IN APPEAL BY
LUKE MUIR MITCHELL
against
HER MAJESTY'S ADVOCATE
SUMMARY

16th May 2008

Today at the Criminal Appeal Court in Edinburgh the appeal by Luke Muir Mitchell against his conviction for the murder of Jodi Jones was refused. The Lord Justice General, Lord Hamilton, sitting with Lord Osborne and Lord Kingarth delivered the following summary of their decision in Court.

"On 30 June 2003 Jodi Jones, then aged 14, was murdered in woodland near Dalkeith. After trial in the High Court at Edinburgh the appellant, Luke Muir Mitchell, was convicted of that murder. At the time of his trial the appellant was 16 years of age; at the time of the murder he was just under 15.

The appellant sought leave to appeal against conviction on various grounds. He was granted leave on six of them; in the course of the hearing of his appeal he was allowed to introduce a further ground. The Opinion of the Court upon his appeal - to which each of its members has contributed substantially - is now available. It is of substantial length. It should be referred to for its terms. The summary which follows is not intended to describe the whole reasons which have led to the court's conclusions.

Under ground of appeal 1 a challenge was mounted to the decision made by the trial judge in advance of the trial to reject an application made on behalf of the appellant that his trial be heard in a court outwith the Edinburgh area. A number of circumstances (mainly media attention) were relied on in support of the proposition that, while the appellant could, notwithstanding that attention, obtain a fair trial, such a trial could not be obtained in a place so near as Edinburgh to the scene of the critical events. It was acknowledged, however, that a decision as to whether or not to order that the trial be heard elsewhere was one primarily for the discretion of the trial judge in the particular circumstances of the case and that no miscarriage of justice could in that respect be said to have occurred unless this court was satisfied that the decision made was one which no judge acting reasonably could have reached. For the reasons given in detail in the Opinion of the Court (which include the steps taken by the judge in the course of the trial to avoid the jury being prejudiced against the appellant as a result of

media attention) we are not satisfied that there was any miscarriage of justice in that regard. This ground of appeal is accordingly rejected.

The appellant next contended that there was led by the Crown before the trial court insufficient evidence in law upon which he could be convicted. Associated with that ground was the additional ground, namely that, having regard to the totality of the evidence, the verdict returned by the jury was a verdict which no reasonable jury properly directed could have returned.

The case against the appellant was wholly circumstantial. The principles to be applied in such a case are clear: individual items of evidence need not be incriminatory in themselves; they should be looked at not in isolation, but in the context of the whole evidence; if capable of more than one interpretation, it is for the jury to decide what interpretation to adopt; a jury is entitled to reject evidence inconsistent with guilt precisely because it is inconsistent with incriminatory evidence which it accepts; guilt can be established on the basis of circumstantial evidence coming from at least two independent sources; and for there to be a case to answer the whole circumstances taken together must be capable of supporting an inference of guilt. For the purpose of testing sufficiency, the evidence relied on by the Crown must be taken at its highest, that is, it is to be treated for this purpose as credible and reliable and is to be interpreted in the way most favourable to the Crown.

Applying these principles the court is satisfied that there was sufficient evidence in law upon which a verdict of guilty could be returned. An important element in the Crown case was the evidence of Mrs Andrina Bryson who testified to seeing a male and a female at the Easthouses end of the Roan's Dyke Path at about 1650-55 on 30 June 2003. Two other female witnesses identified the appellant as the young man they had seen at the Newbattle end of the Path about 50 minutes later. Taken at its highest Mrs Bryson's evidence amounted to an identification of the appellant as that male and of Jodi Jones as possibly that female. Taken along with other evidence (as we refer to later) it would have been open to the jury to conclude that it was indeed her. If that evidence was accepted, it not only destroyed the appellant's alibi (that he was in his home during that period) but also put him in the company of Jodi Jones at a point of time which on other evidence may well have been shortly before she met her death. Further, it rendered the place of her death on the general route which the appellant would have had to take to proceed from one locality where he was sighted to the other. The absence of any signs of struggle on the path side of the wall which ran along the northern side of the Roan's Dyke Path suggests that, if Jodi Jones went through the break in the wall close to where she met her death with someone, she did so with someone she knew - such as the appellant, whom she had gone expressly to meet that evening. The manner of her death was also significant, as was the unexplained disappearance of a

knife which the appellant was in the habit of carrying and of the jacket which he may have been wearing on that day. The appellant's conduct later that evening was also significant - not least in the apparent ease with which he was able to identify the location of the body in relatively dense woodland on the far side of the wall. Before us the Crown also relied on a number of other circumstances which were also capable of playing a part in building up the case against the appellant. It is unnecessary to list these in this summary. When, however, they are taken into account with the circumstances to which we have referred, there was sufficient evidence in law, in our opinion, to allow the jury, if they accepted it, to draw the inference of guilt.

As we have said, the appellant also contended that, even if the evidence against him was sufficient in law, the verdict to which the jury came was one which no reasonable jury, properly directed, could have returned. Discussion of this ground of appeal involves an evaluation of the quality of some of the evidence led. Of particular importance in this exercise is evaluation of the identification evidence given by Mrs Bryson. The quality of that evidence was criticised as to its reliability by counsel for the appellant. In particular, the method by which she came to make her identification - by picking out a photograph of the appellant from a range of photographs of young males - was attacked both as a matter of principle and as to the particular photographs used. The fact that the police had, by failing to hold an identification parade, not followed the relevant guidelines was founded on as a significant irregularity. Having considered Mr Bryson's identification evidence in detail, we have come to the view that, while its reliability was open to challenge, there were elements in it which could reasonably provide the basis for a valid identification of the appellant as the male she had seen and at least a possible identification of Jodi Jones as the female. Moreover, Mrs Bryson's evidence on this matter did not stand alone. It fitted with evidence that Jodi had left home to meet the appellant with a view to their spending time together in the Easthouses area. The place where Mrs Bryson saw the male and the female was a regular rendezvous point for the appellant and Jodi and one where they were likely to meet that evening if it was their intention to spend time together as Jodi anticipated. The timing of Mrs Bryson's sightings also fitted with it being Jodi and the appellant whom she saw. If the jury accepted these identifications - as, having regard to the whole evidence bearing on them, they might reasonably do - there was ample evidence otherwise to allow them reasonably to conclude that Jodi's killer was the appellant. We refer, in particular, to the evidential material discussed in the context of the argument on sufficiency of evidence. The jury were moreover given by the trial judge clear and comprehensive directions about how they should approach evidence of visual identification - with particular directions being given in relation to Mrs Bryson's evidence. In all these circumstances the ground of appeal based on the alleged unreasonableness of the verdict must be rejected.

The appellant also challenged the identification evidence (of Mrs Bryson and of others) as "unfair". But that evidence having been properly admitted (as to which there was no challenge in the appeal), any question of unfairness can go only to the reliability or weight of the evidence in question. That was a matter for the jury. If, as we have already held, the verdict was one to which the jury, properly directed, could have come, this ground of appeal must also be rejected.

A ground of appeal was also advanced challenging the decision of the trial judge to allow evidence to be led about certain bottles of urine. But it was acknowledged that this ground could not on its own justify the conclusion that there had been a miscarriage of justice. Moreover, the trial judge gave clear directions to the jury that they should not judge the appellant on the basis of his personal conduct or habits or lifestyle, except to the extent that these might be relevant to the issues of fact which they had to decide. We have come to the view that, in the particular circumstances before him, the trial judge did not err in allowing the evidence in question to be led and that there is no merit in this ground of appeal.

The appellant was on 14 August 2003 interviewed under caution by police officers. In the course of the trial the Crown sought to lead before the jury evidence of some but only a few of the questions and answers put and given in the course of that interview. Objection was taken on behalf of the appellant to that course of action but the objection was repelled by the trial judge. The challenge was renewed on appeal, it being maintained that the interview was conducted in circumstances which were wholly and manifestly unfair to the appellant. Having considered the transcript of the interview, we are driven to the conclusion that some of the questions put by the interviewing police officer can only be described as outrageous. At times the nature of the questioning was such that the questioner did not seem to be seriously interested in a response from the appellant but rather endeavouring to break him down into giving some hoped-for confession by his overbearing and hostile interrogation. Such conduct, particularly where the interviewee was a 15 year old youth, can only be deplored. However, the issue for determination in this appeal is whether the answers to the particular questions, which alone the Crown sought to introduce in evidence, were elicited in such circumstances that the trial judge was bound to hold that they were inadmissible. Having considered the response of the appellant throughout and in detail each of the passages in dispute, we are satisfied that the trial judge was entitled to take the course which he did. Moreover, having regard to the context of the questions and responses, many of which related to matters already otherwise properly in evidence, we are not persuaded that on this ground a miscarriage of justice can be said to have resulted.

The appellant also contended that certain evidence given by DC Michelle Lindsay should not have been admitted. This constable had been appointed at an early stage in the police inquiry as a family liaison officer to the appellant's family. While at the appellant's home on 2 July 2003 she had a conversation with him which resulted in him giving her certain information, including providing a sketch plan. The trial judge, in the face of an objection on behalf of the appellant and having heard evidence as to the circumstances surrounding the conversation in question, allowed DC Lindsay's evidence to proceed. Before us it was not contended that the trial judge was not entitled to take in the circumstances the course which he did. Nor was it suggested that any unfairness in this matter - looked at alone - could have been such that a miscarriage of justice had resulted. Even if the term "family liaison officer" was, having regard to the role of the officer in relation to the appellant's family, potentially misleading, there was no evidence that the appellant was in any way in fact misled by the officer's enquiries of him or in the drawing of the sketch. Nor could the information provided be regarded, given the other evidence led at the trial, as being of particular significance by itself. This ground of appeal must accordingly be rejected.

By his final numbered ground of appeal the appellant sought to challenge decisions by the trial judge to permit the Advocate depute, in the face of objection on behalf of the appellant, (a) to examine the appellant's mother Corinne Mitchell, and (b) thereafter to lead certain evidence - all in relation to events on 7 October 2003 when the appellant, accompanied by his mother, obtained a tattoo at certain premises in Edinburgh. Mrs Mitchell was led as a Crown witness. She was known to be likely to give evidence in support of the appellant's defence of alibi; and in the event did so. It was in the Crown's interest to discredit her testimony to that effect. Prior to adducing her, the Crown had not disclosed to the defence information about events at the tattoo parlour which had come to its notice in the course of the trial. Whether or not in the circumstances the Crown had an obligation to disclose the information earlier than it did (as to which we express no concluded opinion), we are not persuaded that the absence of earlier notice led to any substantial prejudice to the appellant; it could thus not be said to have led to a miscarriage of justice. The second ground of objection related to the implications which evidence in relation to the events at the tattoo parlour might have for the character of the appellant as presented to the jury. While we are unable to agree with the trial judge that no inference of bad character could possibly be drawn from that evidence, we do not, for reasons which we explain, consider that it can be said that any miscarriage of justice resulted from the leading of the evidence in question. This ground of appeal must accordingly also be rejected.

Counsel submitted finally that, even if no particular ground of appeal on its own warranted quashing of the conviction, the matters complained of when taken together were such as should lead to that result.

Anyone looking at the evidence in totality, he said, would "be left with a sense of unease". We have already addressed and rejected the ground of appeal based on the proposition that no reasonable jury, having regard to the totality of the evidence, could have returned a guilty verdict. As to other matters of complaint, while there may be cases where the combined effect of a series of unsatisfactory features in a trial may result in a miscarriage of justice, we are not persuaded that this is such a case.

In the foregoing circumstances the appellant's appeal against conviction, in so far as based on the existing grounds of appeal, must be refused. In the course of the hearing of the appeal Mr Findlay moved the court to allow to be argued a proposed additional ground of appeal (1A of the appeal process). The Crown having opposed such allowance, the court on 22 February 2008 continued consideration of the appellant's motion to a date to be afterwards fixed, under directions that any further proposed evidence in support of that ground be lodged within four weeks from that date. If the appellant is to insist on his motion, a date will now require to be fixed for its consideration. The appellant also has an appeal against sentence yet to be considered."

NOTE

***This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document*.**

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Justice General

Lord Osborne

Lord Kingarth

[2008] HCJAC28

Appeal No: XC90/05

OPINION OF THE COURT

delivered by THE LORD JUSTICE GENERAL

APPEAL AGAINST CONVICTION and SENTENCE

LUKE MUIR MITCHELL
Appellant;

against

HER MAJESTY'S ADVOCATE
Respondent:

Act: Findlay, Q.C., Farquharson, Young; Beaumont & Co., Edinburgh

Alt: Beckett, Q.C., Balfour; Crown Agent

16 May 2008

[1] This is the Opinion of the Court to which all its members have contributed substantially.

Introduction

[2] On 21 January 2005, after a trial in the High Court at Edinburgh, the appellant was convicted of the murder of Jodi Jones on 30 June 2003, near Dalkeith in Midlothian. The deceased was 14 years of age. The appellant was just under 15 years of age at the time of the murder, and 16 at the time of his conviction. The appellant was on 11 February 2005 sentenced to detention without limit of time, a punishment part of 20 years being imposed. He has appealed against both conviction and sentence.

[3] At the outset of this appeal, parties indicated their agreement that the report by the trial judge, which provided detailed information about the background circumstances and the evidence led at the trial, was of particular assistance in our consideration of the case. The following summary of the procedural history and evidence is taken mainly from that report. Where the appellant disputes matters of fact alleged to support the Crown case, this has been highlighted in the summary of the submissions made on his behalf before us.

