Privy Council DRA. No. 1 of 2004

James Holland *Appellant*

v.

Her Majesty's Advocate *Respondent*

FROM

THE HIGH COURT OF JUSTICIARY

SCOTLAND

– – – – – – – – – – – – – – –

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 11th May 2005

- - - - - - - - - - - - - - - - - -

Present at the hearing:-
Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell

- - - - - - - - - - - - - - - - - -

Lord Bingham of Cornhill

1.I have had the opportunity of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry. I am in complete agreement with them, and for the reasons that they give would make the orders which Lord Rodger proposes.

_____

Lord Hope of Craighead

2.I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Rodger of Earlsferry. For the reasons which he has given, with which I am in full agreement, I would allow the appeal and make the order which he proposes. I should however like to add these brief observations on the use of dock identification evidence.

3.There is no doubt that Scotland is unique among the jurisdictions

in the United Kingdom in the significance that it attaches to dock identification. But in the appeal court, as the Lord Justice Clerk (Gill) records in his opinion, 2003 SLT 1119, 1123, para 25, counsel for the appellant submitted that Scots law on this point compared unfavourably with all other comparable jurisdictions. The advocate depute submitted, on the other hand, that there were numerous other jurisdictions in which dock identifications were allowed. The Lord Justice Clerk said that counsel for the appellant had failed to satisfy him that Scots law was unique among all other comparable jurisdictions in this respect: p 1124, para 31.

4.No attempt was made to deploy any comparative material on this issue during the hearing before the Board. In a letter which was submitted after the hearing the Deputy Crown Agent said that the advocate depute's submissions to the appeal court were based on a document about the use of dock identifications in other European jurisdictions which had been obtained from Eurojust, and their Lordships have been shown a copy of that document. As the appellant's counsel have pointed out, however, it is difficult to make reliable comparisons as the practices of inquisitorial systems differ markedly from the Scottish system with regard to the gathering and adducing of evidence. The most that can be taken from the brief descriptions contained in this document is that, while dock identifications are used in a number of European systems, these systems vary in their approach to evidence of identification generally and in the weight that is to be attached to dock identifications in particular.

5.I do not think that this material assists one way or the other in resolving the issue which lies at the heart of this case, which is whether dock identification evidence is incompatible with the article 6(1) right to a fair trial. As the jurisprudence of the European Court to which Lord Rodger refers makes clear, it is not its practice to address issues about the admissibility of evidence in the abstract or to deal with them as issues of principle: see especially *Schenk v Switzerland* (1988) 13 EHRR 242, 266, para 46. So I would reject any suggestion that the use of dock identification evidence in solemn proceedings must always be regarded as incompatible with the accused's article 6(1) Convention right to a fair trial, even if Scots law is indeed unique in the importance which it attaches to such evidence. It all depends upon the facts of the case – whether the use of this kind of evidence could be said in the particular circumstances to have been unfair.

6.Looking at the point more generally, I see no reason why Scots

law should be diverted from its current practice in the use of dock identification evidence even if it were the case that all other comparable jurisdictions regard this as unacceptable. It is pre-eminently a matter for each jurisdiction to determine its own rules of evidence. Particular care must of course be taken, where identification is likely to be a real issue in the case, to ensure that the way the evidence is obtained and presented is compatible with the accused's article 6(1) right to a fair trial. Guidance as to what is and what is not unfair is to be found in the Second Report of the Thomson Committee in 1975 (Cmnd 6218). In para 134 of its report the Committee recommended that it ought not to be competent for the Crown to ask a witness who had viewed an identification parade and had failed to identify the accused on that occasion to identify the accused in court. But in para 133 the Committee also recommended that it should be competent for the prosecutor to ask a witness who confirms that he did identify the accused at the parade whether the accused in the dock is that person. This shows that the Committee was content to accept that there was no fundamental objection to the practice of dock identification as such.

7. In *Bruce v H M Advocate*, 1936 JC 93, a number of witnesses who were asked to speak to certain facts in connection with the indictment spoke of "the accused James Bruce". But they were not asked directly to identify in court the person to whom they were referring in their evidence. At p 95 Lord Wark said that, as a matter of practice, the identification of the accused by witnesses who are speaking to the facts should, in every case, be a matter of careful and express question on the part of the prosecutor; see also *Wilson v Brown*, 1947 JC 81, where witnesses said that they knew the licence holder but were not asked to identify the accused as that person. In *Stewart v H M Advocate*, 1980 SLT 245, 251, Lord Justice General Emslie re-affirmed what he described as the general rule of practice, that where the Crown sets out to prove that a particular person is the perpetrator of a crime the identification of the accused as its perpetrator must not be left to implication.

8. If this rule is to be applied correctly, the accused – in whose favour, after all, the rule has been devised as a matter of fairness – must accept the fact that witnesses for the Crown may be asked from time to time during the trial to confirm that he is the person to whom they are referring in their evidence. This includes witnesses who were responsible for the conduct of any identification parade as well as those in whose case, because they knew the accused, the holding of a parade was thought to be unnecessary. The general

rule and the practice of asking witnesses to confirm that the person in the dock, or which of them if more than one, is the person to whom they are referring go hand in hand. It would not be possible to abandon the practice without departing from the rule too.

9. The decision in this case demonstrates the limits beyond which the practice of dock identification cannot be taken without risk to the accused's article 6(1) Convention right to a fair trial. But it should not be taken as a signal that the practice of inviting witnesses to say whether the person to whom they are referring is in court, and if so to identify him, is itself objectionable and should now be departed from.

Lord Rodger of Earlsferry

10. The appellant is James Holland who went to trial along with his co-accused, Stephen Foy, at the High Court at Glasgow in April 2002. On 22 April the appellant was convicted inter alia of two charges of assault and robbery (charges 2 and 3). Charge 2 related to an incident at a house at 11 Western Avenue, Rutherglen on 4 September 2001, while charge 3 concerned an incident at shop premises at Rankin Gate, Carluke on 9 September 2001. In addition, the appellant was convicted of two comparatively minor charges: having with him, without lawful authority or reasonable excuse, a loaded air pistol in Tollcross Road, Glasgow on 15 September 2001, contrary to section 19 of the Firearms Act 1968 (charge 4); and attempting to pervert the course of justice by giving the police a false name, also on 15 September 2001 (charge 5).

11. The appellant appealed against his conviction of charges 2 and 3 on the ground, inter alia, that the prosecution conducted in the name of the Lord Advocate had infringed his article 6 Convention rights, first, because the Crown relied on evidence from witnesses who identified him when he was sitting in the dock during his trial and, secondly, because the Crown had failed to disclose certain information to the defence. The appeal thus raised devolution issues in terms of para 1(d) and (e) of schedule 6 to the Scotland Act 1998. The appeal court considered the appeal in two stages. In the first, 2003 SLT 1119, the Lord Justice Clerk (Gill), Lord Osborne and Lord Abernethy, rejected the ground relating to the dock identification and in the second, 2004 SLT 762, the Lord Justice Clerk, Lord Penrose and Lord Hamilton, rejected the ground relating to the alleged failure to disclose the information. In the result they refused the appeal against conviction. On 24

June 2004 the appeal court refused leave to appeal to the Board on the devolution issues, but on 28 July 2004 the Board granted special leave to appeal.

12.To set the scene, it is necessary to explain the circumstances in a little more detail. I gratefully adopt the trial judge's narrative of the events giving rise to the assault and robbery charges, as they emerged in evidence at the trial.

