I was aware that it was a  
8 specific mis-identification at the time when I first met  
9 the SCRO experts. We certainly did by the second  
10 meeting but at the time when I went up to see them -- I  
11 would certainly have gone to see them for a reason, it  
12 may simply have been to go through the expert testimony  
13 to make sure I understood it -- I simply cannot say with  
14 certainty that I was aware of the details of what the  
15 defence position was by that time. It may be that Mr  
16 Findlay and I had spoken and he'd raised something but I  
17 can't say that with certainty. Certainly, I was aware  
18 of that as the position by the time of the second  
19 meeting. It's possible but I can't definitely say one  
20 way or the other.

21 There seemed to be a certain consistency in the  
22 dates Miss Grahame was putting to me but I can't say  
23 with certainty one way or the other. I cannot recall  
24 now what information was in my possession by the time of  
25 the first meeting. I certainly thought I knew, without

1 any detail, that it was a challenge to the SCRO  
2 identifications but I'm not sure now how much of that is  
3 20/20 hindsight. I'm sorry, I just can't remember.

4 MISS CARMICHAEL: Thank you for that. I simply didn't want  
5 you to be proceeding on, as it were, information that it  
6 couldn't have come to light before the 30th.

7 Thank you Sheriff Murphy. I don't have any further  
8 questions for you.

9 THE CHAIRMAN: Thank you very much I am very grateful to  
10 you. I am afraid we have taken up a lot of your time  
11 and I gather we have actually disrupted your own  
12 court --

13 Q. I am a public servant, Sir Anthony.

14 THE CHAIRMAN: -- so I am sorry about that. Thank you again  
15 for your help.

16 So 10.15 tomorrow.

17 **(4.30 pm)**

18 **(Adjourned until 10.15 am the following morning)**

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