Procedural history

[4] At a preliminary diet on 6 October 2004, counsel for the appellant, Mr Findlay, Q.C., made a motion that the location of the trial be moved outwith the local area of the murder, which it was said included Edinburgh. This was due to the high level of publicity given to the circumstances of the murder, and to the interest which the police had shown in the appellant during their investigations. That motion was refused. On 1 November 2004, a motion for the separation of charges was also refused. The appellant faced charges involving the possession of knives and the supply of controlled drugs as well as the murder charge.

[5] The appellant's trial first called on 11 November 2004, when the unempanelled jurors were directed that it would be inappropriate for them to serve should they know any party to the case, or have any personal connection with its circumstances. Thereafter, a jury was empanelled and evidence was led. On 16 November 2004 it was discovered that the then girlfriend of the appellant had a connection with a juror: she used to be the girlfriend of that juror's son, who himself had attended the same school as the appellant and the deceased. The trial was deserted *pro loco et tempore*. On 18 November 2004 new jurors were again admonished by the trial judge prior to being empanelled. The trial thereafter took place over a period of 42 days, being the longest in Scottish legal history against a single accused charged with murder.

Background

Relationship between the deceased and the appellant

[6] The appellant and the deceased both attended St David's High School in Dalkeith. They began a relationship in around March 2003. From an early stage that relationship involved sexual intercourse. By June 2003 they were seeing each other most week nights, and at the weekend.

[7] The deceased lived in the Easthouses area of Dalkeith with her mother, Judith Jones, her sister, Janine Jones, and her mother's partner, Alan Ovens. There was some evidence that she took cannabis, but her family generally regarded her as sensible and reliable. She had an interest in music, particularly the rock band Nirvana. She liked to wear dark baggy clothing. The evidence suggested that the

appellant was the deceased's first real boyfriend. The appellant lived with his mother, Corinne Mitchell, and his brother, Shane Mitchell, in the Newbattle area, to the west of Easthouses. He had a similar taste in music and clothing. He regularly used cannabis. There was evidence that the appellant was also sexually involved with another 15 year old girl, Kimberley Thomson.

Locus

[8] Easthouses and Newbattle are linked by the Roan's Dyke Path, which provides a shortcut between these settlements. The deceased lived around 250 metres from the east end of the path, and the appellant about 600 metres from the west end. The path was about 900 metres long. Evidence suggested that it would take a fit person about 15 minutes to walk from the appellant's house to the east end of the path. The appellant would sometimes collect the deceased at her house. On other occasions they would meet at the east end of the path. The deceased had been told by her mother that she was not allowed to walk along the path on her own.

[9] For much of its length the path is bordered on its north side by a high stone wall, which has fallen into disrepair. The wall and the path run westward from a junction with other paths. To the north of the wall is an area of wooded ground bounded on its north by a park and a golf course. A number of gaps in the wall provide access to the wooded area. Of some importance as regards this appeal are two such gaps. The first is found next to some graffiti ("the Gino point") as one makes one's way along the path westwards from Easthouses. The second gap forms a "V" shape in the wall ("the V point") and is found further along the path, about two-thirds of the distance from its east end. There is an overhang of trees and a number of bushes at this point, which form a kind of canopy overhanging the path.

Events prior to the murder

[10] The deceased's freedom to go out of an evening was restricted by her mother in the weeks prior to her death, but she was released from that restriction on the afternoon of the murder. She arrived home at around 1605 hours. At 1635 she used her mother's mobile phone to send a text message to the appellant. The appellant responded at 1636. A further text was sent by the deceased to him at 1638. The terms of these text messages were not preserved. The deceased left her house at about 1650, informing her mother that she was going to meet the appellant and would be "mucking about up here". At 1654 a call was made from the appellant's mobile telephone to the speaking clock. Between about 1705 and 1720 Leonard Kelly was cycling along the path from the west to the east end, and heard a noise, which he described as "a strangling sort of sound, a human thing", coming from the far

side of the wall. John Ferris and Gordon Dickie rode a moped along the path at about the same time. They did not hear anything of the sort described by Kelly. They did not see him, nor he them.

The discovery of the deceased's body

[11] The appellant telephoned the deceased's house at 1732, but received no reply. At 1740 he called again, and spoke to Alan Ovens, asking if the deceased was in. He was informed that she had left to meet him. He replied, "OK, cool". Ovens informed Judith Jones about this call. The deceased was due to return home by 2200, but did not. At 2241 Judith Jones sent a text to the appellant's mobile phone, indicating that the deceased was again grounded. The appellant then telephoned Mrs Jones, informing her that he had not seen the deceased. At 2300 a search party, consisting of the deceased's grandmother, Alice Walker, Janine Jones and her boyfriend, Steven Kelly, left the deceased's house and began walking along the path from the Easthouses end heading west. The appellant, accompanied by his dog, walked from the west end of the path heading in the opposite direction. He met the rest of the search party near the east end of the path. Thereafter all the members of the party headed west along the path.

[12] In circumstances more fully described below the deceased's body was found in the wooded area behind the wall bordering the path, about 13.6 metres west of the "V" point. Access was gained to the wooded area via the "V" point. There were foliage, overhanging branches and a tree stump, which obscured the view westwards on the north side of the wall at that point. To obtain a view westwards along the inside of the wall it was necessary to walk some distance northwards beyond this tree stump. Once beyond the stump, the presence of other vegetation, including a large tree, again restricted the view westward along that side of the wall. Only from about that point could one see the feet of the deceased, which were lying closer to the wall than her head.

[13] The deceased's body was found naked apart from some socks on the front part of her feet. Other items of clothing were strewn around the area. Her trousers had been used to tie her hands behind her back. There was no evidence of recent sexual abuse. There was no sign of a struggle except in the area around the body. She had a number of injuries, including cuts to the throat, the right cheek, the left breast, numerous cuts to the stomach and cuts round both eyes. Some of these injuries appeared to have been inflicted post-mortem. Defensive injuries suggested that the deceased had struggled with her assailant. The cut to the neck had severed the deceased's windpipe and jugular vein, as well as the carotid artery on the left side. This would have caused death within a couple of minutes. According to the pathologist, Professor Anthony Busuttil, the implement which caused the injuries to the throat was a stout, sharp-pointed, bladed weapon. Professor Busuttil gave evidence that a reddish hair

bobble, or "scrunch", was situated at the back of the deceased's head, but was not easily visible among her hair which was largely uncontained by it.

Outline of the Crown case at trial

[14] In his address to the jury the Advocate depute relied on a number of circumstantial adminicles and highlighted three "key" chapters of evidence.

[15] The first key concerned the discovery of the deceased's body. Of the search party it was the appellant who first went through the "V" point. The Crown asked the jury to accept the evidence of the other members of the search party to the effect that he had gone straight to the "V" as the party moved down the path, that he did not progress beyond this point before returning to it and that he knew to look left and to explore further in that direction as soon as he climbed through the gap. The inference was that he already knew where the body was located. This explanation was to be contrasted with the appellant's account at police interview when he had stated that, having gone some distance past the "V", he had been alerted by the dog to something behind the wall at that point, had retraced his steps and then climbed through the gap.

[16] The second key was the evidence of the witness Andrina Bryson. She had seen a male and a female standing near the Easthouses end of the path at around 1650 or 1655. The female was standing close to the beginning of the path on the pavement looking towards the male, who was on the path. The witness identified the appellant from a book of photographs as being the male whom she had seen. She noted him as wearing a khaki green, hip-length, fishing-style jacket. Its collar was up, and it had a pocket which was bulging. She was unable to identify the female, but gave a description of someone with black, shoulder length hair, which seemed to be contained like a ponytail, wearing a navy blue jumper with a hood and a pair of lighter trousers, which she took to be a pair of jeans. The Crown submitted that, if she had left the house and proceeded directly to the path, the deceased would have been near the Easthouses end of the path at the time of this sighting, and asked the jury to accept that this was a sighting of the appellant and the deceased together.

[17] Thereafter the Crown relied on a variety of other circumstantial adminicles to implicate the appellant.

[18] Lorraine Fleming and Rosemary Walsh identified the appellant as someone whom they had seen at around 1740 to 1745 on the evening of the murder at a gate between the west end of the path and the appellant's house, Miss Fleming suggesting that it appeared that he had been "up to no good".

[19] There was evidence that the appellant had owned and worn a parka-style jacket in the months prior to the murder, that he was wearing such a jacket early in the evening of the deceased's murder and that no such jacket was found when the appellant's home was searched on 4 July 2003. The Crown sought to link this with evidence that a log burner in the back garden of the appellant's home was used on 30 June at around 1830 - 1930 and later, at around 2200, and with evidence of an unusual smell emanating from it.

[20] The appellant had an interest in knives, having been seen, in particular, with a 4 inch lock-knife, contained in a pouch (a "skunting" knife), in the months prior to the murder (a sample knife was lodged as a production). That knife and pouch were not found during the police search of the appellant's house on 4 July 2003. The appellant was seen returning home from the area of Newbattle Road at around 2200 on the night of the murder. The suggestion was made that he could have disposed of the knife at that time. Another knife and pouch were purchased for him in December 2003 by his mother, Corinne Mitchell. During a search of the appellant's home on 14 April 2004, the pouch from the knife, but not the knife itself, was recovered. A number of inscriptions had been made on the pouch: the numbers "666"; an inscription which read "JJ 1989 - 2003", these being the years of the deceased's birth and death; and the words "The finest day I ever had was when tomorrow never came", a quote from the lead singer of Nirvana.

[21] Two days after the murder the appellant purchased, and subsequently viewed, a Marilyn Manson DVD, "The Golden Age of the Grotesque", which included images of apparently naked women tied together and subjected to a form of abduction. Manson had an exhibition of the same name publicised on his website, which included images depicting the death of the actress Elizabeth Short, also known as "The Black Dahlia", who was mutilated and murdered in Los Angeles in 1947. Professor Busuttil gave evidence that, while the circumstances of death were not identical, there was some similarity between the location and type of injury inflicted upon the deceased, and those inflicted upon the actress Elizabeth Short. There was no evidence that the appellant had accessed this website.

[22] Evidence was also led about generally unusual behaviour by the appellant. There was some evidence that he had an interest in Satanism, which was expressed in essays which he wrote and in graffiti which appeared on his school books.

[23] Another circumstance relied on by the Crown was a comment made by the appellant to the witness David High on the evening of 30 June to the effect that the deceased would not be coming out on that evening. This comment was made after the appellant had spoken to Alan Ovens and been informed

that the deceased had left to meet him. The Crown invited the inference that the appellant knew the deceased was already dead.

[24] The Crown led evidence to undermine the credibility of Corinne Mitchell. In particular, evidence was led that she was present when the appellant obtained a tattoo in October 2003, and that she had confirmed his age as being over 18. This tattoo depicted a skull with flames coming from it. Mrs Mitchell had stated to members of staff - "that's really him". The Crown's position was that this evidence demonstrated an unhealthy relationship between the appellant and his mother, to the point where she was indulging inappropriate behaviour on his part, and undermined her evidence in support of his alibi. The witness denied several of these allegations. Evidence from members from staff at the tattoo parlour, as well as expert fingerprint evidence of a consent form signed in the name of an acquaintance of Mrs Mitchell with the appellant's fingerprints upon it, was led. This evidence was subject to a defence objection. It was admitted but the jury was directed that it was only relevant to Mrs Mitchell's credibility.

[25] The Crown also referred to the appellant's police statements at interview. In particular, in his closing submissions, the Advocate depute referred, at length, to excerpts from an interview on 14 August 2003. It was suggested that the appellant came across as calculating, clever and dishonest. Reference was made to contradictory statements concerning the failure to raise the alarm when the deceased failed to meet the appellant; to lies regarding his use of cannabis and the amount of contact he had had with Kimberley Thomson; and to outbursts which demonstrated the appellant's temper and arrogance. It was also suggested that the appellant's claim that no time had been fixed for meeting with the deceased and his description of his movements on the evening of the murder were incredible and that his assertion that he thought that the deceased had not turned up perhaps because she had been grounded did not make sense, given his prior conversation with Alan Ovens.

[26] The third key on which the Crown relied was the evidence of Shane Mitchell, the appellant's brother. While not unequivocal, his evidence suggested that the appellant was not at home at the times asserted in the alibi and contradicted the appellant's position in police interviews.

Defence case

[27] The appellant did not give evidence. His position was outlined in a number of statements which he gave to police officers, both as a witness and subsequently under caution as a suspect in the case. His position throughout these statements was that he had been at home during the period in which the Crown case suggested the deceased was murdered. He saw the deceased at lunchtime on the day of

the murder. She had taken the school bus home after school and he had walked. He had not seen her alive after that point. He had returned home at around 1600 or 1605 and the deceased had texted him at 1620, asking if he was coming out. He had replied that he would do so later on, as he had to make dinner. Arrangements were made for the deceased to come down to the Newbattle area but no time was arranged for the meeting.

[28] The last text was sent at about 1640. The appellant's position was that, thereafter, he had listened to music while cooking dinner. His mother arrived home at 1715. The witness Shane Mitchell was not in the house at this time. He waited at the house for the deceased. He left at around 1730 or 1740, as she had not arrived. He waited at the entrance to the estate on Newbattle Road, moving between that point and a track at Barndale Cottages, closer to the west end of the path. He had walked further along the road at one point to see if he could see the deceased. As he was standing at Barndale Cottages he had seen boys whom he knew from school. He had waited for around 45 minutes. Thereafter, he had wandered into Newbattle Abbey walking up and down a path, wasting time. He then contacted David High and made arrangements to meet him.