The Crimes

13.The complainers in charge 2, a Miss Gilchrist and a Mr Lynn, lived together and were both disabled. At about 9 pm on 4 September 2001 they were at home, expecting Miss Gilchrist's son, Jamie, to return from coaching football for younger children. There was a knock at the front door and, when Miss Gilchrist opened it, she saw three men. One of them had a gun and another had a knife. She screamed and they grabbed her by the hair and pushed her back into the flat. She was dragged to the living room where her hair was again grabbed and she was forced to her knees, while her assailant put his hand over her nose and mouth. She explained that she suffered from asthma and lung disease and that he would kill her, but her assailant continued to keep his hand over her nose and mouth. He was wearing latex gloves. One of the other assailants, whom Miss Gilchrist identified as the appellant, was also wearing latex gloves and held a gun at Mr Lynn's head. The men tied Miss Gilchrist's hands and wrists tightly in front of her body. They also tied Mr Lynn's hands behind his back. The men demanded money and jewellery, pulling a ring from Miss Gilchrist's finger, grabbing and pulling a chain from around her neck and taking one from around Mr Lynn's neck. They were unable to remove all the rings on Miss Gilchrist's fingers and appeared to be preparing to use a kitchen knife to chop off her fingers when Jamie Gilchrist returned home and knocked on the living room window. This caused all three men to run out of the house taking the jewellery with them.

14.The incident in charge 3 occurred some five days later. The complainer, Mr Simpson, was the manager of the R S McColl shop at Rankin Gate, Carluke. Shortly after 8 am on 9 September he arrived to open the shop. When he had opened some of the shutters at the front, Mr Simpson noticed two men loitering outside. He thought that they were customers waiting for the shop to open and he indicated that they should wait for five or six minutes. Mr Simpson then went to the back area of the shop. While he was there, the two men came running through the back door. They

were wearing latex gloves. One was carrying a gun. Putting his arm round Mr Simpson, he put the gun to his left temple. The men forced Mr Simpson upstairs into the cigarette room and pushed him to his knees. He was terrified. The men ordered him to open the safe and he did so. They then began pulling change from the bottom part of the safe. The men put cigarettes, cash and telephone cards into black bin bags. They then forced Mr Simpson to lie in front of the safe, held the gun to the back of his head and obtained the key to the cigarette room. Having locked Mr Simpson in, the men ran off.

15.In the witness box Mr Simpson identified the appellant and his co-accused, Mr Foy, as the two men who had robbed him. After that evidence had been led, Mr Foy pleaded guilty to charge 3, his pleas of not guilty to two other charges on the indictment being accepted by the advocate depute.

The Pre-Trial Procedures

16.Following the incident when he had the air pistol in Tollcross Road on 15 September 2001, the appellant was first detained and then charged with offences relating to incidents on that date. He appeared on petition in the Sheriff Court at Glasgow in that connexion on 17 September 2001 when he was committed for further examination. He appeared again on a fresh, slightly amended, petition in relation to those matters on 21 September when he was fully committed. On the same day, along with Mr Foy, the appellant appeared on a different petition in the same court. This petition contained charges relating to the incidents which eventually formed the subject-matter of charges 2 and 3 on the indictment. In the case of the assault and robbery on Miss Gilchrist and Mr Lynn, the petition was based on Miss Gilchrist having identified the appellant from police photographs that were shown to her. Similarly, in the case involving Mr Simpson, he had given a description of one of his assailants and had identified the appellant from police photographs. On 21 September the appellant and Mr Foy were committed for further examination in respect of these matters and bail was refused.

17.The procurator fiscal directed that an identification parade should be held in respect of both accused. This duly took place on 26 September. Mr Lynn, who has poor sight, attended, as did Miss Gilchrist, Jamie Gilchrist and Mr Simpson. Mr Lynn could not identify anyone. Jamie Gilchrist identified the appellant. Miss Gilchrist and Mr Simpson each picked out two (different) stand-ins. Despite this set-back for the Crown, on 28 September 2001 the

appellant and Mr Foy were fully committed in respect of both robberies.

18.The Crown proceeded to precognosce the witnesses. Miss Gilchrist said to the precognoscer that, after the identification parade, a policeman had told her that she had not done too well. In due course, the precognition and draft charges were submitted to Crown Counsel. In the accompanying summary, the procurator fiscal drew attention to the potential problems as to the sufficiency of evidence for the two charges of assault and robbery. About the charge concerning Mr Lynn and Miss Gilchrist the procurator fiscal said this:

> "There were 3 perpetrators involved in this incident. The witness Allison Gilchrist identified the accused Holland from photographs as being one of the 3 robbers (the one wearing the grey fleece and carrying the knife). She is confident (or, at least, expressed confidence at precognition) that she would be able to identify the one with the grey fleece again if she were to see him in the flesh. Unfortunately, she failed to pick out the accused Holland at the identification parade held on 26 September 2001. She picked out 2 stand-ins at the parade. She has stated at precognition that she was put off by the fact that members of the parade were laughing during the parade and she now thinks that she got things wrong. It is rather concerning that, at precognition, she stated that the police had told her after the parade that she 'didn't do too well'. Clearly the police have no business to be saying such things to witnesses who have just viewed an identification parade (and no doubt, if I made enquiries, I would be met with complete police denials that anything of the sort was said to the witness)."

On the basis of the precognition Crown Counsel instructed that the appellant and Mr Foy should be indicted for trial in the High Court. In due course they were indicted for trial on 11 February 2002 but, in the event, the trial did not take place until April. When the indictment was served, the Crown did not tell the appellant's agents about what the police officer had said to Miss Gilchrist after the identification parade.

19.At some stage in the course of preparing for the trial, the appellant told his agents that there was a rumour in prison circles that Mr Lynn, who was on the Crown witness list, had outstanding drugs charges against him. So, on 29 January 2002, on the instructions of senior counsel, the appellant's agents wrote to the

Crown Office to enquire whether Mr Lynn had outstanding criminal charges against him and, in particular, whether he had been indicted or was due to be indicted in the near future. On 7 February the Crown Office replied, asking the appellant's agents to provide them with the basis on which the request was being made and its relevance to the appellant's defence. On 22 February the appellant's agents replied, saying that their enquiries suggested that Mr Lynn might have been the target of a robbery because of criminal activity on his part and associations he had made in that regard. They further believed that he had an association with the appellant's co-accused (Mr Foy). They believed that evidence of Mr Lynn's conduct and character might cast doubt on their client's involvement in the matters in hand. Finally, on 6 March the Crown Office official replied that he was not in a position to disclose any such information to the appellant's agents.

20.Faced with this refusal, the appellant's agents and counsel did not seek an order from the High Court for the disclosure of the information.

The Evidence at Trial

21.When the trial began and the advocate depute was about to call Miss Gilchrist to give evidence, Ms Scott QC, who was counsel for the appellant, objected on the ground that the advocate depute intended to ask questions that were designed to see whether Miss Gilchrist would identify the appellant, sitting in the dock, as one of the perpetrators of the assault and robbery in charge 2. The same applied to Mr Simpson in charge 3. Ms Scott lodged a devolution minute to the effect that the act of the prosecutor in leading and relying on such evidence was incompatible with the appellant's article 6 Convention rights and so was ultra vires in terms of section 57(2) of the Scotland Act 1998. The trial judge repelled Ms Scott's objection and the trial proceeded.

22.Miss Gilchrist gave evidence in which she identified the appellant as the man who had had the gun during the incident. She also identified Mr Foy as one of those involved in the incident, although he had not been charged with that offence. Towards the end of her examination-in-chief the advocate depute asked her about picking out the two stand-ins at the identification parade. Miss Gilchrist said

> "Well, I wasn't too sure because I was in a state and there was people laughing on the parade and the police were telling them to be quiet. About three times the police told them to be quiet. They were laughing and I am quite self-

> conscious and I thought they were laughing at me, so I was really … I couldn't do it. I really just picked out who I thought it was but I wasn't absolutely positive at the time. I just picked out who looked quite like them, but I wasn't too sure."

She went on to say that the man she had picked out in court "was definitely in my house. Definitely". Ms Scott then cross-examined Miss Gilchrist to the effect that she had not said anything at the time about being frightened or scared. Miss Gilchrist also said that her identification was more likely to be accurate in court, when she saw the men in front of her face, than at the parade 22 days after the event. Ms Scott pointed out to Miss Gilchrist that in court she had identified Mr Foy who was not charged with the offence. She replied, "Well, I don't know who has been charged with it. I am just telling you who was in my house". She rejected any suggestion that she might have been mistaken. In re-examination she confirmed that the man with the spectacles in court (the appellant) was definitely the one with the gun.

