

Thursday, 26th November 2009

1

2 (Afternoon session)

3 (1.50 pm)

4 **Submission by MR SMITH (continued)**

5 MR SMITH: Although this Inquiry is considering events

6 dating over the past ten years, it is clear that

7 significant parts of the criminal justice system have

8 since then lacked integrity and professionalism that the

9 public is entitled to expect.

10 If one word can be used generously it is the word

11 "complacency". There has been complacency in respect of

12 the debacle at numerous levels: SCRO were complacent in

13 the management structures; Strathclyde Police were

14 complacent in their investigation and the response to

15 the acquittal of Shirley McKie; the SPSA were -- and

16 remain -- complacent; and finally the Crown Office

17 were -- and remain -- complacent, promising to react now

18 to the problems that have plainly arisen in the past.

19 It is our position that this complacency was

20 palpable on the individuals, all the way from Stephen

21 Heath, who remained proud of the investigation into the

22 investigation of Marion Ross; from Tom Nelson of the

23 SPSA, who would rather that this Inquiry directed the

24 SPSA as to what to do; and from the former Lord Advocate

25 Lord Boyd, who plainly saw Iain McKie as an irritation,

1 an irritating factor from the outset and only reacted
2 when Frontline Scotland provoked the Crown Office into
3 action. It is indeed a sad day when the Crown Office
4 and the Lord Advocate fail to appreciate a criminal
5 justice catastrophe and react only when the media set
6 out to expose it. Justice when dictated by the media is
7 a dangerous concept.

8 This Inquiry is about public confidence. Although
9 Lord Boyd was rather quick to point out the lack of
10 interest in the Inquiry, plainly suggesting that there
11 was little public demand for review, the fact remains
12 that the system has failed and needs to be repaired and
13 repaired urgently.

14 It seems to us that there are four main issues that
15 have to be considered: the first is were there
16 mis-identifications in respect of Y7 and Q12; second, if
17 so, how did they happen; third, what can be done to
18 prevent errors happening again; and, fourth, how can
19 public confidence be restored in the criminal justice
20 system and, indeed, in the science of fingerprinting.

21 As far as mis-identification is concerned, dealing
22 with that, there is overwhelming evidence that there
23 were mis-identifications in respect of both Y7 and Q12.
24 I do not intend to rehearse the evidence. However, we
25 submit that Mr Swann, Mr Leadbetter, Mr Berry and

1 Mr Graham are all totally discredited. They were
2 mutually contradictory and they contradict the SCRO on
3 numerous issues. They could not demonstrate points said
4 to be there and could not explain differences. However,
5 they resorted to the mantra of distortion, movement,
6 pressure of unspecified types.

7 The same can be said of the SCRO. Their attempts to
8 demonstrate analyses was, frankly, desperation. Worthy
9 of special mention was Mr Mackenzie who said he could
10 see things no-one else could: he draw serpents; he drew
11 a foetus; he told us that the Emperor was wearing the
12 most beautiful clothes. If Professor Champod is to be
13 accepted, this lack of demonstrability and failure to
14 explain and replicate distortion is wholly unacceptable.

15 In our written submission, which will be made
16 available shortly, we point out that the timing in
17 respect of Q12 and Y7 is important. Q12 was originally
18 identified and said to be that of Marion Ross. It was
19 critical to the murder investigation and if the evidence
20 of Pat Wertheim, Arie Zeelenberg, Mr Sheppard, Mr Grigg
21 and indeed, to the extent that it is important, of
22 Mr Frank Crowe (Sheriff Frank Crowe) regarding the Danes
23 almost literally throwing their hands in the air in
24 disbelief, and indeed the evidence of our own eyes in
25 this Inquiry, is accepted then it's not only wrong but

1 clearly so. The note "ident required" may in fact be
2 what we thought and what it says.

3 It was after that that Y7 was identified as being
4 that of Shirley McKie. When she denied she was there,
5 then of course that provoked a reaction. What happened
6 thereafter is quite clear is that there was an effort to
7 ensure that the fingerprint Y7 and the inked mark of
8 Shirley McKie was not passed out of the Bureau. One
9 questions this: what if it had been? What if it had
10 been found to be a mis-identification? The conclusion
11 that one can draw from that is that it is likely
12 questions would have been raised by either Asbury's
13 defence team, or indeed by the Crown Office, as to the
14 veracity of all fingerprints involved in the murder
15 inquiry. That would, of course, have included the
16 fingerprint Q12.