[29] The appellant thought that something must have happened which meant that the deceased was not coming out, such as that she had forgotten, changed her mind, been grounded, or met somebody. He had spoken to the witness Ovens around 25 minutes after he had been waiting outside, and was told that the deceased had left. David High had appeared around 25 minutes after the appellant had phoned him. After spending some time at the Abbey, the appellant went home, arriving between 2105 to 2110. He watched a video until he received the text from the deceased's mother at 2241.

[30] As regards the discovery of the deceased's body, the appellant's position was that he had walked some yards ("not even 20 yards" and other estimates being given) past the "V" point with his dog, which had been trained as a tracker dog. It had gone straight to the wall at that point and started clawing up at it. He had then doubled back to the "V" point, handed the dog to Mrs Walker and climbed through. He had looked to his left, walked around six paces in that direction and had seen the deceased's legs close to a tree, and, as he took another step, her body. The dog had started to climb up on the wall at a point "parallel" to the point where the deceased's body was found. Some information in this regard was given to a police liaison officer appointed to the appellant's family, Detective Constable Michelle Lindsay, to whom the appellant provided a sketch plan, indicating where the deceased might have gone and where her body was found.

[31] The appellant lodged special defences of alibi and incrimination. The alibi defence was to the effect that he was not on the Roan's Dyke Path between the hours of 1700 and 1745, being at his home and at other points around the Newbattle Abbey Road area. The special defence of incrimination, unusually, did not name any suspect for the murder, simply stating that the deceased was murdered by "person or persons whose identity is or identities are to the panel unknown". However, the fact that the witnesses Ferris and Dickie had had the opportunity to commit the murder influenced the defence approach to cross-examination, and was hinted at in Mr Findlay's introductory remarks before us.

Grounds of appeal

[32] Mr Findlay made submissions on each of the seven grounds on which leave to appeal had been granted. In the course of the hearing he sought and was granted leave to present an additional ground of appeal (ground 3A) to the effect that, having regard to the totality of the evidence, the verdict returned by the jury was a verdict which no reasonable jury properly directed could have returned, reference being made to sec. 106(3)(b) of the Criminal Procedure (Scotland) Act 1995. He submitted that a number of these grounds, of themselves, suggested that a miscarriage of justice had taken place. However, many were interrelated and, when taken in the round, suggested that the appellant had been denied a fair trial at common law. That submission is considered separately, after the following analysis of the individual grounds of appeal.

Ground of appeal 1

[33] Ground of appeal 1 is stated in the following terms:

" That the Learned Trial Judge erred in refusing an application to have the Appellant's trial heard in a jurisdiction outwith the Edinburgh area. In all the circumstances given the nature of the crime under consideration, the local interest which it in turn generated and the significant, substantial and largely speculative press coverage that it attracted on a regular basis until the trial proceedings themselves, the accused could not and did not receive a fair trial.

Whilst leave to appeal the Learned Trial Judge's decision (of 6 October 2004) was granted it was not in the Appellant's interests to pursue the matter and risk further delays to his trial diet, given his age, inexperience of the criminal justice system and the fact that he had been in custody since April 2004 for a trial originally indicted in July 2004. There being significant concerns about the appellant's mental and physical wellbeing, further delays in bringing this matter to trial were not deemed to be in his best interests.

It is accepted that the press coverage of this matter extended nationally. The media interest was not limited to reporting factual matters but amounted to large scale speculation about the Appellant himself which was sustained until this matter proceeded to trial. The Learned Trial Judge failed to take into proper consideration the effect of that coverage in the context of the intense local interest that this murder generated. This crime was committed within a small community the majority of whose working adult population are required to commute into Edinburgh. It will be submitted that outside the local area the chances of any individual taking anything more than a passing interest in the press coverage were reduced and the risk of prejudice to the Appellant could have been eliminated by transferring proceedings outside of Edinburgh. It will further be submitted that the risk of prejudice could not and was not be (*sic*) met by directions to the jury. This was evidenced in the course of proceedings with the need to discharge a juror in the first trial who failed to disclose a connection to the Appellant notwithstanding clear and robust directions from the Learned Trial Judge prior to being empanelled. The overriding concern of the Court must be to ensure a fair trial. It will be submitted that in refusing to transfer this trial outside of the local area the Learned Trial Judge failed to manage the risk of prejudice to the Appellant and he did not therefore receive a fair trial."

Submissions for the appellant

[34] By way of introduction to his submissions, Mr Findlay said that, following his instruction in the case, he had had a meeting with the Advocate depute concerning several matters, but, in particular, the location of the trial. Counsel had had concerns regarding the fairness of any trial that might be held in the Edinburgh area because of the horrific nature of the crime and the publicity which it had attracted. His view had been that any trial ought to be held outwith the Edinburgh area. However, the Crown had thought otherwise and indicted the appellant for trial in Edinburgh. A motion had been brought before the court to the effect that the court should order that the trial be held outwith the Edinburgh area, which motion was resisted by the Crown. The trial judge, who heard this motion, repelled it.

[35] The submission to be made was that the court's failure to accede to the defence motion relating to the location of the trial was unfair in the circumstances of the case. As a consequence, there was no fair trial. A miscarriage of justice had occurred upon that ground. Counsel founded on the commencement, build-up and persistence of intense media coverage of a particularly emotive nature. Given the character of the offence, a violent murder of a young girl in the Edinburgh area, the event had understandably attracted much local interest. Against that background, it was contended that to have held the trial in the Edinburgh area involved a real risk of injustice. Moving the location of the trial might not have completely eliminated that risk, but it could have been substantially reduced. It was, of

course, recognised that it was for the Crown to decide the location of a trial, but such a decision was subject to the supervision of the court. It was accepted that traditionally criminal trials had been held in the area where the crime had been committed; however, that traditional rule of practice was now, mainly, honoured in the breach; the modern practice followed by the Crown was to try cases where it was convenient to the Crown to do so. Thus, in substance, the traditional rule had been departed from.

[36] Counsel contended that the media attention given to the present case had been on an exceptional scale. Much of that attention had been in the national press. There was much interest in the case. More particularly, there had been much speculation that the killer of the deceased had been her boyfriend, the appellant. It had been made clear by the police at a fairly early stage that the appellant was the only suspect. That had been the case since 4 July 2003. Anyone taking an interest in current affairs could not have failed to become aware of the background to the case. During the course of the trial itself there had been some evidence which indicated that certain witnesses had in fact been influenced by the publicity of which they had become aware. If that were the case, it was likely that jurors would have been similarly affected.

[37] While the justice system under solemn procedure operated upon the basis that jurors accepted directions given to them by the judge presiding at the trial, it was plain that sometimes trials had had to be deserted because of information or circumstances which had tainted the jury. That showed that the palliative of appropriate directions was not all-powerful. It was impossible to say for sure that the jury in the present case had not been tainted. The position of the appellant was not that there could not have been a fair trial at all; his position was that a fair trial could not have been achieved within the Edinburgh area, in all the circumstances.

[38] In evaluating the appellant's submissions it was necessary to examine some of the coverage itself. There had been prepared several volumes containing extracts of press articles relating to the case. These ran from July 2003. Volume A commenced on 2 July 2003. The first extract was from the Daily Record of that date, which had contained headlines such as "Innocence Destroyed", associated with a photograph of the deceased at a young age, "Find Jodi Maniac", "Soaked in Blood"; "Killer in the Mist" and "Girl's Throat Slit in Attack Frenzy". These headlines had been associated with pages of coverage, including photographs of the locus, the house of the appellant, the house of the deceased and other relevant locations. On subsequent days, the same newspaper had featured a range of similar headlines referring to the killer as a "Fiend" and including "Shocked Villagers Gripped by Fear as Cops Hunt Killer on the Loose". There had been references to the appellant as the boyfriend of the deceased as early as 4 July 2003 when a floral tribute had been left by him near to the locus where the deceased's body

had been found. By 5 July 2003 attention was being focused on the position of the appellant. The Daily Record of that date had contained a headline "Jodi's Boy Quizzed. Search at Home of Murdered Girl's Sweetheart". It was contended that that material was significant and powerful.

[39] A wide range of newspapers had been involved at that time in providing similar coverage. These included the Dundee Courier, the Evening Times, the Daily Mail, the Daily Record, the Evening News, the Scotsman, Metro, the Daily Star, the Daily Express and the Herald. In the Herald of 2 July 2003 the murder had been characterised as one of the worst murders that the police officer leading the investigation had seen in 28 years. An atmosphere of fear and suspicion had been engendered by newspaper articles. For example, the Daily Mail of 3 July 2003 bore the headline "Police Warn Parents that Jodi's Brutal Killer Could Strike Again". Volume A of the press coverage showed that that level and character of material continued to be published throughout July 2003. The material had been designed to and had had the effect of driving up the emotional level; it gave the impression that the killer was a maniac, or a monster, and drove home that this had been a local event; the killer might strike again in the same locality, that is to say the Edinburgh area.

[40] Counsel went on to draw our attention to Volume B of the extracts of published material. It contained similar material to Volume A, but other newspapers had been involved. These were the Sun, the Daily Mirror, the Sunday Herald, the Times, the News of the World, the Sunday Mirror, Scotland on Sunday, the Sunday Times and the Press and Journal. The circulations of these newspapers were very extensive. On the other hand, it had to be accepted that they circulated nationally, not just in the Edinburgh area. That having been said, it was submitted that the media coverage was more intense in publications circulating in the east of Scotland.

[41] Our attention was then drawn to the contents of Volume C of the extracts of published material, which related to the month of August 2003. Counsel submitted that this material showed that, at that time, attention had begun to be focused on the appellant himself. There were accounts of the circumstance that he had then been told to stay away from school and not to attend the funeral of the deceased. That had been associated with publicity accorded to statements made by the police, to the effect that they were almost certain that they knew who was responsible for the death of the deceased. Publicity had also been accorded to occasions when the police had called in the appellant for questioning. It was submitted that this material tended to imply that the appellant was in fact the person responsible for the death of the deceased. Further suspicion concerning the position of the appellant inevitably arose from the fact that on 14 August 2003 he was detained and questioned at length by police officers. That event received very widespread publicity.

[42] Counsel went on to draw our attention to Volumes D and E of extracts of press coverage. The former related to the month of September 2003. The latter related to the months of October, November and December of that year. During that period, it was contended that the case had still been prominently covered in the press. At that stage the appellant had been described as the only suspect. In the closing months of 2003 the press coverage of the matter could properly be described as accusatory of the appellant. He had been repeatedly described as the only suspect and references had been made to his exclusion from school and from the funeral of the deceased. There had been extensive and critical publicity accorded to the appellant's visit to the deceased's grave on the day of, but after, her funeral. On 5 September 2003 considerable publicity had been given to the fact that the procurator fiscal was then considering whether there was sufficient evidence for a prosecution against the appellant, who was named as the subject of a police report. Counsel went on to point out that there had been a revival of press interest in the case when the appellant had been arrested and charged with the murder.

[43] Counsel submitted that, having examined a broad cross section of the media material produced, the character of the coverage was clear. Given the nature, extent and duration of the publications involved, he contended that it was impossible to conceive that there were many people who had not acquired some knowledge of the investigation into the murder. Furthermore, they would be aware that the murder was of a young girl who had died in horrific circumstances, where there had been Satanic overtones. The press coverage plainly suggested that the appellant had had something to do with her death. He was seen as central to the police investigation. The press had also suggested that the crime had impacted heavily on the local community, which included Edinburgh itself. Of course, it had to be accepted that memory fades; however, if it were suggested that a killer was "on the loose", that plainly affected people living in the locality concerned. Furthermore, throughout the appellant had been the prime suspect. There had been little or no public support for him.

[44] All this material had been brought to the attention of the Crown and the trial judge. The problem could have been largely eliminated, or at least minimised, if a decision had been taken to the effect that the trial should be held outwith the Edinburgh area. In subsequent discussion, counsel accepted that the decision as to whether a trial should be held in the locality in which the crime had been committed, or elsewhere, was a matter for the exercise of the discretion of the judge before whom the issue came. Thus, it was accepted that this ground of appeal could succeed only if the appellant could persuade the court that the decision actually taken was one which could not have been reached by any reasonable judge. The submission was that that could be said in this case. At this point in the discussion, counsel referred to the transcript of proceedings before the trial judge on 6 October 2004. He accepted that while specific extracts from publicity material relating to dates after September 2003

had not been put before the trial judge, the point had been made that the publicity had continued beyond September 2003 with differing levels of intensity. In that connection reference was made to Volume F of the material. There had been a renewal of intense publicity when the appellant had been arrested and charged with the murder on 14 April 2004, although he had not been named until he had attained 16 years of age. That occurred on 24 July 2004 when there was further publicity about the appellant; this time he was named.