23.When he gave evidence, Jamie Gilchrist, who had already identified the appellant at the identification parade, again identified him in the dock as being one of the three men who ran out of the building as he arrived. In cross-examination he said that it was possible that he could be mistaken but that the appellant looked very much like the man. In re-examination he said that he was "sure" of his identification of the appellant.

24.Because of his defective sight, Mr Lynn was not asked if he could identify any of the robbers.

25.There is no transcript of the evidence of Mr Simpson but it is not disputed that he identified the appellant and Mr Foy as the two robbers. He was asked about the identification parade and said that the appellant was the man whom he had picked out on that occasion. It was put to him that he was wrong about that. He also said that no-one had told him at the parade that he had [not?] picked the right man.

26.None of the officers who conducted the identification parade was called as a witness.

27.In seeking a conviction of the appellant on charge 2, the advocate relied on the dock identification by Miss Gilchrist and Jamie Gilchrist of the appellant as one of the participants. The

advocate depute also relied on the evidence, led in relation to charge 4, that on 15 September 2001, some 11 days after the assault and robbery in charge 2, the appellant was in possession of an air pistol which Miss Gilchrist, Mr Lynn and Jamie Gilchrist all said was similar to the weapon used in that assault and robbery.

28.So far as charge 3 was concerned, the Crown relied, of course, on the evidence of Mr Simpson identifying the appellant as one of the perpetrators. The advocate depute also relied on Mr Simpson's evidence that the air pistol found in the possession of the appellant on 15 September, some 6 days after the assault and robbery on Mr Simpson, was similar to the weapon which he said had been used. For corroboration of Mr Simpson's evidence, the Crown invoked the principle in *Moorov v HM Advocate* 1930 JC 68. Here the incidents in charges 2 and 3 were both assaults and robberies; they occurred within a few days of one another; the places where they occurred were in the same general geographical area; and there were striking similarities (the holding of the gun to the victim's left temple, forcing the victim to the floor, the use of latex gloves) between the two incidents. In these circumstances, if the jury accepted the evidence of Mr Simpson as truthful and reliable, they could find corroboration of it in evidence which they accepted, indicating that the appellant had been one of the perpetrators of the assault and robbery in charge 2. Equally, of course, Mr Simpson's evidence was potentially available as corroboration of the evidence of Miss Gilchrist and Jamie Gilchrist on charge 2.

The Judge's Charge to the Jury

29.In his charge to the jury the judge began with the usual general directions and then gave directions on the legal meaning of the charges which they had to consider. He continued:

> "Now, having explained to you the legal meaning of each of the charges which James Holland faces, let me give you some words of warning about the evidence of identification of the accused, particularly in relation to charges 2 and 3. This is a warning which is to a large extent not particular to the circumstances of this case. It is a warning which I give in all trials which involve identification evidence. In giving it I do not mean to suggest to you that you should believe or disbelieve any particular witnesses: that is a matter for you. What I am inviting you to do is to take particular care in assessing the identification evidence.
>
> The critical issue, ladies and gentlemen, in this trial in relation to charges 2 and 3 in particular is the quality of the

identification evidence. That is something you must decide on.

Now, the Crown asks you to accept the evidence of Alison Gilchrist, Jamie Gilchrist and Stuart Simpson as credible and reliable evidence pointing to the accused as the perpetrator of the crimes in charges 2 and 3. And the defence invites you not to accept their identifications as reliable, and to conclude that this is a case of mistaken identity.

It's for you to decide if that evidence sufficiently links the accused with the perpetration of the crimes in charges 2 and 3. You would have to be satisfied beyond reasonable doubt that the accused has been identified as the perpetrator of the crime in charge 2 and as the perpetrator of the crime as charged in charge 3. And the evidence for that would have to come from two independent sources, both credible and reliable. If you were not satisfied, the Crown would have failed to prove one of the essential facts by corroborated evidence, and you would have to acquit the accused of whichever charge you were considering.

Errors can occur in identification. Sometimes we think we have recognised somebody we have seen before; sometimes we are right, sometimes we are wrong. Some people are better at it than others. Mistakes about identification have been made in court cases in the past; but it doesn't follow from that that any mistake has been made here. It's for you to assess the soundness of the eye witness identification. But you will need to take special care in assessing that evidence. You may wish to take account and consider several factors. First, what opportunity did the witness have to observe the person concerned? Was it a fleeting glimpse? Was there time for reliable observations to be made? And was the person clearly visible? What was the state of the lighting? Was the person previously known to the witness, or was he a stranger? Was the person someone with some easily distinguishable feature or not? How positive have the identifications been? And have the memories of the witnesses been affected in any way?

To regard the identification evidence as acceptable, it's not necessary that you should conclude that the witness in question has made a 100 per cent, absolutely certain identification; but you need to be satisfied that you can rely

> on the substance of what the witness said.
>
> The task of assessment is not an easy one: it is certainly one which has to be approached with great care and circumspection."

Up to this point, the trial judge was giving the standard directions on identification suggested in the Judicial Handbook and ending with a sentence taken from Lord Cullen's charge to the jury in *Farmer v HM Advocate* 1991 SCCR 986, 987D–E.

30. The judge then went on to deal with the evidence given by the eye witnesses. He reminded the jury of Miss Gilchrist's dock identification and also reminded them that, at the identification parade, she had not identified the appellant but had identified two stand-ins. He reminded the jury of the explanation which she had given of that. He went on:

> "But in assessing that, ladies and gentlemen, remember that in her evidence she denied saying to the police that she would know the one with the grey fleece, but that she couldn't identify the other; and you have heard the evidence of PC Angus McDougall, who spoke to the fact that he had taken a statement from her that day, and he read out to you what she had said; although remember also that that statement was given within one hour of the incident, and that could go either way: that is a matter for you. It might mean that her recollection was clearer, or because she was very upset at the time it might be that you wouldn't be swayed by what she said at the time. It's a matter for you."

The trial judge then went over Jamie Gilchrist's evidence, before saying:

> "So, ladies and gentlemen, you may think that you have two witnesses giving positive identification of the accused James Holland in court. That is a matter for you. What I am urging you and directing you to do is to take particular care in assessing and weighing up this material. As I said, the task of assessment is not an easy one, and it is certainly one which has to be approached with great care and circumspection."

31. When he came to charge 3, the trial judge said:

> "Turning to charge 3, ladies and gentlemen, you have got the evidence on that charge of identification, which came from Stuart Simpson, the store manager. According to my

> recollection – and I repeat, it's yours that counts – he identified Mr Holland in court as one of the two men. And he thought that he had picked him out at the identification parade. In fact – and it's not, I think, disputed by the Crown – he did not pick Mr Holland out in the identification parade. And he accepted in cross-examination that he could possibly be mistaken, although he said in re-examination, as I recollect him, that he was sure of his identification of the two men in court today.
>
> Now, all the words of caution that I gave you about identification evidence in relation to charge 2 also apply to this evidence in relation to charge 3. I do not meant to suggest that Mr Simpson is mistaken in this identification of the accused in court, nor that he is correct in it: that is a matter for you to decide. You must remember all the points relied on by Miss Scott in her speech to you, including the general point that what is known as a dock identification, that is pointing to an accused in court, is in her submission not fair and therefore not to be relied upon. All I require of you is to approach all the evidence of identification with great care and circumspection."

32.In the light of the judge's charge, by a majority, the jury found the appellant guilty of charge 2 and, unanimously, found him guilty of charges 3, 4 and 5.