17 The question that arises is this: was there a
18 desperation that Q12 should not be looked at and, if so,
19 it raises serious questions of whether it was known or
20 at least strongly suspected that the identification of
21 Q12 was incorrect. It will be recalled that Mr Sheppard
22 stated that he could only assume that Q12 was identified
23 as a correct match to support the case against David
24 Asbury and he may well be correct.

25 So what was the cause of the mis-identifications?

1 The starting point for this exercise must be that SCRO,
2 as they maintain, were competent and if we proceed on
3 that assumption, we have a number of difficult questions
4 to answer. What we have then is within one murder
5 investigation, two fingerprints are mis-identified and
6 all of that in the face of a denial of the
7 identification of Y7. It has always been accepted by
8 those representing Shirley McKie that it is probable
9 that Y7 was originally mis-identified by mistake.
10 However, once the challenge was presented, any
11 reconsideration would have alerted any competent
12 examiner to the error. This Inquiry cannot of course
13 determine criminality directly but if the level of
14 gravity of a failure on Q12 is accepted, there are a
15 number of options.

16 The first option is that there were competent
17 examiners and they made two honest mistakes in the same
18 case, which we say is improbable. The second option is
19 that they were not competent. The third option is, of
20 course, that they were competent, they erred, they knew
21 it and were not prepared to do anything to disclose that
22 they had in fact made the error.

23 There are a number of worrying features about the
24 evidence that was presented before this Inquiry that
25 gave rise to suspicion. The first of these is the

1 continual approach by the SCRO, aided by Mr Leadbetter
2 and Mr Swann, which has been to attack anyone who
3 disagrees with them. Whilst Pat Wertheim and Arie
4 Zeelenberg in particular provided demonstrations of how
5 they reached their conclusion, there was clearly
6 demonstrable there was something that was open to
7 challenge if it was chosen, they did not reduce
8 themselves to personal attacks.

9 I would invite you, Chairman, to consider the manner
10 in which evidence was given on the one side effectively
11 by those supporting Ms McKie's position and compare that
12 to the manner of the evidence given by those supporting
13 the SCRO.

14 I would draw attention again to something Mr Holmes
15 said earlier today which related to the way in which the
16 witnesses who were denying the SCRO identification gave
17 their evidence and the language that they used. I must
18 say that the language used by Mr Leadbetter in his
19 statement, and indeed by Mr Swann in his statement,
20 appears to be something that is not in any sense
21 replicated in any statement or a report by those who
22 support Ms McKie's position.

23 The second worrying feature about this particular
24 Inquiry is the presentations prepared by Mr Mackenzie.
25 Those presentations were not only to Tulliallan but

1 before this Inquiry and what we suggest is that the
2 quality of the presentation was something that gives
3 rise to serious questions over its veracity.

4 What he was doing was, amongst other things,
5 charting points that are plainly not on the print,
6 arguably and possibly on the wood-grain itself. He was
7 drawing circles that were empty and he was telling us
8 that he could see things in them. What we say is this
9 appears to be a desperate attempt and the desperation
10 shows he is either deluded or, frankly, attempting to
11 deceive. Either way he is, we say, utterly discredited.

12 The third matter of concern is what appears to be
13 three instances of what we say are quite clearly lies
14 before the Inquiry. They are as follows: the first is
15 the suggestion that was made before this Inquiry that
16 the blind test was a routine test and was not devised to
17 manage the panic within the office. It is submitted
18 that simply cannot be right and defies all logic and
19 common sense.

20 The second lie is the suggestion that the meeting
21 with Sean Murphy lasted only a few minutes and that is
22 of course a lie that casts directly into question the
23 integrity of Sean Murphy, which we say is frankly
24 unforgivable.

25 The third is the astonishing evidence of Ms McBride

1 that she was unaware of the nature of the challenge that
2 was being levelled by the American experts until she
3 nearly fell off the seat after she completed her
4 evidence.

5 I should perhaps remind the Inquiry the Scenes of
6 Crime Officers, Michael Moffat, knew the challenge was
7 the talk of the office and that was why he tried to
8 provide assistance by suggesting the fingerprint may be
9 that of Gary Gray.

10 When we take all of this on board and if it is
11 thought that these are lies then what we have is three
12 out of the four who signed the report that was critical
13 to the prosecution of Ms McKie and three out of the
14 three who gave evidence in her trial lied to this
15 Inquiry. When you start from that point that point,
16 that professionals, experts, those in the criminal
17 justice system have lied here, the problem is we don't
18 know when the lies stop and the truth commences and,
19 accordingly, it might be said in the absence of any
20 acceptable, supporting, corroborative evidence on a
21 critical matter the Inquiry should be very slow to
22 accept what is said by these witnesses.