[45] Counsel next turned to make submissions on the authorities which he considered relevant to the matter. The first of these was *Stuurman* v *HM Advocate* 1980 J.C. 111. The issue in that case had been whether a fair trial could take place at all in the light of the pre-trial publicity, not whether a trial in a particular location could not be fair. At page 123 the Lord Justice General (Emslie) stated what had become the recognised principle to be applied in cases concerned with pre-trial publicity. The issue had been whether the risk of prejudice in consequence of the publications was so grave that even the careful directions of the trial judge could not reasonably be expected to remove it. Counsel next referred to *HM Advocate* v *Mitchell* 1993 S.C.C.R. 793, a case closer to the circumstances of the present case, since the location of the intended trial had been an issue. The sheriff had made a decision in favour of the accused person, considering that, despite a lapse of 12 months, there still existed a risk of prejudice attributable to newspaper publicity, which could not be expected to be removed by suitable directions from the trial judge. Reference was made to the observations of the Lord Justice Clerk at page 801. Counsel went on to draw our attention to *McLeod* v *HM Advocate* 1997 J.C. 212. The issue in that case had been whether the effect of pre-trial publicity prejudicial to the accused rendered a particular trial venue inappropriate. In that case, the decision of the sheriff was reversed, the High Court considering that the sheriff should have exercised his discretion by granting the motion before him, which was to desert the diet in order to have a fresh indictment brought in a different court. Reference was made to the observations of Lord Coulsfield at page 215 to 216. In *HM Advocate* v *Fraser* 2000 S.C.C.R. 412 the issue had been whether a fair trial could take place at all in the light of prejudicial pre-trial publicity. The contention that no fair trial was possible had been rejected. A factor in the decision was the area in which the preponderance of the published material had been circulated, as appeared from the observations of Lord Osborne at page 421. Counsel went on to rely on *Crummock (Scotland) Limited* v *HM Advocate* 2000 J.C. 408. That case had been concerned, not so much with publicity, as with the impartiality of the potential jury. Reference was made to the observations of the Lord Justice Clerk at page 412. Counsel then proceeded to draw our attention to *Sinclair* v *HM Advocate* [2007] H.C.J.A.C. 27. The issue in that case had been whether a fair trial could take place. Reference was made to paragraphs [15] and [16] of the Opinion of the Court, delivered by the Lord Justice General. In that Opinion emphasis had been placed upon the presumption that had to be made that there was

trust between judge and jury, including an understanding that jurors would not deliberately disobey the instructions which they were given by the trial judge.

[46] At this point in the discussion, the issue was raised whether it was significant that the appellant had decided not to appeal against the decision reached in advance of the trial by the trial judge in relation to the issue of its location. Counsel submitted that that circumstance was of no significance. He accepted that, after trial, the appellant required to demonstrate that the decision in question constituted a miscarriage of justice; there was no dispute about that. There had been good reasons why an appeal had not been taken at that stage.

[47] Counsel then referred to *Mitchell* v *HM Advocate* [2006] H.C.J.A.C. 84 in which a decision had been given in the present case, following a hearing under section 107(8) of the 1995 Act. In that decision, it had been held that ground of appeal 1 was arguable.

[48] A factor of importance in the present case was the circumstance that the trial judge had given extensive guidance to the jury at the commencement of the first trial, which had had to be aborted. What he had said was reproduced in Appendix A to the trial judge's report to this court. What had followed that introduction to the jury was that the first trial had commenced, after which a problem had arisen. One juror had been lost on account of her not being well. Following that, a problem had arisen relating to a second juror on the fourth day of the trial. The nature of that problem is described in paragraph [114] of the trial judge's report to this court and summarised at paragraph [5] of this opinion. It had been submitted to the trial judge that the juror would have been discharged from service as a juror at the outset if it had been known that the circumstances existed that had subsequently been brought to the attention of the court. The trial judge concluded that that juror ought to be discharged. What these circumstances showed, submitted counsel, was that clear and unequivocal directions given to the jurors at the outset of the trial had not been obtempered. The explanation for that was unknown. The foregoing considerations tended to undermine the assumption that the jury would necessarily follow the directions given by the trial judge in relation to the effect of extraneous influences, such as publicity.

[49] Counsel submitted that, in evaluating this ground of appeal, the court was in the realm of the assessment of risks to the proper administration of justice caused by the publicity which the case had attracted. In that connection he made reference to certain passages of evidence at the trial. At page 544 of the transcript of proceedings for 2 December 2004, in the cross-examination of Rosemary Walsh, there was a passage of significance: the witness agreed that by 15 August 2003 the murder inquiry had been running for some time with no person charged; there was much concern and anxiety

in the location of the murder about that circumstance. Likewise, at page 599 of the same volume, in the cross-examination of Andrew Holburn, the witness agreed that he had taken an interest in what had been reported in newspapers about the matter. He had seen certain photographs of the deceased published, but not of the appellant. At page 629 and following of the same volume of the transcript, the witness Carol Heatlie agreed that she had seen photographs in newspapers and on television of the person whom she claimed to recognise in connection with her evidence, namely the appellant. She had seen the interview conducted on television with the appellant and his mother. It was difficult to say that such influences had not affected the evidence of such a witness. Reference was also made to pages 733 to 734 of the transcript of proceedings of 6 December 2004 narrating the evidence of George Ramage. Counsel also drew attention to pages 344 to 345 of the transcript of proceedings of 1 December 2004, which recorded the evidence of Lorraine Fleming. She had seen news photographs and reports of the appellant. It was contended that what she described amounted to the "building up of a piece of evidence" concerning identification. It was submitted that the foregoing examples showed that media coverage had had a significant influence in relation to witnesses.

[50] Counsel submitted that there were several features of the present case, consideration of which led to the conclusion that a miscarriage of justice had occurred on account of the decision of the trial judge that the trial should proceed in Edinburgh. These were, first, the fact that the victim of the crime was a young girl; second, the nature and extent of the publicity accorded to the case and the level of emotion engendered by it; third, the publicity regarding the horrific circumstances of the murder and the coverage of the position of the appellant himself; fourth, the question of whether the publicity was so local or so national in character that moving the case from Edinburgh to some other location would be a cogent step to take; and fifth, the matter of the management of the trial. The appellant's contention was that a miscarriage of justice had occurred. If that were determined by the court, there could be a fresh trial elsewhere; the appellant would not resist a motion for a fresh trial.

[51] Questioned by the court as to whether it was being contended that the trial judge, in reaching his decision concerning the location of the trial, had ignored relevant material, counsel said that the basis of the criticism of his decision was that it was one which no reasonable judge could have reached. The trial judge had failed to give proper weight to the material put before him and to reach the only reasonable conclusion that, in the circumstances, was open to him; that is to say to obviate a demonstrable risk of prejudice by causing the trial to be held in a location other than Edinburgh. The problem was that jurors did not necessarily obtemper the instructions given to them by a presiding judge. Other than possible inconvenience to some persons, there was no reason why the trial could

not have been caused to take place away from Edinburgh. The palliative of judicial directions can never be absolutely effective, as was recognised in the case of *Stuurman* v *HM Advocate*.

Submissions of the Advocate depute

[52] The Advocate depute began by drawing attention to the background of this ground of appeal. As appeared from the decision of the court under section 107(8) of the 1995 Act in the present case, paragraphs [11], [12] and [13], the court had concluded, only with some hesitation, that this ground of appeal was arguable. The matter of this ground of appeal was the subject of treatment by the trial judge in his report between paragraphs [89] and [99]. The position of the Crown was that the decision of the trial judge as to the location of the trial had been reasonable in all the circumstances. A miscarriage of justice could not arise out of a reasonable decision by the trial judge.

[53] It was important to recognise that there had been an acceptance on the part of the appellant that a fair trial was possible. That had been the position taken up before the trial judge at the preliminary hearing on 6 October 2004, as appeared from paragraph [90] of his report, and it was reiterated in the appellant's submissions before this court. It followed from that position that any potential prejudice to the appellant created by media coverage was capable of being cured in some trial court, somewhere. Thus, what was being suggested on behalf of the appellant was that measures to cure it, which would have been sufficient elsewhere, were not sufficient in a trial in Edinburgh.

[54] It was accepted by everyone that there had been extensive media coverage of the case, as appeared from paragraph [96] of the trial judge's report. However, the copies of the coverage produced showed that that publicity was of a national character, both in the press and on television. That had an important bearing upon the issue relating to the location of the trial. Furthermore, it ought to be recognised that a substantial part of the publicity which the case had attracted was based upon statements made by or on behalf of the appellant. The fact that some of the publicity had been generated in that way was relevant to the present issue. If some disadvantage was self-inflicted, the appellant could hardly complain of it.

[55] Most of the publicity had occurred in the immediate aftermath of the death of the deceased. It was a matter of concession that, by around September 2003, the intensity of the coverage had very largely died down. In that connection reference was made to pages 70 to 71 of the transcript of proceedings of 6 October 2004. In addition, it had been accepted that the publicity in itself was not of what could be called an improper nature. For example, it did not involve the revelation of previous convictions.

[56] It had been suggested that there was significance in the fact of the atmosphere of fear that had been generated by the publicity in the Edinburgh area. However, even if there had been a heightened risk that Edinburgh jurors might be fearful of the murderer, they would not be likely to convict the wrong person because of that. Rather, they would be anxious to convict the actual perpetrator. In this connection the Advocate depute relied on *Crummock (Scotland) Limited* v *HM Advocate*, particularly paragraph [13] of the Opinion of the Court. The present case contrasted sharply with *Sinclair* v *HM Advocate*, as appeared from paragraphs [3] to [7], [16] and [20] of the Opinion of the Court; the argument under consideration there was that no fair trial was possible anywhere.

[57] A particular point made on the appellant's behalf was that, in the media coverage during the period of July to September 2003, the appellant had been portrayed as the "only suspect". However, that was not said itself to be prejudicial; he was, in fact, also the only person who had been indicted. That was a feature of many prosecutions. Furthermore, he had had a relationship with the deceased and had been due to meet her on the day of her death. In this connection the Advocate depute drew attention to *B.B.C., Petitioners* 2002 J.C. 27, particularly paragraph [19]. In that case the court had concluded that an order under section 4(2) of the Contempt of Court Act 1981 was unnecessary, albeit that, in the trial in question, there were likely to be frequent references to the incriminee in a trial for murder of a nature highly prejudicial to him. The court had expressed its confidence in the system of trial by jury to provide a fair trial for the incriminee with proper directions. The Advocate depute, in this connection, also relied upon *Montgomery* v *HM Advocate* 2001 S.C. (P.C.) 1 at pages 24 and 26 - 31.

[58] The Advocate depute wished to emphasise the significance of the national character of the publicity in the present case. If the preponderance of the publicity was national in character, then the benefit of the trial being held in a location within Scotland but remote from Edinburgh would be illusory, since jurors in such location would have been just as much exposed to the publicity as jurors in Edinburgh would have been. Furthermore, it was important to note that none of the jurors finally selected for the trial lived in the Dalkeith area, as appeared from paragraph [118] of the trial judge's report. Of the jury, as finally constituted, ten jurors lived in Edinburgh and one each came from Whitburn, Livingston, South Queensferry, Ratho and Penicuik. No objection had been taken to the juror from Penicuik. Thus the jury emanated from areas other than that most directly affected by the occurrence of the crime and the associated publicity.

[59] It had to be borne in mind that the trial judge had taken thorough steps to warn the jury as regards material which they could not take into account in reaching their decision. In this connection the Advocate depute relied on what the trial judge had said at page 7 and following of the transcript of his

charge to the jury. The instructions given were quite clear; extraneous material had to be excluded from the minds of the jurors.

[60] It had been conceded on behalf of the appellant that the trial judge, in reaching a decision as to whether the trial should take place in Edinburgh or not, had been exercising a discretion. Accordingly, his decision could not relevantly be attacked unless one of the recognised bases of criticism of a discretionary decision could be established. The contention was that the decision reached was one which no reasonable trial judge could have reached. In this connection it had been said that nothing would have been lost by trying the case elsewhere than in Edinburgh. But that was beside the point. The question was whether the trial judge had applied the proper test and reached a decision which was within the range of reasonable decisions. It was submitted that the reasons that he had given for his decision at pages 201 to 204 of the transcript of proceedings of 6 October 2004 showed that he had done that. In any event, even if the trial judge had reached an unreasonable decision, it was still necessary for the appellant to demonstrate that a miscarriage of justice had occurred.

[61] It had been argued on behalf of the appellant that the Crown allocated cases to locations as a matter of its convenience. That was not so. Since April 2005 the Crown did not select venues for trials. It selected venues for preliminary hearings. Thereafter, it was the court itself that allocated cases to a particular venue.

[62] It was the position that following upon the decision of the trial judge as to the location of the trial, the appellant had been given leave to appeal that decision. For reasons given by counsel for the appellant, he had not availed himself of that grant of leave by appealing in advance of the trial. It had to be emphasised that that decision had had the result of imposing an additional burden upon the appellant now, in respect that it was now necessary for him to demonstrate that a miscarriage of justice had occurred as a result of the trial judge's decision. That would not have been necessary had there been an immediate appeal of the decision in question.

[63] The Advocate depute then turned to consider a number of authorities. The first of these was *Gray* v *HM Advocate* 2005 J.C. 233. At paragraph [6] of the Opinion of the Lord Justice Clerk, the point was made that steps may be taken in advance of a trial as a matter of precaution but failure to take such steps did not necessarily lead to the conclusion that a miscarriage of justice had occurred. This case showed the difference between preliminary decisions and decisions on final appeal. The Advocate depute also relied upon *Stewart* v *HM Advocate* 1980 J.C. 103, at pages 108 - 109. It showed

that a jury was presumed to be impartial until the contrary was shown. In that connection reliance was also placed on *Pullar* v *HM Advocate* 1993 J.C. 126 and *Pullar* v *The United Kingdom* 1996 S.C.C.R. 755. The case of *McLeod* v *HM Advocate* had been relied upon by the appellant. However, that case involved an appeal against a decision of a sheriff relating to the location of a trial prior to the holding of the trial. That necessarily involved the application of a different criterion from that appropriate in the present case. For that reason the decision was not helpful here. *HM Advocate* v *Mitchell* had also been relied upon by the appellant, particularly at pages 795 - 796. It was submitted that the published material there was of a very extreme nature and, in any event, the case involved an appeal against a pre-trial decision in advance of the trial. For those reasons it was not helpful in the present circumstances. Further, the appellant had not been correct in his assertion that it was difficult to imagine more prejudicial publicity than that involved in this case; other cases had involved significantly more prejudicial material, for example, in relation to serious previous convictions, but that had not resulted in a successful appeal regarding a pre-trial decision concerning prejudice, as appeared from *Beggs* v *HM Advocate* 2001 S.C.C.R. 836.