Post-trial Developments

33.On 21 June 2002 Mr Lynn and Miss Gilchrist appeared at the High Court at Glasgow on charges of dealing in heroin at 11 Western Avenue, Rutherglen between 19 January and 1 June 2001. Mr Lynn pleaded guilty to a restricted charge covering the period from 19 April to 1 June 2001. The court was told that he had more than £3,000 hidden in a safe in the house, that he had £1,096 in his trouser pocket and sums of £600 and £188 hidden behind an electric cable in the road. He had been found with 10 bags of heroin and was later caught selling a bag of heroin to an addict. The Crown accepted Miss Gilchrist's plea of not guilty. Since then the appellant's agents have established that Mr Lynn and Miss Gilchrist appeared on petition on these charges on 12 July 2001, some weeks before the incident in charge 2.

34.On 7 July 2003, the day before the first hearing in the appeal court, the advocate depute who was to conduct the appeal told Ms Scott that he had come across certain information among the

Crown papers regarding the identification parade in which Miss Gilchrist took part. He gave her a photocopy of part of the summary attached to the Crown precognition. The passage about the police officer's remark quoted in para 9 was taken from this photocopy.

The Dock Identification Evidence

35.Before the Board, Ms Scott's challenge to the dock identification evidence was put in two ways: first, that such evidence was so unfair and unreliable that it was incompatible with a fair trial under article 6(1); secondly, that the procedure of dock identification compelled the petitioner to assist the Crown case against him by exhibiting himself, contrary to his article 6(1) Convention right against self-incrimination. These are sweeping submissions and, as the Lord Justice Clerk pointed out, 2003 SLT 1119, 1124, at para 30, if they were accepted, they would mean that dock identification was always unfair to the accused.

The Right against Self-Incrimination

36.I begin with the second of these submissions, which in my view is devoid of merit. Section 92(1) of the Criminal Procedure (Scotland) Act 1995 provides that, in general, "no part of a trial shall take place outwith the presence of the accused". This requirement that the accused should usually be present throughout his trial is designed to promote his interests by ensuring that he can see and hear all the evidence against him and observe how the proceedings are conducted. It also gives him an opportunity to alert his solicitor or counsel to any matters that may be relevant to his defence. Section 92(1) therefore confers an important right on the accused – one that is not so fully guaranteed by many other systems. Clearly, however, by abusing section 92(1) and refusing to be present, the accused might prevent his trial from going ahead. So, where necessary, appropriate steps can be taken to ensure that he comes to court and remains in court during the trial. That does nothing to alter the fact that section 92(1) is conceived in the interest of the accused. The requirement for him to be present involves no conceivable breach of article 6(1) of the Convention: rather, it is designed to promote the values protected by that article.

37.Of course, one side-effect of the accused's right to be present when witnesses give their evidence is that they can see him in the dock. Any potential dangers in witnesses identifying the accused sitting in the dock as the perpetrator of the crime do not arise, however, out of the legal requirement for him to be present in court: they would apply equally if he were present voluntarily.

Notably, the quality of the witnesses' identification of the accused is not affected one way or the other by the fact that he is compelled to be present. In these circumstances, given the purpose of section 92(1), there is no basis for saying that the fact that a witness may identify the accused when he is present in court means that his article 6(1) Convention right against self-incrimination has been infringed. It might well be very different if, when in the dock, the accused could be required to assist the prosecution witnesses by, say, standing up, or turning round, or showing part of his body. But nothing like that is permitted. In *Beattie v Scott* 1990 SCCR 296, 301D Lord Justice General Hope emphatically declared that, when a case comes to trial, "the interests of the accused person demand that the Crown should prove its case against him without any assistance whatever on his part". In the present case, there was, of course, no question of the appellant being asked to do anything to assist the Crown in proving their case against him. In these circumstances there was no infringement of his article 6(1) right against self-incrimination.

Evidence and a Fair Trial under article 6(1)

38.I turn now to Ms Scott's principal submission on this aspect of the appeal. In the appellant's written case and, it appears, in the appeal court this submission was formulated very broadly - to the effect that evidence derived from the witness identifying the accused in the dock was, by its very nature, so unfair as to be incompatible with his article 6(1) rights in all cases. That broad submission cannot be accepted.

39.It is trite that the Convention does not concern itself with the law of evidence as such. In particular, it does not lay down that certain forms of evidence should be regarded as inadmissible. Such questions are left to the national legal systems. What article 6 does is guarantee a fair trial and so, when the introduction of some form of evidence is said to have infringed the accused's article 6 rights, the question always is whether admitting the evidence has resulted in the accused not having a fair trial in the circumstances of the particular case. So, for instance, in *Teixeira de Castro v Portugal* (1998) 28 EHRR 101, 114–115, para 34, the European Court of Human Rights observed:

> "The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain

> whether the proceedings as a whole, including the way in which evidence was taken, were fair …"

Statements to a similar effect are to be found in many earlier authorities, including *Edwards v United Kingdom* (1992) 15 EHRR 417, 431, para 34. In *Schenk v Switzerland*, (1988) 13 EHRR 242, 265–266, para 46, where the applicant complained about the use of an unlawful recording of a telephone conversation, the Court again noted that article 6 simply guarantees the right to a fair trial and that admissibility of evidence was primarily a matter for regulation under national law. The Court added:

> "The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr Schenk's trial as a whole was fair."

The Court went on to note that the rights of the defence were respected: the applicant had the opportunity of challenging the authenticity of the recording and of opposing its use. The defence had been able to secure an investigation of the background of the relevant witness and could have examined him in court. In addition, the Court attached weight to the fact that the recording was not the only evidence on which the applicant's conviction was based and that the domestic court had expressly said that it had relied on evidence, other than the recording, which pointed to the applicant's guilt.

40.In *Tani v Finland* Application No 20593/92, 12 October 1994, the applicant had been convicted of murder. He complained to the European Commission of Human Rights that one of the prosecution witnesses had identified him when he was brought into a room where the witness was being questioned. For identification purposes he ought to have been placed in a room along with others of similar appearance. The Commission reminded itself that the task of the Convention organs when considering a complaint under article 6 was to ascertain whether the proceedings, considered as a whole, including the way in which evidence was taken and submitted, were fair. The Commission noted that the applicant's conviction was based on an assessment of a significant amount of corroborative circumstantial evidence; that the identification in question had not played any decisive role in the applicant's conviction; that the applicant was assisted by counsel throughout the proceedings and that he had been able to question the witness in the proceedings before the domestic court. "Having assessed all elements of the domestic proceedings", the Commission rejected

the application as manifestly ill-founded.

41.These authorities show that the proper approach is to consider whether, having regard to all the elements of the proceedings, including the way in which the identification evidence was obtained, the accused had a fair trial in terms of article 6. While one cannot exclude the possibility that, in an extreme case, the judge could conclude that admitting dock identification evidence would inevitably render the trial unfair, normally the requirements of article 6 will not raise any issue of admissibility. So the trial judge was right to reject the objection to Miss Gilchrist's evidence in this case. Similarly, while there might occasionally come a time in the course of a trial when the judge could conclude that the dock identification evidence had made the trial unfair, in most cases it will be impossible to reach a view on that matter until the judge has given his directions to the jury and they have returned their verdict. In effect, therefore, the issue will generally be for the appeal court to determine after considering all the relevant aspects of the trial.

42.Two factors which will weigh in favour of the conclusion that an accused did indeed have a fair trial will be the fact that he was legally represented and that the rights of the defence were respected, with the accused's representative being able to challenge the admissibility of the evidence, to cross-examine the witness and then to address the jury on the weaknesses of the evidence. It will also be important to consider any directions which the judge gave to the jury about the identification evidence. The significance of the contested evidence in the context of the prosecution case as a whole will also be relevant. In particular, was it one of the principal planks in the case against the accused or was there a substantial body of other evidence pointing to his guilt? Since decisions are thus liable to depend very much on the circumstances of the individual case, they are likely to afford only limited guidance in subsequent cases.