23 It is perhaps worth remembering what Mr Zeelenberg
24 said regarding Mr Mackenzie's presentation at Tulliallan
25 that it was, he said, the closest to malpractice that he

1 had ever seen.

2 The SCRO and the SPSA of course have an opportunity
3 to manage the difficulty. From the outset there has
4 been not only complacency but a failure to take any
5 opportunity to reform the systems. The reaction of the
6 SCRO was a rebranding. The SCRO becoming the Scottish
7 Fingerprint Service and then becoming the SPSA.
8 Changing the name does not change the structure. The
9 SPSA's profuse misuse of terminology down to the
10 description of users as "customers". The SPSA provides
11 a service at the heart of the criminal justice system;
12 it is not providing a consumer product.

13 The problems with the SPSA are cultural and, at its
14 heart, it is an organisation that is divided. The
15 individual bureaux within it are divided from the
16 Glasgow Bureau and it is difficult to imagine how this
17 matter can be addressed other than by radical action.
18 It is suggested that if, and especially if, Y7 and Q12
19 are held to be mis-identified, the only result that
20 would permit confidence to be returned would be the
21 closure of the Glasgow Bureau at this time, thereafter a
22 reassessment of the systems and the competency of
23 individuals involved in it, and outside scrutiny of
24 whether there has been improvement before the Bureau can
25 be permitted to reopen.

1 The watchword, of course, is transparency --
2 transparency for the public. We contrast what happened
3 here to what happened in the Mayfield case and what
4 happened in Boston following the McKern(?) case. In the
5 former matter the investigation was transparent, the
6 results were published, the public could see what had
7 taken place. In the latter case in Boston, the Bureau
8 was closed until the system was fit for purpose.

9 One contrasts that with what happened here. Ten
10 years later, numerous investigations and inquiries
11 later, millions of pounds later, the SPSA is still
12 telling us, "We will wait and see what the Inquiry
13 decides" when asked this: "If another problem arises,
14 will we expect no change until a further public inquiry
15 is ordered?" A system of management that so operates is
16 a completely shirking of responsibility.

17 The Crown Office too have had ample opportunity to
18 react, to recognise the problem, to investigate it, to
19 demand change. However, that was not done. Iain McKie
20 was seen as an irritation. He was only one person,
21 according to Lord Boyd, and it seems that the message
22 was only of importance if it was delivered publicly.

23 It is acknowledged by both the Crown Office and by
24 SPSA that there are serious issues that have to be
25 addressed for the Crown's disclosure and for the SPSA's

1 disclosure. Mistakes may happen, they did happen, but
2 one can judge the integrity of any organisation by its
3 reaction to those mistakes. As already said, both by
4 the Crown and the SPSA, that reaction was woeful.

5 Far from being critical of Iain McKie for, as is
6 pejoratively described, his "campaign" there should be a
7 recognition of the debt owed to him. Few come out this
8 well but I suggest, frankly, that Iain McKie has for his
9 tenacity and, frankly, dignity in the face of the most
10 disgraceful and unfounded allegations about his
11 daughter. He emerges from this entirely unscathed. It
12 is a pity, frankly, that Lord Boyd failed to acknowledge
13 that matter in his evidence.

14 Few have in this Inquiry acknowledged mistakes. Pat
15 Wertheim did but the mistake was explicable. Gillian
16 Climie did, even though she cannot carry any blame. You
17 might think this Ms Climie deserves considerable credit
18 for her evidence.

19 Over the years, many have come forward and placed
20 their reputations on the line on both sides of the
21 debate. Although Pat Wertheim was employed as an
22 expert, Mr Zeelenberg has staked his reputation on his
23 evidence and others likewise. The result of this
24 Inquiry on Q12 and Y7 will undoubtedly affect the
25 reputation of those individuals. It is hard to see how

1 Mr Wertheim, Mr Zeelenberg, Mr Sheppard, Mr Grigg, the
2 PSNI and others can justify their position should the
3 decision of this Inquiry agree with the identifications
4 by SCRO.

5 Conversely, the same applies in respect of
6 Mr Leadbetter, Mr Swann and the others who support SCRO.

7 Should the decision of this Inquiry be to the opposite
8 effect and deny the identification of SCRO, clearly
9 their reputations are going to be seriously damaged.