Discussion of ground of appeal 1

[64] There is no doubt that the offence with which this case is principally concerned, the murder of Jodi Catherine Jones, was an horrific event. The injuries inflicted upon her were bizarre, numerous and severe. The shocking nature of the murder was augmented by the circumstance of her relatively young age. The fact that a person as young as the appellant, who was but 14 at the time of the murder, became a suspect naturally evoked public interest and dismay. Against that background, it was hardly surprising that, in the weeks following the murder, much press and media interest was generated by the event. The resulting coverage was understandably intensified by the very public nature of the funeral of the deceased, with the public emotion that it engendered. It was quite correctly said, on behalf of the appellant, that a proportion of the coverage was of a speculative nature. Again, that was quite understandable having regard to the uncertainty which endured for some time relating to the circumstances of the death of the deceased. In the press coverage that was associated with expressions of concern about the risks which might be faced by other young girls living in the Dalkeith area until the person responsible for the murder in question had been identified and arrested.

[65] It is pertinent to the issues arising out of this ground of appeal to note the particular sources of the publicity involved. Apart from coverage in the commonly viewed television channels, there was widespread reporting in numerous newspapers. We were informed that these included the Dundee Courier and Advertiser, the Glasgow Evening Times, the Daily Mail, the Daily Record, the Edinburgh

Evening News, the Scotsman, Metro, the Daily Star, the Daily Express, the Sun, the Daily Mirror, the Herald, the Sunday Herald, the Times, the News of the World, the Sunday Mirror, Scotland on Sunday, the Sunday Times, and the Aberdeen Press and Journal. Looking at the reports published in these organs of the press, it is evident that the publicity accorded to the event was of a national nature, as well as appearing in newspapers circulating in the Edinburgh and Dalkeith area. While much of the reporting was of a factual nature and framed in a tempered style, other parts of it, particularly in what may be described as popular newspapers, were couched in extravagant and emotional language.

[66] It is also pertinent to notice the period of time over which the publicity ran at an intense level. Looking at the material produced on behalf of the appellant before this court, it is clear that the intensity of the coverage, both as regards volume and content, was at its height in the weeks following the murder, that is to say, in July and August 2003. From around the beginning of September onwards, the coverage materially diminished, until it was temporarily revived around the time when the appellant was arrested and charged with the murder on 14 April 2004.

[67] Following the commencement of the proceedings against the appellant, in due course, a minute under section 72 of the Criminal Procedure (Scotland) Act 1995 was lodged on his behalf, the purpose of which was to seek an order from the court, the consequence of which would have been that the trial of the appellant would have been heard outwith the Edinburgh area. From the outset, the position adopted on behalf of the appellant was that a fair trial was possible, despite the publicity concerned, but that a fair trial could not be held in Edinburgh. This minute was heard by the trial judge on 6 October 2004, on which date the application was refused. The reasons for its refusal were given by the trial judge on that date and are recorded at page 200 and following pages of the transcript of proceedings on 6 October 2004. Following upon the refusal of the application, the trial judge granted leave to appeal his decision in that respect. No such appeal was taken for the reasons which are given in the second paragraph of this particular ground of appeal. In our view, no particular significance attaches to that circumstance, save in the respect which we mention hereafter.

[68] Before us there was no dispute as to the criteria which this court had to apply in relation to this particular ground of appeal. It was a matter of agreement that the decision of the trial judge made on 6 October 2004 was of a discretionary nature. It followed from that position that it could be attacked only upon the basis of the well-known grounds of criticism which are available in the context of an appeal against a discretionary decision. Counsel for the appellant specifically made clear that the only basis upon which he attacked the decision in question was that it was unreasonable, in the sense that it was a decision which no reasonable judge could properly have arrived at in all the circumstances of the

case. Since this court is now dealing with an appeal against conviction, having regard to the provisions of section 106(3) of the 1995 Act, it was also accepted that the appellant would have to demonstrate that a miscarriage of justice had occurred, before this ground of appeal could be upheld. If the appellant were able to show that the trial judge's decision in this respect was unreasonable, in the sense explained, it might be that it would be a short step to establishing that a miscarriage of justice had occurred, but no argument was addressed to that aspect of the matter.

[69] In assessing whether a miscarriage of justice has in fact occurred in this case upon the basis of the matters referred to in ground of appeal 1, it is plain that this court must take account of the steps actually taken to ensure that justice was done. In saying that, we have in mind the steps taken in the selection of jurors and the directions given to the jury at the commencement of the trial and in the trial judge's charge. Although *Stuurman* v *HM Advocate* was a case in which the contention was that the applicant in a plea in bar of trial could not have a fair trial on account of the effect of pre-trial publicity, it appears to us that the test expressed at page 123 by Lord Justice General Emslie is relevant in the present context. There he said:

" ... the question for us is whether on 25 January 1980 the risk of prejudice as the result of these publications was then so grave that even the careful directions of the trial judge could not reasonably be expected to remove it. In our opinion that question falls to be answered in the negative. The publications occurred almost four months before the trial diet was called. In considering the effect of these publications at the date of trial the court was well entitled to bear in mind that the public memory of newspaper articles and news broadcasts and of their detailed contents is notoriously short and, that being so, that the residual risk of prejudice to the prospects of fair trial for the applicants could reasonably be expected to be removed by careful directions such as those which were in the event given by the trial Judge."

Of course, the issue which the trial judge had to address was whether the appellant could receive a fair trial in the High Court in Edinburgh, in all the circumstances. In considering that question he was quite entitled to have regard to the directions which would be given to the jury in a trial in that location and, indeed, to the other measures to avoid prejudice, particularly in relation to the selection of jurors.
[70] The application of the relevant test was considered in detail in *Montgomery* v *HM Advocate* by Lord Hope of Craighead at page 28. It is appropriate to quote that passage:
"In *Stuurman* v *HM Advocate* the test was applied to a case of pre-trial publicity. The directions which the trial judge gave to deal with this matter were not said to have been defective in any way. The

argument was that no direction by the trial judge, however careful, could reasonably be expected to remove the risk of prejudice to the fair trial. The reasons which the Lord Justice General (Emslie) gave for rejecting this argument at page 123 were these [his Lordship then quoted the passage reproduced above].

This passage indicates that, when the test is being applied in practice, all the circumstances of the case require to be taken into account. It is only by having regard to all the circumstances that it can be determined whether the directions by the trial judge can reasonably be expected to remove the prejudice. This point is illustrated also by its application in *McFadyen* v *Annan* [1992 J.C. 53]. The three matters to which Schiemann L.J. referred in paragraph (10) in *Attorney General* v *M.G.N. Limited* [[1997] 1 All E.R. 456] at page 461B - the length of time since publication, the focusing effect of listening to evidence over a prolonged period and the likely effect of the directions by the trial judge - are all taken into account in practice in the application of the *Stuurman* test in cases of alleged oppression due to pre-trial publicity. Applied in this way the test is, in my opinion, well suited for use in the context of a complaint which is made under Article 6(1) of the Convention. It fits in well with the approach which the Strasbourg court took to this matter in *Pullar* v *United Kingdom*."

[71] In assessing the reasonableness of the decision of the trial judge in this case, in the light of the foregoing observations, it is appropriate to look at the whole circumstances, including the steps which were taken in addressing the unempanelled jurors, in the selection of the jury itself and in the introduction given to the empanelled jury by the trial judge. These matters are described in detail in paragraphs [117] and [118] of the trial judge's report to this court. Prior to the selection of the jury the trial judge addressed the unempanelled jurors in terms which are set out in Appendix A to his report. In those observations, the trial judge emphasised the requirement that the jury would take an oath or affirmation to the effect that they would well and truly try the accused and give a true verdict according to the evidence. Then he continued:

"All their [the jury's] decisions about the facts must be based on the evidence which they hear in the course of the trial and on nothing else. You will understand from this that one of the essential requirements of a fair trial is that every member of the jury should be able to perform his or her duties, free from prejudice or extraneous influence and free from personal considerations which might prevent concentration on the task in hand."

Thereafter the trial judge emphasised that it would be inappropriate for anyone to serve as a juror who had personal knowledge of those referred to in the indictment or who had connections with the area

where the deceased lived and where she was allegedly murdered, or connections with the school where some of the people mentioned were pupils.

[72] In the body of his report the trial judge goes on to describe the steps that followed. In consequence of his opening remarks to unempanelled jurors, a number of such persons sought to be, and were, excused. Thereafter the jury were empanelled. Following upon the swearing of the jury and during the course of the normal subsequent adjournment, a juror brought to the attention of the clerk of court circumstances which indicated a connection with the school above referred to. In the light of that, the trial judge decided to discharge that juror and another was selected in his place. The first unempanelled juror to be balloted lived in the Dalkeith area and was objected to. She was excused. The jury as finally constituted consisted in ten jurors living in Edinburgh and one each from Whitburn, Livingston, South Queensferry, Ratho and Penicuik. In the trial judge's charge to the jury following upon the conclusion of the evidence and speeches, he emphasised the necessity that the jury's verdict should be reached only upon the basis of the evidence that they had heard. More particularly, at page 7 of the transcript of the charge, the trial judge said this:

"I must ask you to approach the task calmly and carefully and not to allow yourself to be swayed by any prejudices which might distract you from that task. Put out of your minds anything you may have heard or read about this case either before or during the course of the trial: concentrate dispassionately on your recollections and impressions of the evidence."

Thus, it is apparent from what was said to the unempanelled jurors and to the jury itself at the opening stage of the trial and in the charge that they were clearly and specifically told to put out of their minds anything which they had read or heard about the case and to make a decision upon the evidence alone.

[73] In *Montgomery* v *HM Advocate* at page 30 Lord Hope of Craighead said this:

"The judges in the court below relied on their own experience, both as counsel and as judges, of the way in which juries behave and of the way in which criminal trials are conducted. Senior counsel for the second appellant submitted that there was no basis on which one could assess the likely effect of any directions by the trial judge. He said that this was something that was incapable of being proved. But the entire system of trial by jury is based upon the assumption that the jury will follow the instructions which they receive from the trial judge and that they will return a true verdict in accordance with the evidence."

[74] While the view there expressed is widely accepted, it was argued by counsel for the appellant that the events which had occurred in this case demonstrated that reliance could not be placed upon the view that juries accepted directions given to them. In particular, he adverted to the fact that the first trial commenced here had had to be aborted. The circumstances in which that happened are referred to in para [48] above. While it may be true that the juror who was found to have a personal connection with individuals connected with the case would have been discharged from service as a juror at the outset, if those circumstances had been known, it does not appear to us to follow from that situation that that juror deliberately disregarded the directions of the trial judge. In any event, the occurrence of that situation in the first trial, in our view, cannot be regarded as a basis for supposing that the jury empanelled in the second trial, which ran to its conclusion, with a verdict, disregarded the instructions of the trial judge.

[75] There were also drawn to our attention passages in the evidence of certain witnesses which were said to show the malign influence which the pre-trial publicity had had upon the evidence in the case. The witnesses concerned were Rosemary Welsh, Andrew Holburn, Carol Heatlie, George Ramage and Lorraine Fleming. We have already specified the passages of the evidence concerned in our narrative of the argument. We would make two points about this particular submission. First, it proceeds upon hindsight. What emerged during the course of the evidence of these witnesses was not and could not have been known to the trial judge when he made his decision concerning the location of the trial on 6 October 2004. It is therefore impossible to see what bearing that material could have upon a consideration of the reasonableness of that decision. Second, in any event, what was said by these witnesses in relation to what they had either heard or read was itself before the jury for their consideration in their evaluation of the evidence of these witnesses. It was therefore, no doubt, taken into account by the jury in that connection. Accordingly, we have difficulty in seeing how those particular passages of evidence could be said to demonstrate that the appellant did not enjoy a fair trial. Third, whatever influence pre-trial publicity might have had upon the evidence of the witnesses concerned, that was a function of what they themselves may have heard or read. The holding of the trial in a different location from that in which it was held, for which the appellant contended, would have made no difference whatever in that regard. Accordingly, it is impossible to see what relevance these matters could possibly have to the assessment of the reasonableness of the trial judge's decision as regards the location of the trial.

[76] In *HM Advocate* v *Fraser* the issue before the court was whether pre-trial publicity had been so prejudicial as to deprive the accused of his right to a fair trial under Article 6(1) of the European

Convention on Human Rights and at common law. In the course of the hearing in that case, the attention of the court was drawn to a very substantial amount of published material concerning the accused. Likewise in the present case we had drawn to our attention a similarly very substantial volume of published material. In *HM Advocate* v *Fraser*, at page 421, Lord Osborne said this:

"Associated with that point is the consideration that, while the totality of the published articles contained in the file before the court was the basis of submissions made to me, it is, in my view, in the highest degree improbable that any potential juror would have read all of that material. It appears to me that, in the context of the examination of the totality of it in a court situation, there is a danger of overestimating the impact which any publicity may have had on potential jurors."