43. In the present case the appeal court found it convenient to split the hearing of the appeal into two parts, with the alleged breaches relating to the identification evidence being considered by the Lord Justice Clerk and two judges in the first part and those relating to non-disclosure being considered by the Lord Justice Clerk and two different judges in the second. It is clear from the judgments that the court would have rejected both grounds of appeal, irrespective of whether they had considered the points separately or together. But the ultimate question is whether the trial as a whole was fair and that question can only be decided by the same court

considering all its relevant strengths and weaknesses, including any breaches of specific safeguards in article 6, together. It follows that, although the issues relating to identification and non-disclosure were argued in sequence at the hearing before the Board, in deciding whether the appellant can be said to have had a fair trial, the Board must consider all the relevant elements together.

44.As I have explained, in this case the police did not hold an identification parade at the time when the appellant and Mr Foy were charged. It was only after they had appeared on petition that the procurator fiscal instructed that a parade should be held. The Advocate Depute was unable to explain why no identification parade had been held initially, but he repudiated any suggestion that the police were now holding fewer parades than in the past. Moreover, he told us that Scottish police forces are introducing the VIPER identification system, which is based on a library of moving computer images and which does away with the need to find suitable stand-ins for an identification parade. It is also less stressful for witnesses. In future, there should therefore be even less reason than hitherto for not having identifications checked at the earliest possible stage.

45.In the present case the Board are concerned with a trial conducted under solemn procedure. In their Second Report (Cmnd 6218, 1975), para 46.12, the Committee appointed by the Secretary of State for Scotland and the Lord Advocate to examine trial and pre-trial procedures ("the Thomson Committee") discussed identification evidence and concluded, albeit reluctantly, that a distinction should indeed be drawn between solemn and summary proceedings. That distinction has also been recognised in England where, despite the firmly-rooted hostility to dock identifications in the Crown Court, for practical reasons they are permitted in driving cases in the magistrates' court: *Barnes v Chief Constable of Durham* [1997] 2 Cr App R 505, 512–513. So in this case the Board are considering the position in solemn proceedings only.

46.Moreover, the Board are concerned only with the issues in a case where, as here, identification is a live issue at the trial and the Crown witnesses who identify the accused in court have previously failed to pick him out at an identification parade. Therefore the appeal does not touch the use of dock identification in other cases, e.g. where the witness knows the accused or identification is not in dispute. Nor, of course, does it cast any doubt on the requirement that a Crown witness's identification of the accused should not, generally, be left to implication: *Bruce v HM Advocate* 1936 JC 93;

Stewart v HM Advocate 1980 SLT 245, 251. Lastly, this case is not concerned with questioning by defence counsel, especially in cases involving several accused, which is designed to show that counsel's client was not the person to whom the witness was referring.

Identification Evidence and Article 6

47.In the hearing before the Board the Advocate Depute, Mr Armstrong QC, who dealt with this aspect of the appeal, accepted that identification parades offer safeguards which are not available when the witness is asked to identify the accused in the dock at his trial. An identification parade is usually held much nearer the time of the offence when the witness's recollection is fresher. Moreover, placing the accused among a number of stand-ins of generally similar appearance provides a check on the accuracy of the witness's identification by reducing the risk that the witness is simply picking out someone who resembles the perpetrator. Similarly, the Advocate Depute did not gainsay the positive disadvantages of an identification carried out when the accused is sitting in the dock between security guards: the implication that the prosecution is asserting that he is the perpetrator is plain for all to see. When a witness is invited to identify the perpetrator in court, there must be a considerable risk that his evidence will be influenced by seeing the accused sitting in the dock in this way. So a dock identification can be criticised in two complementary respects: not only does it lack the safeguards that are offered by an identification parade, but the accused's position in the dock positively increases the risk of a wrong identification.

48.These criticisms are at their most compelling in a case like the present where a witness who has failed to pick out the accused at an identification parade is invited to try to identify him in court. The prosecutor is then seeking to use evidence obtained in circumstances which carry a heightened risk of a false identification, when he knows that the witness was unable to identify under the controlled conditions of an identification parade. By leading and relying on such evidence, the prosecutor is introducing into the trial this particular element of risk.

49.The potential dangers of a dock identification in these circumstances derive from aspects of human psychology which are the same in similar societies. In this respect witnesses and juries in a Scottish court are no different from witnesses and juries in, say, an English or Canadian court. So, when the advocate depute invites the witness to identify the accused in such a case, the

Crown are deliberately introducing an adminicle of evidence which certain other systems generally exclude - precisely because of the heightened risk that the identification will be mistaken. The issue in any given case is whether, by doing so, the Crown have rendered the accused's trial unfair in terms of article 6.

50.Not surprisingly, the dangers of dock identification have been as obvious to Scottish authors and official bodies as to those in other parts of the world. Indeed, as long ago as 1833, in his *Practice of the Criminal Law of Scotland*, p 628, Alison recognised that a dock identification of the accused was open to the observation that "his being in that situation helped them to believe he was the same".

51.In 1975 the Thomson Committee recorded, at para 46.03, that many of those who gave evidence to them had been very critical of the procedure for identifying the accused in court. Much of the criticism was directed at the practice of the accused being put into such a prominent position, in the dock between two uniformed policemen. Most of the Committee's witnesses thought that the procedure could result in prejudice to the accused. The Committee accepted this criticism and agreed, at para 46.09, that

> "in many cases such an arrangement may cast doubts upon the fairness and accuracy of the identification."

At para 46.11 the Committee recommended that, where identification was in issue, the Crown should be required to arrange for an identification parade to be held for each witness who would be called on to identify the accused. They further recommended that it should not be competent for the Crown at the trial to lead evidence of identification other than evidence of identification at such a parade. At para 46.13 the Committee expressly recommended that

> "in any case in which a witness has viewed an identification parade and has failed to identify the accused, it shall not be competent for the Crown to ask that witness to identify the accused in court."

52.These recommendations were not adopted, but for present purposes the importance of the report lies in the Committee's recognition of the risks in a dock identification in such cases – risks which the Committee clearly considered to be so significant as to justify a blanket ban on the use of such evidence.

53.In 1976 the report of the Departmental Committee on Evidence of Identification in Criminal Cases chaired by Lord Devlin (HC

338, 1976) was published. It recommended (Chapter 8.7) that the discretion of the trial judge to admit dock identification evidence should be limited and regulated by statute. In particular identification at an identification parade or in some similar fashion should generally be a precondition to identification in court and, where a dock identification was permitted, the judge should be required by statute to warn the jury about the weakness of such evidence in a situation in which there has to be a confrontation and not a picking out.

54.Following the publication of that report, the Secretary of State and Lord Advocate set up a Working Party chaired by Sheriff Principal Bryden to examine its implications for Scottish criminal procedure. In their Report (Cmnd 7096, 1978), the Working Party considered the question of dock identification and came down against recommending any reform along the lines proposed by the Thomson Committee.

55.The Working Party began by acknowledging, at para 3.02, that "The fallibility of eye-witness evidence on identification is now generally accepted". This perception of the nature of eye-witness identification evidence forms the backdrop against which they considered the particular issue of dock identification evidence. Having summarised the observations which they had received, the Working Party said this, at para 5.12:

> "We found this question particularly difficult to resolve. On the one hand, we recognised that, in the interests of fairness to the accused, dock identifications were undesirable because of the conspicuous position of the person to be identified. There is clearly a danger that a person might make an identification in court because, simply by seeing him in the dock, he had become convinced that he was the offender. Because of this consideration, we were in sympathy with the Devlin Committee's suggestion that the witness should previously have had to take the initiative in picking out the accused in a situation where he was not conspicuous."

