

NOTE TO LORD ADVOCATE

from ALAN DEWAR

HMA v DAVID ASBURY

On 4th June 1997 David Asbury was convicted, by majority, of the murder of Miss Marion Ross. I was the trial depute. This was the case in which the fingerprint of DC Shirley Cardwell was found on the bathroom door standard - the bathroom being where the deceased's body was found.

The question arises as to whether DC Cardwell should be prosecuted for perjury as she gave evidence during the trial to the effect that she had never been in the house. She had, of course, no authority to be there.

An extensive police inquiry has taken place as to how the fingerprint came to be in the house and disciplinary proceedings against DC Cardwell have been commenced. On the basis of my knowledge of the case, arising from the conduct of the prosecution, there would appear to be no other sensible conclusion than that the DC must have been in the house, without authority, at some stage. On oath, she denied, on a number of occasions, that she had been.

The matter is a very serious one as the jury might have acquitted Asbury on the basis that they could not rely on the other (incriminating) fingerprint evidence in the case. Thankfully, they did not but the danger was there and made the preparations for the trial, and the trial itself, lengthier and more complicated than they otherwise would have been.

In these circumstances, my recommendation, at this stage, is that perjury proceedings should be taken. As a starting point in that process, a transcript of DC Cardwell's evidence will require to be obtained. Thereafter, I assume, the case will require to be reported in the usual way for Crown Counsel's consideration and instruction. If I can assist in that process I will be happy to do so.

Two other matters arising from the trial occur to me:

1. The Asbury case was, in the usual way, one of a number of cases listed for my court in Glasgow on the second of two "back to back" sittings which I was doing. I got the (extensive) papers for the Asbury case on the Wednesday or Thursday prior to the commencement of the second of those sittings. I had been given no prior warning that this was such a difficult, high-profile, case and had had no prior involvement in it. At the time the papers were delivered to me I was conducting a trial and still had other cases outstanding from the first of my sittings.

This meant that I was not able to begin to read the papers in any detail until the weekend prior to the commencement of the second sitting. Fortunately, the defence were not in a position to begin the trial until later in the week and it did not, in fact, begin until the Friday of the first week of the second sitting. Before that, however, I did another trial (a two day drugs case) from the sitting.

Frankly, this did not really allow me adequate time to prepare as well as I would have liked for the Asbury trial until the weekend after the trial started. In the end of the day I do not think that I was disadvantaged in presenting the case, but it was a far from ideal way to commence such an important trial. I cannot but think that the trial should have been given its own sitting (as it was always going to be a lengthy trial without any prospect of a plea), or that the trial depute should have been given prior warning of the case and more time to prepare it, or some such thing so as to ensure that by the start of the trial Crown Counsel had had an appropriate period of time in which to prepare properly for the trial.

I do not raise this matter by way of complaint because I well know how much pressure we are all under. Rather I put the point forward for consideration in the hope that note can be taken of it for the future and, if possible, some improvement made.

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It seems to me that a better procedure would be for an accused who wishes to give a voluntary statement to be placed before a microphone and asked to say on tape what he wants to say without being interrupted other than for purposes of clarification. The tape could then be replayed and transcribed there and then the written (or typed) version authenticated. The result, I feel, would be much more satisfactory than the present procedure - which I have come across before and seems to be the standard procedure at the moment.

I hope these comments are of some assistance and apologise for their length.

ARD
5th JUNE 1997