We consider that that point possesses force here. We think that it is also worth bearing in mind the observations of Lord Coulsfield in *McLeod* v *HM Advocate* at page 216. There, in the context of a consideration of an appeal from a decision of a sheriff who had declined to make an order which would have resulted in a trial being held in a court other than that in which the case had been originally indicted, he said:

"The rule must remain that every case is to be judged on its own facts and circumstances and that an appeal court will be slow to interfere with a decision made by a judge after weighing all the relevant facts and circumstances."

[77] In the light of all of the foregoing, we have reached the conclusion that we cannot hold that the decision of the trial judge taken on 6 October 2004 was so unreasonable that it could not have been reached by any reasonable trial judge. In reaching that conclusion we are influenced by several considerations. First, the publicity attracted by this case was plainly of a national nature. The vast preponderance of the material to which we were referred was published in national newspapers, as opposed to organs of the press circulating only in the Edinburgh area. It would follow from that that the effect of ordering that the trial should take place in some location apart from Edinburgh would have been likely to have had little practical effect as regards the impact of publicity. Second, the major part of the published material which formed the basis of the argument in support of this ground of appeal dated from the time of the murder itself on 30 June 2003 to early September 2003. The jury which ultimately reached a verdict in this case was empanelled on 18 November 2004. Thus the period of time which elapsed, and which the trial judge, no doubt, expected would elapse, between the cessation of the major part of the publicity and the commencement of the trial was very considerable. We would respectfully agree with the observations of Lord Justice General Emslie in *Stuurman* v *HM Advocate* in

regard to the effect of the passage of time in a matter such as this. Third, the trial judge was entitled to proceed on the basis that he would give, and, in the event, he gave, to the jury the clearest of directions to the effect that they should ignore material which they might have read, or heard, relating to the case and reach a decision exclusively upon the evidence led before them in court. We have no reason to suppose that the jury did not comply with those directions. Fourth, looking at the published material concerning the case that was brought to our attention, while much of it was of an emotional nature, nothing was said to us to suggest that any published material contained gross improprieties, such as an assertion of the guilt of the appellant.

[78] In all the circumstances we reject this ground of appeal.

Sufficiency/Unreasonable Verdict (Grounds 3/3A) - submissions for the appellant

[79] Mr Findlay submitted that the evidence adduced by the Crown was insufficient in law to entitle the jury to convict the appellant. In any event, no jury properly directed could, having considered the whole evidence, reasonably have returned the verdict which was returned.

[80] Counsel first questioned the significance which the Crown had placed on its first key: the appellant's discovery of the deceased's body. It was not clear what could be taken from the evidence of the members of the search party, even if accepted by the jury. Commonsense suggested that the last thing the appellant would have done, had he been responsible for the murder, would have been to lead the party to the deceased, especially given the possibility that, the longer the delay in discovery of the body, the more likely it was that any incriminating forensic science evidence would be destroyed. The other members of the search party only looked for the deceased on the path itself. There were a number of reasons why she might have gone to the other side of the wall. The appellant had demonstrated a logical approach in looking there. He had previously shone his torch over the wall at the "Gino" point; the "V" opening was only the second access point. The circumstances presented did not justify the sinister explanation relied on by the Crown. The stark reality of this chapter of evidence was that, but for the actions of the appellant, the search party would have continued past the "V" point without discovering the body of the deceased.

[81] Similarly, Mrs Bryson's evidence, the second key, did not support the inferences relied on by the Crown. At no point had this witness identified the female whom she saw as the deceased. In describing the female's clothing, she had not mentioned a prominent "Deftones" logo which featured on the deceased's top. The female she had seen was wearing jeans; the deceased had been wearing baggy

trousers. The description which she gave of the clothing which the male was wearing also contained inconsistencies. In evidence she had identified a photograph of a jacket as being similar to the one that the male was wearing. That jacket went below waist length; in her police statement she described the jacket as being waist length. There were also the difficulties with her identification outlined in ground of appeal 5 (discussed below). When taken together, these matters cast real doubt on her identification evidence. It did not come up to the quality or significance relied on. Even if accepted at its highest, it suggested that the appellant met the deceased at around 1700. That might supply a reason to reject the alibi, but could go no further than that.

[82] The claims made by the Crown as regards the first and second keys were exaggerated beyond all proportion. No reasonable jury, taking both keys together, could have concluded that they provided anything of substantial significance in relation to the appellant's guilt.

[83] Counsel then addressed us on the general points of circumstantial evidence relied on by the Crown. As indicated in relation to ground of appeal 5, there had been serious difficulties with the identification evidence provided by Miss Fleming and Miss Walsh. When their evidence was considered in that light, an important foundation of the Crown case was seen to crumble. The issue of identification had to be considered carefully: if the appellant was not the real killer, the latter must have been in the area around the time of these sightings. It was important to note that, despite the position adopted by the Crown, the time of the deceased's death was never established in evidence. There was insufficient evidence to suggest that she had been murdered between the sighting of the male thought by Mrs Bryson to be the appellant, and his subsequent suggested sightings by other witnesses. During his closing submissions the trial Advocate depute had suggested that the appellant was clearly an intelligent young man. If the sightings by Fleming and Welsh took place before the murder, one had to ask where the deceased was at that time; if it was after, one had to consider why an intelligent young man would take the risk of lingering in the vicinity of the locus.

[84] Even if the jury were entitled to accept that witnesses had seen the appellant, there were inconsistencies between them as to whether he was wearing a parka. The Crown case proceeded as if all of the witnesses had described the appellant as having worn such a jacket, but that was not correct. That was important given the reliance which the Crown placed on the appellant's parka having gone missing and the subsequent purchase of a replacement. That suggestion in itself raised questions: it was not clear why a replacement would be purchased openly in the Edinburgh area. There was no evidence establishing what was burned within the log burner, and in particular that it included a jacket belonging to the appellant. During the search of the appellant's house on 4 July, the contents of the

ash can were removed and subsequently analysed, but gave a negative result. The evidence of the burner was therefore of limited value.

[85] The Crown's reliance on the appellant's comment to David High as indicative that he knew the deceased was dead went beyond any reasonable inference which could have been drawn. Similarly, the reliance on his inaction when she failed to turn up after Alan Ovens had told him she had left was unjustified. The appellant was fourteen years old at the time. It would be unfair to judge him by adult standards. He had agreed to meet his girlfriend and she had simply not turned up. By the time he met High, it was clear that she was not going to meet him. On no reasonable view was this evidence incriminatory of the appellant. Nobody in the Jones household initially displayed any concern, despite it being clear that the deceased had left the house some time earlier but had not met the appellant. That was not regarded as sinister. Nor could the appellant's call to the speaking clock at 1654 be interpreted as incriminatory. There was no evidence to contradict the suggestion, for example, that the appellant had phoned the speaking clock out of pure idleness while at home. The position adopted by the Crown in relation to these circumstances was unfair; it amounted not to legitimate inference, but to speculation.

[86] The reliance on evidence concerning the appellant's interest in knives also involved speculation and was unfair. There was no evidence to suggest he had disposed of a knife prior to being seen at 2200 by neighbours. Nor was it was clear why the knife purchased in December 2003 should be regarded as a replacement or why the appellant would wait a number of months before buying any such replacement. There was no explanation as to why he would subsequently hide the replacement knife. The Crown was really seeking to undermine the character of the appellant and his mother in this chapter of evidence. It might be that she was acting inappropriately in purchasing the knife following the murder, and he strangely in creating a memorial for his girlfriend by making inscriptions on the pouch, but there was nothing in this evidence which pointed to the appellant being the killer of the deceased.

[87] The references to Marilyn Manson and to the "The Golden Age of Grotesque" DVD also represented an attack on the appellant's character. In his address to the jury, the Advocate depute did not suggest that there were any similarities in the murder of the deceased and that of Elizabeth Shaw, nor that the injuries were the same. He did, however, suggest that there were some general similarities in the wounds inflicted. Similarly, he accepted that there was no evidence linking the appellant to the website of Manson, but indicated that this website would not be hard to find. That approach was plainly contradictory. There was no evidence of the appellant having seen any of the artwork relating to Shaw

prior to the murder. There were more differences than similarities between the injuries inflicted on Shaw and those on the deceased. The appellant had not seen the DVD of Manson until after the death of the deceased. Janine Jones, the deceased's sister, also bought a CD by Manson following the murder. This was not considered suspicious. This was part of a calculated attack designed to blacken the character of the appellant and was evidentially insignificant.

[88] The suggestion that the deceased had gone through the "V" point with someone whom she knew, given that there was no sign of a struggle on the path side, was an unjustified inference which it was unfair to make. There was no way of knowing that the killer was not already on the wood side of the wall when the deceased went through. There was no evidence at all that the deceased went through the "V" point with her killer.

[89] Shane Mitchell's ultimate position in cross-examination appeared to be that he could not be sure whether the appellant was in the house between 1653 and 1716 on the evening of the murder. At its highest, that evidence undermined the appellant's alibi, and allowed an inference that he was more likely out of the house at that time. For the Crown to rely on this witness as the third key in this case was not realistic. It certainly did not add anything in relation to sufficiency.

[90] In considering the circumstantial case against the appellant as a whole, it was important to consider the conjunction and coherence of the circumstances and what this might convey to the jury in terms of the appellant's guilt (*Al Megrahi* v *HM Advocate* 2002 J.C. 99). The jury were entitled to draw reasonable inferences from the evidence, but the law did not give them free rein in that regard. The court was entitled to bring to bear its experience of the criminal justice system in order to assess the inconsistencies and disjunction of evidence without excessive deference to the verdict of the jury (*AJE* v *HMA* 2002 J.C. 215). We should adopt that approach in assessing the sufficiency of the evidence in the present case, in order to determine what inferences could legitimately be drawn by a jury properly instructed. Any consideration of sufficiency must involve a qualitative assessment of the relevant material. If the inferences relied upon by the Crown could not be so drawn, there would be insufficient evidence in the present case. However, if the court was not satisfied that that was the correct approach, the additional ground of appeal in relation to an unreasonable verdict under section 106(3)(b) of the Act had been lodged and was available for consideration.

Grounds 3/3A - submissions of the Advocate depute

[91] The Advocate depute opened his response to this ground of appeal by outlining six legal propositions derived from *Al Megrahi* v *HM Advocate* which represented the legal background against which any ground of appeal based on insufficiency of evidence ought to be addressed: adminicles of

circumstantial evidence need not be incriminating in themselves; they should be looked at not in isolation, but in the context of the whole evidence; if capable of more than one interpretation, it was for the jury to decide what interpretation to adopt; a jury was entitled to reject evidence inconsistent with guilt, precisely because it was inconsistent with incriminatory evidence which it accepted; guilt could be established on the basis of circumstantial evidence coming from at least two independent sources; and for there to be a case to answer the whole circumstances taken together must be capable of supporting an inference of guilt. It was also stressed that the trial had been conducted on the basis that the deceased had met her death between 5 and 6pm. That had a legitimate bearing on how the jury and an appellate court should approach their respective tasks (*Megrahi*, para [319]).

[92] Against that background the Advocate depute set out twenty adminicles of circumstantial evidence on the basis of which, he submitted, the jury was entitled to convict. Many of these have been outlined in the summary of the Crown case above. However, he expanded on the facts and on the inferences which, he contended, could legitimately be drawn from the case as presented by the Crown: (1) the deceased had told her mother that she was going to meet the appellant and had left home at about 1650; (2) the appellant had called the speaking clock at 1654 at a time when, it could be inferred, he was out of his house; (3) the appellant had been seen at the east end of the Roan's Dyke Path at about 1655 with a young female who, it could be inferred, was the deceased; (4) he had been seen at about the west end of the path at about 1740-45; (5) the appellant's conduct from about 1730 was that of a person seeking to put his defence in place, his subsequent explanations of his conduct being demonstrably false; (6) it was a reasonable inference from the appellant's conduct during the search that he already knew where the body was; (7) in contrast to others, he had shown no sign of emotion when the body was found; (8) he was familiar with the wooded area behind the wall; (9) the deceased had gone with someone she knew, there being no sign of a struggle on the path side of the wall, nor of a sexual assault; (10) he had been able to describe a distinctive hair fastening which the deceased had been wearing, it not being readily visible when the body was found; (11) he had been able to name the type of tree near which the body was found, though this would have been difficult in the dark; (12) his description of her clothing implied that he had seen her that day later than at school; (13) he had had a jacket (which later mysteriously disappeared) which broadly matched that worn by the young man identified at each end of the path; (14) the log burner at his home that evening had been used, giving off an unusual smell; (15) he had previously told a witness that he could imagine getting "stoned" and killing someone; (16) he had, while showing a fellow pupil a knife, said that he knew the best way to slit someone's throat; (17) he had owned at the time a "skunting" knife which had mysteriously disappeared and equally mysteriously been replaced; (18) he had lied to the police about the last time

he had contacted Kimberley Thomson, whom he was due to meet shortly after the murder, and had not told the deceased about her (a possible source of conflict between him and the deceased); (19) he had been observed walking outside his house about 2200 (when he had had the opportunity to dispose of a knife) and (20) his alibi had been undermined by the evidence of Mrs Bryson and of his brother. The evidence regarding Marilyn Manson was not founded upon. However, Janine Jones had bought not "The Golden Age of Grotesque", but another disc.

[93] The evidence in relation to the parka, the knife and the discovery of the deceased could only be negated by an innocent explanation from the appellant. He had failed to offer such an explanation or it had been negated by other evidence. In such circumstances, an inference of guilt could more readily be drawn (*HM Advocate* v *Hardy* 1938 J.C. 144; *Langan* v *HM Advocate* 1989 J.C. 132). Reference was also made to *Maguire* v *HM Advocate* 2003 S.C.C.R. 758.