10 There are a number of victims in this matter, not just
11 Shirley McKie and David Asbury, but Michael Moffat and
12 Gillian Climie and no doubt many individuals within SCRO
13 and SPSA. Some, of course, only have themselves to
14 blame.

15 But at the end of the day the victim that remains
16 above all is Marion Ross. To date, no-one has been
17 convicted of her murder and that is a tragedy.

18 What we invite you to do, Chairman, is as follows.

19 We invite that an interim report under the Act is
20 prepared on the issue of Q12 and Y7 simply indicating
21 whether the SCRO identifications were correct or
22 incorrect. What this will do is will enable the SPSA to
23 take immediate action as managers. It will permit them
24 to show leadership and control change in the best way
25 possible. I have no doubt that they would welcome this

1 to ensure that there is no prospect of a miscarriage of
2 justice in the interim. This is so no matter what
3 decision is taken. On any basis, some within SPSA are
4 wrong. Even if it is concluded that the marks are
5 incapable of identification, in that event it appears
6 that they are all wrong.

7 The second thing that we invite you to recommend,
8 sir, is a recommendation that all changes within SPSA,
9 and indeed with regards to the Glasgow Bureau, are
10 reviewed by an outside agency, whether set up
11 specifically, or an agency that was also in existence to
12 carry out the review. Timescales should also be set.

13 Finally, there should be transparency of the changes
14 proposed and implemented.

15 Similar procedures should be implemented in respect
16 of the Crown Office. Disclosure is, it would seem,
17 something of an abstract concept for the Crown Office.
18 There has been a theoretical concept. It's no use
19 having obligation of disclosure if those who possess the
20 information don't know that they have to hand it over.
21 It's almost as if Crown policy is what should be
22 disclosed is what can easily be found out by the defence
23 from other sources.

24 You recall that Lord Boyd fundamentally disagreed --
25 his words -- with the suggestion that disclosure after

1 conviction should be Crown-led. It is apparently for
2 the defence to appeal -- on what grounds, we can only
3 guess -- to trigger that disclosure.

4 It appears almost on a Rumsfeld analysis that there
5 are "unknown unknowns". That may relieve the Crown of
6 the responsibility of disclosure but it does nothing for
7 a mature system of justice with more than mere lip
8 service to an accused's rights.

9 The Inquiry has exposed failings. As a result of
10 those failings, apart from the massive cost to the
11 public purse, Shirley McKie was prosecuted, David Asbury
12 was convicted of murder, and no-one has been convicted
13 of the appalling murder of Marion Ross.

14 We would like to thank all those present for the
15 professional approach to what has been a difficult and
16 thorough fact-finding exercise. In particular, we would
17 like to pay tribute to Mr Moynihan for his exhaustive
18 and careful analysis of the evidence. The Inquiry has
19 provided many answers but has raised many questions, the
20 answers to which we look forward to reading in the
21 report of the Inquiry. Thank you, sir.

22 THE CHAIRMAN: Thank you very much. Unfortunately, we
23 underestimated the time that would be required today and
24 Mr Russell was not asked to come until tomorrow. I am
25 not sure what the current position is but at one stage

1 he raised a question about Mr Swann's evidence and
2 whether we had the correct version of it. We put to
3 Mr Russell the Inquiry's understanding of Mr Swann's
4 evidence but we have not had confirmation from
5 Mr Russell that that is accepted by Mr Swann. So I
6 can't rule out the possibility that Mr Russell may ask
7 for Mr Swann to be recalled about that. I do not think
8 we have had a response, though we have been waiting for
9 one for some days.

10 MR MOYNIHAN: Apparently, sir. I am looking to see those at
11 the back of the hall. We have not had a response to
12 that particular question.

13 THE CHAIRMAN: Unfortunately, he has not been able to
14 respond. We will sit tomorrow then or I shall sit
15 tomorrow at 10.00 and, as I said earlier, anyone who
16 finds they are otherwise engaged I quite understand
17 that. Otherwise, I am afraid that is as far as we can
18 go today, isn't it?

19 MR MOYNIHAN: Sir, that is indeed the position. I myself
20 invited Mr Russell to give his closing statement
21 tomorrow and, therefore, it is no fault of his that he
22 is not available this afternoon.

23 THE CHAIRMAN: I am sorry about that, otherwise we might
24 have been able to finish the Inquiry or the oral part of
25 the Inquiry today but it is not to be. Very good.

1 Tomorrow morning at 10.00. Thank you.

2 **(2.13 pm)**

3 **(Adjourned until 10.00 am the following morning)**

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