The Working Party then marshalled the counter-arguments and eventually expressed their conclusion in this way, at para 5.16:

> "Taking all this into account, we have concluded that, although dock identification can be criticised, it would be more undesirable to make it always conditional upon prior identification at a parade. We see it as vital to preserve the importance of identification on oath; and the recommendation that identification at a parade be made a

> condition precedent of dock identification seems to us to erode this. We feel that it is of paramount importance to protect the witness's right to change his mind at the time of the trial, and the jury's right to have such evidence placed before it: cross-examination can bring out the value (or lack of it) to be attached to such evidence in the particular circumstances. We were reluctant to differ from the recommendations of the Thomson Committee in this respect, but in the course of our detailed consideration of this question we came to the conclusion that the implementation of the Thomson Committee's recommendation would require in practice numerous exceptions to be made, and we found it impossible to formulate a recommendation which would be flexible enough for the purpose. We therefore decided against proscribing dock identifications where these have not been preceded by an identification outwith the court. Where an identification parade has been held at which a witness identified the accused, and the basis of the identification has been noted and can be established in court, then a leading question should be permitted, such as 'Is that the man you identified at the identification parade on [date] as the man who on [24 April] [snatched your handbag] in [the Canongate, Edinburgh]? It could be left to the cross-examiner to raise the question of mistaken identify and give the witness the opportunity of correcting any mistake."

Again, what matters for present purposes is the clear recognition by the Working Party of the "danger" associated with dock identifications. This is over and above the fallibility of eye-witness identification evidence in general.

56.I would understand the Lord Justice Clerk to be acknowledging this same increased risk when he said, 2003 SLT 1119, 1125, para 39, that

> "dock identification can in some cases be a less satisfactory form of identification than identification made at an identification parade, or on some other occasion shortly after the relevant event."

Having regard to the safeguards afforded by the laws of evidence and procedure, the Lord Justice Clerk concluded that dock identifications could not be said to be unfair per se and should not be inadmissible, 2003 SLT 1119, 1124E–F, para 33.

57.I respectfully agree that, except perhaps in an extreme case,

there is no basis, either in domestic law or in the Convention, for regarding such evidence as inadmissible per se. The safeguards to which the Lord Justice Clerk draws attention – the requirement for corroboration, the opportunity for counsel to contrast the failure to identify at the parade with the identification in the dock and to comment accordingly – are, of course, important. Their mere existence cannot be used, however, to justify the abstract proposition that in all cases in Scots law an accused who has been convicted on the basis of a dock identification has necessarily had a fair trial. In Scots law, as in any other system, the actual circumstances of any given trial have to be considered before one can say that it was fair. In some cases, for instance, the dock identification evidence of one witness will have been confirmed by the evidence of witnesses who knew the accused. In other cases, there may be DNA evidence confirming the identification. In others again, however, the available corroboration may consist in facts and circumstances which are open to more than one interpretation, or else it may take the form of a dock identification by another witness who failed to identify at the identification parade. Similarly, in most trials counsel will have duly cross-examined the witness about the purported identification, but in some the cross-examination may have been perfunctory. In some trials defence counsel may have made a powerful submission to the jury on the point; in others counsel may have made little, or even nothing, of it. The effectiveness of these and other potential safeguards in securing a fair trial depends on what actually happened in the individual case.

58.One potentially important safeguard lies in the judge's directions to the jury. Indeed the Lord Justice Clerk saw it as the most important: 2003 SLT 1119, 1125, para 37. It is necessary, however, to distinguish between directions which a judge gives on the approach to be adopted in relation to eye-witness identification evidence in general and directions on the dangers of dock identification evidence, in particular. The Lord Justice Clerk referred to the Lord Justice General's 1977 Practice Note and to a series of decisions in which the appeal court have given guidance on eye witness identification in general. Important as these are in relation to that matter, they do not deal with the peculiar dangers of a dock identification where a witness previously failed to identify at an identification parade. Nor is there anything in the excerpts from the Judicial Handbook to suggest that judges should give a direction of this kind. Doubtless, in practice, judges often do so. In my respectful view, however, given the importance of the safeguard, judges should give an appropriate and authoritative

direction in all cases of this kind. The general lines of such a direction are obvious, but, ideally, in any given case its precise form will reflect the particular circumstances.

59.Applying the approach which I have outlined to the circumstances of this case, one can immediately see that the appellant had the benefit of counsel, who first objected to the admission of the dock identification evidence and then cross-examined the witnesses about their identifications, including the point that they had failed to identify the appellant at the identification parade. Furthermore, although there is no transcript of the speech which Ms Scott made to the jury, the passage which I have quoted in para 31 from the judge's charge to the jury shows that she made submissions to the effect that the evidence was not fair and that the jury should not rely on it. It is therefore clear that, in this respect, the rights of the defence were fully respected.

60.So far as corroboration of the identification by Miss Gilchrist is concerned, there was the identification of the appellant by her son, who had picked him out at the identification parade. In addition there was the air pistol which had been found in the appellant's possession some eleven days later and which looked like the pistol used in the attack on Mr Lynn and Miss Gilchrist. But there was evidence also that air pistols tended to look the same. So far as charge 3 is concerned, the principal corroboration of the dock identification evidence of Mr Simpson was to be found in the identification evidence of Miss Gilchrist and Jamie Gilchrist on charge 2. In addition there was the evidence that the air pistol found in the appellant's possession was similar to the weapon used in the attack on Mr Simpson.

61.It is important to recall that, as the judge directed the jury, the critical issue in the trial, in relation to charges 2 and 3 in particular, was the quality of the identification evidence.

62.Finally, while the judge gave the jury the usual directions on the need for care in relation to identification evidence, he merely told them that they should remember Ms Scott's general point that a dock identification "is in her submission not fair and therefore not to be relied upon. All I require of you is to approach all the evidence of identification with great care and circumspection". Whether deliberately or not, the way that this particular direction was formulated might be thought to suggest that the judge was distancing himself from Ms Scott's submissions on the point. At the very least, neither by associating himself with her submissions

nor otherwise did the judge clearly warn the jury of the particular risks of a dock identification in a case where the witness had previously failed to identify the appellant at the identification parade.

63.These factors will have to be reconsidered in the context of Ms Scott's further submission that the trial was unfair in terms of article 6 because of two distinct failures by the Crown to disclose relevant information to the defence.

Failure to disclose outstanding charges

64.Ms Scott submitted that, by failing to disclose the information about the charges against Mr Lynn and Miss Gilchrist relating to drug dealing from the house where they were attacked, the prosecution had infringed the appellant's rights under article 6(1) of the Convention. The parties accepted that the requirements of article 6(1) in this regard had been correctly identified by the European Court of Human Rights in *Edwards v United Kingdom* (1993) 15 EHRR 417, 431–432, para 36:

> "The Court considers that it is a requirement of fairness under paragraph 1 of Article 6 (art. 6-1), indeed one which is recognised under English law, that the prosecution authorities disclose to the defence all material evidence for or against the accused. ..."

In *McLeod v HM Advocate* (No 2) 1998 JC 67 a Court of Five Judges applied that guidance when considering the duty of the Crown to make disclosure under Scots law. I put the position shortly, at p 79F-G:

> "Our system of criminal procedure therefore proceeds on the basis that the Crown have a duty at any time to disclose to the defence information in their possession which would tend to exculpate the accused."

I added, at p 80E–F, that the court would order the production of documents if satisfied that their production "would be likely to be of material assistance to the proper preparation or presentation of the accused's defence". Lord Hamilton said, at p 83A–C, that the duty was to disclose information that "is significant to an indicated line of defence" or is likely to be of real importance "to any undermining of the Crown case or to any casting of reasonable doubt on it".

65.Before the Board the Advocate Depute, Mr Brailsford QC, who argued this part of the appeal, accepted these formulations of the

Crown's duty of disclosure. Similarly, Ms Scott accepted that they accurately described the duty of the Crown in terms of article 6(1). The problem, she said, was not the way that the duty had been formulated in *McLeod* but the way in which it had subsequently been interpreted and applied by the Crown and, in her experience, by the judges. If she had not applied to the court for an order for disclosure in this case, it was because, in her experience, it would have been unlikely to be granted.