[94] The appellant's actions had also amounted to an attempt to construct a false defence; his explanations to police officers, and to the deceased's mother, as to why the deceased might not have arrived to meet him contradicted his knowledge of her movements on the evening of her death; he told David High that the deceased was not coming out, despite knowing she had left to meet him and had made no effort to enquire as to where she was when she failed to appear; and he had repeatedly lied about the circumstances in which his dog's reaction led him to the deceased. This was conduct from which incriminating inferences could be drawn (*Campbell* v *HM Advocate* 1998 J.C. 130, per Lord Justice Clerk Cullen at 137A-F; *Winter* v *Heywood* 1995 S.C.C.R. 276; *Bovill* v *HM Advocate* 2003 S.C.C.R. 182). There were a number of reasons why someone suspected of a crime might choose to lie, which might undermine the significance of this submission (*Wilkie* v *HM Advocate* 1938 J.C. 128). However, it was of the nature of circumstantial evidence that there might be more than one interpretation and it was for the jury to decide its significance (*Al Megrahi; Fox* v *HM Advocate* 1998 S.C.C.R. 115). Reliance on the appellant's lies did not involve an assumption that the opposite of what he said was true. Instead, an inference could be drawn that he was indulging in that conduct to avoid detection. Such inferences had, since the time of *Hume*, been legitimately drawn in other circumstances, such as an accused running away from the scene of a crime. *Hume* also recognised that some instances of lying could found inferences of guilt, such as awkward explanations in the case of reset (vol. I p. 114). These examples were not considered by the court in *Wilkie*. In contrast, the court in *Bovill* was referred to *Hume* and also to *Fox* and *Megrahi*. It appeared to have recognised that such lies and conduct could be of value in a circumstantial case.

[95] The Advocate depute also addressed some of the discrepancies highlighted in the submissions for the appellant. It was not irrational to infer that Mrs Bryson had seen the deceased; she had confirmed that her recollection was not complete in every detail and that she had not seen the back of the girl's top, where the "Deftones" logo was situated. Her evidence was of significance in the context of the case as a whole; it put the deceased and the appellant together shortly before the time when it could be inferred that she was killed, in a place that would fit in with him requiring to pass the locus before being later seen in the Newbattle Road area. Similarly, Miss Fleming and Miss Walsh might be wrong in their recollection of some matters. Any discrepancies regarding the description of the jacket worn by the appellant did not present the jury with an insurmountable obstacle to accepting that he was wearing such a jacket; they could find that witnesses were correct in some particulars and incorrect in others. The suggestion that the appellant simply shone a torch over the second available access point to the wall did not correspond with the appellant's own explanation of what had taken place; he told officers he had gone through the "V" point and to the left before seeing the body.

[96] The only question to be addressed in relation to sufficiency of evidence was whether there was evidence which, if accepted, would entitle the court to proceed to conviction (*Williamson v Wither* 1981 S.C.C.R. 214; *Gonshaw v Bamber* 2004 S.C.C.R. 482). Reference was also made to *Smith* v *HM* Advocate [2008] HCJAC 7. The suggestion that the quality of evidence could have a bearing on sufficiency was incorrect (cf Renton and Brown 6th Edn, paras. 18.75.2 and 21.27). The case of *AJE* v *HM Advocate* did not support that proposition; in that case it was expressly stated that there was a sufficiency (per the Lord Justice Clerk at para 19). In any event, *AJE* turned on its own extraordinary facts (*Kerr* v *HM Advocate* 2004 S.C.C.R. 319**,** per the Lord Justice Clerk at para 6; *Holland* v *HM Advocate* 2003 S.C.C.R. 616, per the Lord Justice Clerk at para 53). There was no authority that the general fairness of evidence which was not inadmissible could have anything to do with sufficiency.

[97] It was for the jury to determine what weight to attach to evidence (*Megrahi* at paras [22] - [24]). Section 106 (3) (b) did not permit this court to substitute its own verdict on the evidence. It was the verdict which had to be unreasonable, not the acceptance of any particular piece of evidence. The identification of a single rational basis for the guilty verdict defeated any argument based on unreasonableness (*Gage* v *HM Advocate* [2006] HCJAC 7; *Harper* v *HM Advocate* 2005 S.C.C.R. 245; *King* v *HM Advocate* 1999 J.C. 226). In the present case, there were a number of different rational

bases for conviction. When the circumstantial evidence was looked at as a whole, there was a powerful and compelling body giving rise to an almost irresistible inference of guilt against the appellant.

Unfairness in identification evidence (Ground 5) - submissions for the appellant

[98] Mr Findlay submitted that there were serious difficulties with the identification of the appellant made by Mrs Bryson, Miss Fleming and Miss Walsh. The photograph from which Mrs Bryson had initially identified the appellant as the young male whom she had briefly seen at the Easthouses end of the path had been taken following his detention. There was inherent unfairness in the nature of the other eleven photographs she had been asked to view: the appellant's photograph had a noticeably lighter background; the other males were not of similar appearance to the appellant; his hairstyle set him apart from the others; and one of the males appeared much younger. The witness had seen a picture of the appellant in a newspaper the following day and had confirmed in evidence that this had added some weight to her identification. These matters cast serious doubt on the value of her evidence.

[99] More importantly, the appellant was denied the opportunity of an identification parade. Reference was made to the Scottish Home and Health Department guidelines which governed the use of identification parades at the time of the appellant's detention. These indicated that an identification parade should be held where a suspect was available to take part in it, rather than photographs being used. The senior police officer involved in the investigation was never able to give a satisfactory explanation as to why an identification parade had not been held. If photographs were to be used, the guidelines made it clear that nothing should make the suspect conspicuous or draw attention to him. Given the factors highlighted, the police could not have shown any greater disregard of these guidelines. Reference was also made to the most recent guidelines by the Lord Advocate in relation VIPER parades, which involved a number of checks to ensure that nothing would alert the eye of the person viewing the parade to a particular individual. The failure to hold a parade had denied to the appellant the procedural protection of a solicitor, who would have been able to object to the appearance of any stand-ins. This was a manifest unfairness and created a real risk that the identification evidence of this witness was tainted. It was not submitted that Mrs Bryson's evidence of identification was inadmissible; but it required to be viewed with the greatest care. It was also important that Mrs Bryson had been unable to identify the young female she had seen as being the deceased and had not seen a distinctive feature of the clothing the deceased had been wearing that evening, namely, the "Deftones" logo on the back of her top.

[100] The identification evidence of Miss Fleming and Miss Walsh was also criticised. They had spoken to seeing the appellant. Fleming claimed to have seen a picture of the appellant in the Daily Record newspaper on 15 August 2003, following the murder. Her evidence in this respect was confused. In particular, she initially claimed that the newspaper was brought home to her by her partner, the witness Patrick Walsh. However, in cross-examination she confirmed that her partner was in Ireland when the newspaper in question was published. Her position then changed as to the date on which she had seen this photograph, claiming that it had been in the week of 4 - 8 August. She later accepted that she was mistaken in this regard also, as no such picture had been printed at that time. Leaving aside the issue of the timing of the photograph, the witness was confused about the image she had seen. In her statement she suggested that this was of a young man walking towards a house, but the newspaper contained no such picture of the appellant.

[101] Miss Fleming's police statement hinted at what may actually have occurred. She had informed the police that Miss Walsh, the sister of her partner, provided her with a copy of the Daily Record of 15 August 2003 on 21 August. Miss Walsh spoke to having seen this newspaper and to it featuring a picture of the appellant whom she recognised as the male she had seen. She accepted that she had then shown this picture to Miss Fleming. This demonstrated that Miss Fleming had been confused about how she came to see the picture and that she had manufactured a piece of evidence. The cross-contamination of the identification evidence between Miss Walsh and Miss Fleming was of particular importance, given the fact that no identification parade had taken place.

Ground of appeal 5 - submissions by the Advocate depute

[102] In response, the Advocate depute submitted that the evidence was admissible in law and that issues such as procedural irregularities, which bore on its reliability, were for the jury to determine (*Kerr* v *HMA* 2002 S.C.C.R. 275 at page 286 C). The issues had been explored with witnesses in cross-examination. Explanations had been offered in relation to the identification parade. It was important to note that it was not always practical to hold a parade, given the six hour time limit involved in a detention under section 14 of the 1995 Act.

[103] In assessing this matter it was also relevant that identification by Mrs Bryson was not dependent only on her selection of the appellant's photograph but was supported by the presence of a girl whose general description matched that of the deceased, by the fact that the deceased had gone to meet the appellant at about that place and time, and by the fact that the youth she saw was wearing a green

jacket of a type possessed by the appellant until that day. Furthermore, the identification was only one of at least twenty elements of circumstantial evidence implicating the accused.

[104] While acknowledging that the guidelines relied on by the appellant had not been followed, the Advocate depute stressed that there was no rule of law that an identification can only be achieved at a parade. The legitimate use of informal identifications, without procedural safeguards, was not uncommon in Scots law, as when a witness spontaneously points out a suspect close to the locus of an offence (*Muldoon* v *Herron* 1970 J.C. 30). Similarly there was no authority which would suggest that the identification of the appellant from a selection of twelve photographs was inadmissible. Nor was there authority to support the proposition that the dock identification by Miss Fleming and Miss Walsh was unfair, due to them having previously seen pictures of the appellant in the media. That was a matter of reliability and weight for the jury's consideration. Both the High Court and the Judicial Committee of the Privy Council had held that dock identification was generally admissible.
[105] The trial judge had given detailed directions about identification in this case, addressing many of the irregularities identified. The appellant had not challenged these directions. This was not a case where, in light of the evidence led, the judge ought to have directed the jury to disregard the identification evidence. That would have required an assessment that its use by the jury would be so irremediably unfair that it ought to be treated as inadmissible (*Holland*, per the Lord Justice Clerk at para [52]). There being no devolution minute, the argument about fairness was based on the common law. That could not succeed. The use of the identification evidence neither amounted to a miscarriage of justice, nor could it contribute to a miscarriage of justice.

Discussion of grounds of appeal 3 and 3A

[106] The case against the appellant was wholly circumstantial. There was no direct evidence that he was responsible for the murder of Jodi Jones. He made no statements which were directly incriminatory. The evidential principles to be applied in such circumstances are clear. They were most recently explained authoritatively in *Al Megrahi* v *HM Advocate*. We are satisfied that the propositions drawn by the Advocate depute from the Opinion in that case are sufficiently vouched by it. Implicit in them is that when any question of sufficiency of evidence arises, in the course of a trial or on appeal, the evidence relied on by the Crown is to be taken "at its highest", that is, for this purpose it is to be treated as credible and reliable and is to be interpreted in the way most favourable to the Crown. Although in some (usually simpler) cases there may arise, on a question of sufficiency of evidence,

issues as to the incongruity of separate sources of evidence, each incriminatory, no such issues arise in this case.

[107] In developing his submissions on ground of appeal 5 Mr Findlay contended that the identification evidence of Mrs Bryson was, by reason of the procedures which had been adopted and not adopted, "tainted" and "unfair" to the appellant. Similar criticisms were made of the identification made by Miss Fleming and Miss Walsh. Although at the trial objection was taken to the adducing in the course of Mrs Bryson's evidence of certain photographs which had been shown to her by the police and out of which she had picked the appellant's likeness, it was not contended before us that the leading of that or any other identification evidence was of such unfairness to the appellant that it was inadmissible in law. In these circumstances it must be regarded as legitimately before the jury for their consideration, its reliability and weight being a matter for them.

[108] For the purposes of sufficiency the court must proceed on the basis that Mrs Bryson identified (by means of photographs) the appellant as the young male she had seen with a young female (who in some respects at least fitted the description of the deceased) near the east end of the Roan's Dyke Path at about 1650-55 on 30 June and that Miss Fleming and Miss Walsh identified the appellant as the young male they had seen near the west end of that path about 50 minutes later. If that evidence was accepted, it not only destroyed the appellant's alibi; additionally it, first, put the appellant in the company of a young female who may well have been the deceased at a point of time which on the evidence may have been shortly before she met her death and, secondly, rendered the place of her death on the general route which the appellant would have had to take to proceed from one location where he was sighted to the other. Although the pathologists were unable to fix a time of death, the untoward sound heard by Leonard Kelly as he cycled along the Roan's Dyke Path would fit with the attack upon her having taken place behind the wall at that time. The absence of any signs of struggle on the path side of the wall (in contrast to the scene behind it), while not conclusive of the deceased's going willingly through the "V" gap, was suggestive that, if she went there with someone, it was with someone she knew. Such a person was the appellant, whom she had gone expressly to meet that evening. The deceased's cutting injuries are consistent with their having been caused by a knife of the kind which, at the relevant time, the appellant owned and which, without adequate explanation, then disappeared. The appellant had previously made a comment about knowing the best way to slit a person's throat - the mode by which the deceased died. There also disappeared at about this time a jacket owned by the appellant and which may have been that worn by him when sighted by Mrs Bryson; the unusual smell from the log burner at the appellant's home later that evening was consistent with

that piece of clothing, which may have held incriminatory evidence of a struggle, having been destroyed at that time.