66.There is no doubt that, historically, in Scotland the Crown have been reluctant to provide the defence with details of the previous convictions of witnesses in advance of trial. In part, at least, this reluctance is probably a hangover from a time when the Crown regarded all the information which they gathered when investigating a case as confidential. This could be – and was - justified on the ground that it prevented unnecessary and undesirable diffusion of discreditable information about individuals. Moreover, in practice this approach was not thought to be liable to prejudice the defence since, at the trial, the prosecutor, acting as a minister of justice, would put forward everything that needed to be revealed in the interests of both the prosecution and the defence. On the other side, the defence were free to precognosce the relevant witnesses and to build up their case in preparation for the trial. But, since at the trial the prosecutor would correct any false impression about a witness's previous convictions, there was no need for the defence to be told about them in advance.

67.In more recent years the practice of the Crown has been somewhat modified so as to permit disclosure of previous convictions where the defence agents can show that they would be relevant to the proposed defence. In 2002, when the question of disclosure arose in this case, the Book of Regulations for the Procurator Fiscal Service described the position in this way:

> "Defence solicitors may be supplied with copies of the criminal records of their clients if they so request in connection with any matter relating to bail. In relation to any request for the criminal record of a witness, the defence should be asked to state the basis upon which the previous convictions are sought in relation to each witness and, in particular, the relevance of any previous convictions to the proposed defence. Thereafter, procurators fiscal should consider, having regard to the relevant authority, whether the previous convictions requested ought to be disclosed. In cases of doubt or difficulty or of particular complexity, the

> request for disclosure should be reported for the instructions of Crown Counsel. The report should include ... copies of any schedules of previous convictions of the witnesses requested and should detail the basis upon which the previous convictions are sought and, in particular, the relevance of the previous convictions to the proposed defence.
>
> If any witness gives false evidence regarding their criminal record, it is the duty of the Crown to ensure that the court is made aware of the true position."

68.It is a tribute to the traditions of fairness among prosecutors in Scotland that the system which I have described has caused surprisingly little difficulty in practice. Presumably, this is part of the reason why, as late as 1988, in *HM Advocate v Ashrif* 1988 SLT 567 the appeal court came down firmly against permitting defence agents to recover the previous convictions of Crown witnesses. In that case the accused had sought to recover the previous convictions not from the prosecution, but from the Scottish Criminal Record Office. Moreover, the decision of the appeal court turned in part on their view of the competency of such a motion in the sheriff court. Nevertheless, the Lord Justice Clerk (Ross) also observed, at p 569:

> "In my opinion, there are very sound reasons why a diligence in these terms should not be granted. If access is to be given to such criminal records of a witness, it could not be confined to solicitors acting for accused persons but would also be available to accused persons who were appearing on their own behalf. This might then result in an accused getting full information of all offences of which the witness had been convicted even though these were not relevant and even though they had occurred many years before. If that were to be the position, the result might well be that members of the public would be slow to come forward to give evidence if they knew that their past record was liable to become public and in particular to be disclosed to an accused person to whom they might be known. This difficulty was recognised by the Thomson Committee who stated their ultimate conclusion in para 27.07 as follows: 'While we have some sympathy with the view that the defence should be able to use previous convictions in the same way as the Crown, bearing in mind the general public interest, we are not persuaded that it is desirable that the previous convictions of witnesses should be disclosed to the

accused person or his solicitor'."

69.More recently, under the influence of article 6(1) of the Convention, the weaknesses of this approach have become apparent. In *Maan Petitioner* 2001 SCCR 172 the accused was charged on indictment with assault. He lodged a special defence of self-defence and gave notice of an intention to attack the character of the complainer and the other two Crown witnesses. He sought to recover the previous convictions of the complainer and these witnesses, as well as those relating to a third witness who had been cited for the defence. The Crown resisted the motion and relied on *HM Advocate v Ashrif*. Adopting the general approach in *McLeod v HM Advocate (No 2)*, Lord Macfadyen declined to follow *Ashrif* and ordered production of the previous convictions of all four witnesses. He said, at p 187, para 27:

> "In my opinion, provided the witnesses' previous convictions are relevant to a legitimate attack on character or to their credibility, the material sought would plainly be relevant to his defence. It is therefore material which the petitioner is prima facie entitled to have disclosed to him. Moreover, in my view he is prima facie entitled to have it disclosed to him in advance of the trial. His right is to have disclosed to him material necessary for the proper preparation as well as the proper presentation of his defence. Possession of information about the witnesses' relevant criminal records would enable the petitioner's counsel or solicitor to make proper preparation for the cross-examination of the witnesses in question. Lack of that information in advance would not wholly preclude the contemplated lines of cross-examination, but would make embarking on them a much more uncertain course. Matters of credibility and character depend very much on the impressions made on the jury, and cross-examination might well be less effective if embarked upon without knowledge of the detail of the witnesses' records. An impression unfairly unfavourable to the petitioner might be made on the jury if cross-examination were embarked upon on his behalf, appeared to be unsuccessful, then was followed by re-examination which showed that the cross-examiner had been ill-informed."

70.As Lord Macfadyen shows, it is in principle wrong that at trial the prosecutor should have official information about witnesses' previous convictions which has been withheld from the defence. The presentation of the defence case is liable to be less effective if

the accused's counsel and agents do not have the information in advance of the trial. Reflecting a shift in the position of the Crown, in presenting his argument before the Board the Advocate Depute did not seek to justify this situation by reference to the supposed practical difficulties identified in *Ashrif* – which, it is fair to say, have not been experienced in other jurisdictions where previous convictions have long been supplied to the defence. Nor did he advance any other reason why the public interest required that this information should be withheld.

71.Although the approach recommended in the Book of Regulations constitutes a significant advance on the traditional stance of the Crown, it still requires procurators fiscal to decide whether the circumstances are such that, in the public interest, the witnesses' previous convictions should be revealed to the accused's representatives. That procedure is open to the kind of criticism expressed by the European Court in *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, 30. Having explained that it is not the role of the European Court to decide whether or not non-disclosure on public interest grounds was strictly necessary, the Court continued, at para 62:

> "Instead the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.
>
> 63. During the applicants' trial at first instance the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds of public interest. Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of article 6(1)."

72.Although it is open to the defence to apply to the Court for an order for production, the scheme envisaged by the Book of Regulations places procurators fiscal and Crown Counsel in the invidious position of having to judge the relevance of previous convictions to a defence, the lines of which the accused's representatives are generally under no obligation to reveal. In reality, however, the scheme is more deeply flawed since it is obvious that a reasonably competent defence agent or counsel,

considering how to approach the examination or cross-examination of a witness, would wish to know whether the witness had any previous convictions and, if so, their nature. Indeed it is precisely the kind of thing he would want to know. What use, if any, the agent or counsel chooses to make of the information is a matter for him and he may well not be able to decide until he actually has it. But, at the very least, the information will help in assessing the strengths and weaknesses of the witness. Therefore, information about the previous convictions of any witnesses to be led at the trial "would be likely to be of material assistance to the proper preparation or presentation of the accused's defence". Under article 6(1) the accused's agents and counsel are accordingly entitled to have that information disclosed so that they can prepare his defence. Since in this way both sides will have access to this information at trial, the accused's right to equality of arms will be respected. The observations to the contrary effect in *HM Advocate v Ashrif* 1988 SLT 567 should not be followed.

73.Of course, in the present case the defence agents did not ask for details of previous convictions of Mr Lynn but, rather, for information about any outstanding criminal charges that he faced. In particular, they wished to know whether he had been indicted or was due to be indicted in the near future. Again, for the same kinds of reasons, this is information which would be likely to be of material assistance to the proper preparation or presentation of the accused's defence. So, in principle, in terms of article 6(1) the Crown should disclose it. As a rule, there could be no good reason not to disclose that the witness had been charged. Similarly, in solemn cases, where the witness has been indicted, the defence agents can be told. Where no decision has yet been taken about indicting the witness, the defence agents should be told that.

74.Details of previous convictions are computerised and procurators fiscal can readily obtain the necessary information. Details of outstanding charges, especially in summary proceedings, may well be much more difficult to discover, if, for example, a different office is dealing with the matter. So, while the duty of those handling the Crown case will be to disclose any outstanding charges of which they know, a general duty to search for outstanding charges would be unduly burdensome. If Crown officials are asked about a particular witness, they need only take such steps to search for any outstanding charges as are appropriate, having regard to any indications given in the defence request.

75.At first sight, the letters from Crown Office in this case might

give the impression that, without further specification, the officials would not have known whether there were any charges against Mr Lynn. That is plainly not the case, however. Mr Lynn had appeared on petition on 12 July 2001 and so his trial would have had to begin within twelve months of that date. He and Miss Gilchrist were indeed indicted to a sitting of the High Court in July 2002 – and High Court indictments are handled under the direction of Crown Office. Therefore, as the Advocate Depute conceded, in February 2002 officials in Crown Office would either have known, or have readily been able to discover, that there were outstanding charges against Mr Lynn (and Miss Gilchrist) relating to drug dealing from the very house where the assault had taken place. The officials simply chose not to disclose that information, apparently on the view that the defence agents had not shown that it was necessary for the proper preparation of the appellant's defence. That was, however, an untenable conclusion since, quite plainly, a reasonably competent agent or counsel preparing the defence would have wished to know that, in another context, the Crown were alleging that, shortly before, both the complainers had been involved in drug dealing from the very house where they were attacked. Such information would help to complete the picture both of the complainers and of their milieu. In that sense, it was highly relevant to the preparation of the defence and should have been disclosed, whether or not the defence agents asked for it and whether or not they sought a court order. Moreover, the information was not any the less relevant because in the end counsel might choose not to refer it at trial. The agents and counsel were entitled to have the information on which to reach their own independent judgment on how best to proceed. In these circumstances I am satisfied that, by failing to provide the defence with information about the outstanding charges against Mr Lynn and Miss Gilchrist, the Crown infringed the appellant's article 6(1) Convention right.

Failure to disclose remark after the Identification Parade

76.Both before the appeal court and again before the Board, the Crown accepted that they had infringed the appellant's article 6(1) Convention right by failing to tell the defence about the remark which the police officer had made to Miss Gilchrist after the identification parade.

Did the appellant have a fair trial in terms of article 6(1)?

77.It is now necessary to consider whether, taken as a whole, the appellant's trial was fair in terms of article 6(1).

78.The fact that he was represented by counsel and a solicitor - who could investigate the case on his behalf, who could, and did, object to the admission of evidence, who examined and cross-examined the witnesses and who made submissions to the jury - is a positive feature, pointing towards the trial being fair.

79.On the other hand, the appellant's rights under article 6(1) were breached by the Crown's failure to disclose the outstanding charges against Mr Lynn and Miss Gilchrist as well as by their failure to tell the defence what the police officer had said to Miss Gilchrist after the identification parade. In the appeal court both the Lord Justice Clerk and Lord Hamilton considered that, on any view, these failures had not resulted in any substantial prejudice to the appellant: 2004 SLT 762, 767, paras 41–44 and 768–769, paras 54–59 respectively.

80.So far as the failure to disclose the outstanding charges is concerned, at the trial the advocate depute called Mr Lynn's sister, Anne Lynn, as a witness. She gave evidence that Mr Lynn and Miss Gilchrist were drug dealers and were involved in prostitution. The advocate depute did not suggest to Miss Lynn that her evidence on this point was untruthful and Ms Scott did not take the matter any further. The Lord Justice Clerk considered that Miss Lynn's evidence put the defence in the best possible position since the information came from a source within the family and had emerged without defence counsel having to run the risk that, by questioning the complainers about their involvement in drugs, she would have exposed the appellant to questioning about his own (significant) previous convictions.

81.Ms Scott made the point, however, that, if she had known about the outstanding charges and had been able to put them to the complainers, this would have reinforced Miss Lynn's evidence and so would have helped, for instance, to undermine the credibility of Miss Gilchrist who had claimed not to know what was meant by "gear". She accepted that cross-examination on the outstanding charges would have come within the terms of section 266(4)(b) of the Criminal Procedure (Scotland) Act 1995, but submitted that in the circumstances she might well have been able to persuade the judge to exercise his "wide discretion" to refuse any application by the advocate depute to cross-examine the appellant on his previous convictions: *Leggate v HM Advocate* 1988 JC 127, 145.

82.Clearly, if the appellant's convictions had been revealed to the jury, this might well have been a "disastrous consequence", to

adopt the Lord Justice Clerk's description. But, given what Miss Lynn said in evidence and Miss Gilchrist's claim that she did not know what was meant by "gear", I am unable to say that cross-examination of the complainers about the outstanding drugs charges would inevitably have led to the Crown being permitted to cross-examine the appellant on his previous convictions. Information about the outstanding charges might therefore have played a useful part in the defence effort to undermine the credibility of the Crown's principal witness on charge 2. At least, that possibility cannot be excluded. One cannot tell, for sure, what the effect of such cross-examination would have been. But, applying the test suggested by Lord Justice General Clyde in *Hogg v Clark* 1959 JC 7, 10, I cannot say that the fact that counsel was unable to cross-examine in this way might not possibly have affected the jury's (majority) verdict on charge 2 – and hence their verdict on charge 3.

83.Similarly, it is hard to make any precise assessment of the significance of the Crown's failure to disclose the remark made to Miss Gilchrist after the identification parade. One can be sure, however, that, if the defence had been aware of it, Ms Scott would have deployed it in her cross-examination of Miss Gilchrist. It would have been one more reason for suggesting to her – and ultimately to the jury – that her dock identification of the appellant was not to be trusted. By withholding the information, the Crown deprived the defence of the opportunity to advance this additional argument on the crucial issue of identification. Again, I cannot say that this might not possibly have affected the jury's verdict.

84.The two Crown failures to disclose information are therefore properly to be seen not as separate and isolated infringements of article 6(1), but as infringements that each had a bearing on Miss Gilchrist's dock identification of the appellant, which was one of the central elements of the prosecution case at the trial. For the reasons which I have already given, the dock identifications by Miss Gilchrist and Mr Simpson, who had failed to pick out the appellant at the identification parade, carried with them significant risks of mistake, over and above the risks of mistake which go with any eye-witness identification evidence. Unfortunately, the trial judge gave the jury no proper warning about those additional risks.

85.At the trial the Crown also relied, by way of corroboration, on Jamie Gilchrist's evidence and on the appellant's possession of an air pistol which resembled the one used in the assaults and robberies. None the less, as the trial judge told the jury, the critical

issue in relation to charges 2 and 3 was the quality of the identification evidence. Taking all the relevant factors together, I have reached the conclusion that in this case the failures of the Lord Advocate's representatives to disclose information to the defence and the advocate depute's reliance on the dock identifications of Miss Gilchrist and Mr Simpson were incompatible with the appellant's core article 6 Convention right since, taken together, they resulted in an unfair trial. Since a conviction resulting from an unfair trial cannot stand, the appellant's conviction of charges 2 and 3 must be quashed.

86.I would accordingly propose that, in the exercise of the Board's powers under article 4(1)(a) of the Judicial Committee (Powers in Devolution Cases) Order 1999, the appeal should be allowed, the verdict of the jury set aside and the appellant's conviction of charges 2 and 3 on the indictment quashed. Thereafter the case should be remitted to the appeal court to decide whether to grant the Crown authority to bring a new prosecution in terms of section 119 of the Criminal Procedure (Scotland) Act 1995.

Baroness Hale of Richmond

87.I am in complete agreement with the opinion of my noble and learned friend Lord Rodger of Earlsferry and for the reasons that he gives would make the orders which he proposes.

Lord Carswell

88. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Rodger of Earlsferry. For the reasons which he has given I too would allow the appeal and make the order which he proposes.