[109] The conduct of the appellant that evening is also relevant. If he in fact met the deceased, as Mrs Bryson's evidence tended to suggest, his action in later telephoning her home to enquire where she was is suggestive of an attempt to distance himself from events surrounding her. His conduct in going directly to the "V", proceeding almost immediately to the left around the foliage, overhanging branches and tree stump, and finding the body some distance along the length of the wall on the other side, while capable of an innocent explanation, was also consistent with that of a person with knowledge that it was to be found there. The jury would have been entitled on the evidence to conclude that his explanation, namely, that he had, having walked well passed the "V", been alerted by the dog to something untoward behind the wall, was false. This being the appellant's only explanation for his conduct, the jury having rejected it were entitled to draw the alternative sinister inference; the fact that there might be a third explanation (diligent searching for the missing girl) - an explanation not founded on any evidence - did not preclude the jury from drawing the sinister inference. It is unnecessary for the purposes of this case to express a view as to whether the giving of a false explanation can, in some circumstances, itself be incriminatory (*Bovill* v *HM Advocate*). If, as the jury were entitled to do, they rejected the appellant's account of the dog having scrabbled at the wall some metres west of the "V", it is remarkable how readily the appellant, if he had no prior knowledge of the location of the body, was able to identify its position in the darkness in the relatively thick woodland. It is also remarkable, if he had not been there in daylight, that the appellant was able to speak of the special fastening in the deceased's hair (concealed as she lay dead) or identify the type of tree beside her body.

[110] We have not in this account narrated the whole circumstances founded on by the Advocate depute. Other circumstances were also capable of playing a part in building up the picture which constituted the circumstantial case. But we are quite satisfied that there was sufficient evidence led by the Crown to entitle the jury to draw the inference that the appellant was the killer. His ground of appeal 3 must accordingly be rejected.

[111] In ground 3A the appellant relies on section 106(3)(b) of the 1995 Act as the basis of a miscarriage of justice. That provides that there may be such a miscarriage based on "the jury's having returned a verdict which no reasonable jury, properly directed, could have returned". Although in consideration of such a ground of appeal it may be necessary to consider individual items of evidence, it is important to

notice that it is the verdict, that is, the conclusion on the whole evidence, which must be considered. Moreover, the ground is only made out if no reasonable jury, properly directed, could have returned the verdict in question (see *AJE* v *HM Advocate*, per Lord Justice Clerk Gill at para. [30]). The test is objective (*King* v *HM Advocate*). This court is not entitled to quash the verdict of the jury merely because, on the basis of the record of the evidence, it would have reached a different view from that which the jury plainly reached (*AJE* v *HM Advocate*, per Lord McCluskey at para. [31]).

[112] However, the task of the appeal court on such a ground necessarily involves an evaluative exercise. This is more difficult when reviewing a jury verdict, since it will not be known what view was in fact reached by the jury of individual items of evidence - what they accepted, what they rejected, what they had initial doubts about but had their doubts resolved because of other evidence in the case which they accepted as truthful and reliable.

[113] In making his submissions on ground of appeal 3 Mr Findlay sought, among other things, to undermine the reliance by the trial Advocate depute on his "second key" (Mrs Bryson's evidence). Although not at that stage in his submissions before us focused on ground of appeal 3A, the burden of his contention was that, while Mrs Bryson's evidence was admissible in law, it was for a number of reasons unreliable. Her evidence was plainly an important element in the Crown case. As we have already said, taken at its highest, it put the appellant in the company of a young woman who may well have been the deceased at a time shortly prior to when she may well have met her death; if it was indeed the deceased and the appellant whom Mrs Bryson saw, Mrs Bryson was on the evidence the last person, bar the appellant, to see the deceased alive. So, in addressing ground of appeal 3A (as well as addressing ground of appeal 5) it is relevant and necessary to examine Mrs Bryson's evidence with some care.

[114] Mrs Bryson did not know the deceased or the appellant. In the late afternoon of 30 June she was driving home from the supermarket, her two young children being in the car with her. She was proceeding south along Easthouses Road. The Roan's Dyke Path joined Easthouses Road at a point near where the road, for a person driving southwards on it, bends to the left. The entrance to the path lies ahead at this point. As she approached the bend Mrs Bryson saw two young people, a girl nearer to her (on the pavement of Easthouses Road) with her head turned to her right towards a young male who was on the path (about 20 feet from Mrs Bryson). He appeared to be gesturing towards the girl, with his palms out facing her. She thought this very strange. The view that Mrs Bryson had of the girl was of the side and back of her head. The girl had very dark hair which had a wave which suggested it had at some time been contained in a ponytail. (The deceased's hair was dark and she sometimes

wore it held in a "scrunch" at the bottom of her neck; such an item was found with her body). She described the girl's clothing as comprising a navy blue hooded jumper and pair of trousers ("I just took them to be a pair of jeans"); the trousers were lighter in colour than the jumper. (The description of the jumper was consistent with what the deceased was wearing when she left home; her trousers were dark in colour and of a "baggy" type). She was unable to see the girl's face or to form an impression of her age. The male she described in evidence as having a lot of hair ("quite messy") of a sandy/brownish colour. He was wearing a kind of green jacket which was "hippy" in length. It put Mrs Bryson in mind of a fishing type jacket, an outdoor type. His trousers were a similar colour. She saw his face "for a brief second". At a later stage in her evidence in chief Mrs Bryson was asked to look at a photograph of a jacket, similar to that which witnesses were to testify the appellant had been seen wearing before 30 June. She described what the male had been wearing as "very similar" to that photographed. She did not identify the appellant in court.

[115] In the course of Mrs Bryson's evidence in chief Mr Findlay had objected to the line of evidence in which it was anticipated that the witness would speak to having been shown by police officers a number of photographs of young males and to having picked out from them the photograph of the appellant. In support of his objection Mr Findlay took a number of points. He also gave a narrative, which was not disputed by the trial Advocate depute, as to the circumstances in which Mrs Bryson had been shown the photographs.

[116] These were as follows. On the morning of 14 August 2003 the appellant had been detained under section 14 of the 1995 Act and taken to Dalkeith Police Station where he was interviewed. While in detention he had been photographed. A print of that photograph was included in the album of photographs which was later that day shown to Mrs Bryson.

[117] Mr Findlay submitted to the trial judge that the use of photographs for the purposes of identification was a highly dangerous practice, that the particular selection of photographs made in this case was unfair (regard being had in particular to the distinctive background to the photograph of the appellant and to the circumstance that he had a different hairstyle from the others photographed) and that the officers conducting the inquiry had breached the relevant guidelines by not affording to the appellant the opportunity of an identification parade. The guidelines referred to were those dated May 1982, issued by the then Scottish Home and Health Department. These guidelines were also before us. Their promulgation followed the publication of the Bryden Report "Identification Procedure under Scottish Criminal Law" (Cmnd. 7096). They include the statement - "In all cases where identification may be an issue the police should normally hold an identification parade." (para. 3). Para. 8 reads - "A

person who is in custody is not entitled to refuse to take part in an identification parade ... " - though it is not altogether clear whether that sentence is intended to apply to a person detained under section 14, no right to require a detainee to take part in an identification parade being expressly conferred by the statute. As to the use of photographs, the guidelines state:

"29. Where a suspected person has not been apprehended and photographs are to be shown to witnesses for the purposes of identification, a witness should be shown a photograph of the suspected person along with a minimum of 11 other photographs of other persons of similar age and appearance. The photographs should bear no marks which would enable the witness to identify the suspect's photograph and the witness should not be permitted to handle the photographs if they bear identification marks on the back. The witness should be left to make a selection without help and without opportunity of consulting other witnesses

...

32. As a general rule however photographs of suspects or accused should not be shown to witnesses for the purposes of identification if the circumstances allow for physical identification."

The trial Advocate depute, acknowledging that the guidelines, as a statement of best practice, were still current in August 2003, was prepared to proceed on the basis that the procedure adopted by the investigating officers was an irregularity; but he contended that that irregularity did not render the line of evidence inadmissible. The irregularity, together with other factors criticised by Mr Findlay, went, he argued, only to the weight of the prospective identification evidence.

[118] The trial judge repelled the objection, ruling that the procedure which had been adopted by the police and the criticisms of the selection of photographs used went to the reliability of Mrs Bryson's prospective testimony, not to its admissibility. That ruling is not challenged in the appellant's grounds of appeal.

[119] The objection having been repelled, Mrs Bryson returned to the witness box. In further examination in chief she described how police officers had come to her home and shown her a booklet of photographs which she had looked at carefully, taking her time. When asked whether at that time she recognised anyone, she responded "I seen someone there, yes". That person she had been asked to point out. She had pointed to photograph No. 4 (that of the appellant). She later explained the features which were the basis of her recognition - his hair and his small face. She confirmed that at the time she had said to the police officers - "Image 4 is very very like the male I saw at the top of the path",

"He has the same shape of face, same colouring and same colour and style of hair" and "I am sure as I can be that is the same male". That was what she had felt on that day. The next day she had seen a photograph of the appellant in a newspaper, which had identified him by name. She had been totally taken aback by it. She testified "I just remember seeing it and I couldn't believe it ... because it looked to me like the same person".

[120] Mr Findlay, in cross examination of Mrs Bryson, elicited from her that the view she had had of the male was "a glance as I went round". As to the female, she recognised her sex from the shape of her body but was unable to tell her age. (It subsequently emerged that she had described the female to the police as "approximately 15-16 years"). She was cross-examined under reference to label production 146 (the black or very dark navy hooded top which the deceased had worn the evening she died) and challenged about a prominent, brightly coloured, Deftones logo or badge on its back. When asked how she could fail to have seen this, she responded "I have no idea". She was challenged on her evidence about the jacket the male was wearing, Mr Findlay eliciting a number of differences between what she had described and the label production replicating the appellant's jacket (which had subsequently disappeared). She had also described to the police the male she had seen as " ... white, early 20s, average height, not tall or short, medium build, sandy/brown hair sticking up on the top and very thick". Other aspects of her identification were explored by Mr Findlay. She at no stage retracted the identification by photograph which she had made.

[121] In re-examination Mrs Bryson confirmed that it was her impression that an exchange of some kind was going on between the young people she had seen. She confirmed earlier testimony that the image she had of the young female was of a side view.

[122] In his charge to the jury the judge said:

" There is, however, something further that I require to say about evidence of identification of the accused in various ways by a number of witnesses as a person they each said they saw at a particular place at a particular time. The Advocate Depute relies on each identification to a greater or lesser degree, as he has explained to you. The most important for the Crown case is that of Andrina Bryson, and I shall have more to say about it. But what I'm about to say applies to all identification evidence, including hers.

Errors can occur in identification. Sometimes we think we recognise somebody we've seen before. Sometimes we're right, sometimes we're 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 identifications. You will need to take special care in assessing that evidence. You may wish to consider: first, what opportunity did the witnesses have to observe the person concerned? Was it a fleeting glimpse? Was there time for reliable observations to be made? Was the person clearly visible? Second, what was the state of the lighting? Third, was the person previously known to the witness, or was he a stranger? Fourth, was the person someone with some easily distinguishable feature, such as facial features, colour and length of hair, height, build or not? Clothing may also be of significance. Fifth, how positive have the identifications been? Sixth, have the memories of the witnesses been affected in any way? To regard the identification evidence as acceptable, it is not necessary that you should conclude that the witness in question has made a one hundred percent absolutely certain identification. But with each of them you would need to be satisfied that you can rely on the substance of what he or she said: the issue here is one of reliability, and that is for you to resolve. So you will see that there are a number of important matters that require to be weighed up and the task is not an easy one.

In undertaking this task, you should bear in mind that identification depends on recognition, which is a mental process. You may wish to reflect on what is involved, in your own experience, in recognising somebody. Do you have to be able to describe someone accurately in words in order for recognition to take place? Do you have to be able to pick them out of a set of photographs of similar people, or a group of similar people, or do you just know, or at least feel quite sure, that someone you see in the street, in the pub, on the bus, or wherever it might be is a person you recognise from having seen them before? Think carefully about questions such as this, as they may be important when you consider identification evidence, especially that of Mrs Bryson."

He later said:

" The second key was the evidence of Mrs Bryson, which the Crown invited you to accept as identifying the accused, and possibly serving to identify Jodi, as the people she saw at the top of Roan's Dyke Path, very close to the time they would have met there after Jodi left home for the last time, if that was where they arranged to meet. Again, the importance of this is obvious. I have already given you directions about the care which needs to be taken in considering evidence of identification, and this applies to what Mrs Bryson said about the male and female she saw.

I would add this now. Mrs Bryson's honesty is not disputed. You may take it that she saw two people. What is in issue is her reliability in describing the female and in saying she recognised the male as the accused. You have heard a great deal about guidelines - which are just that, they are not legal

requirements, though they are there for a purpose - about the use by the police of photographs and identification parades. While it is a matter for you, you may well have understood that these procedures exist, not to make the process of recognition more demanding than it is in everyday life, but to prevent the witness, consciously or unconsciously, from picking someone out because that person is a suspect, rather than because they recognise them as the person they saw before. For an identification to be reliable - and therefore fair to the suspect or accused who is identified by the witness - it must be capable of being regarded as a genuine process of recognition, uninfluenced by other considerations.

The central question in addressing Mrs Bryson's evidence is whether it is reliable, particularly her identification of the accused from photographs. Obviously you must take into account the criticisms which have been made about the selection of photographs, with particular reference to length of hair and colour of background. The question for you is whether, when she picked out the photograph of the accused, she did so because she recognised him as the person she saw at the tope of the Roan's Dyke Path, or whether it was as a result of being consciously or unconsciously influenced by these differences."

[123] The jury were, accordingly, given comprehensive and very clear directions as to how they should approach identification evidence, and in particular the evidence of Mrs Bryson. They were aware that both the appellant and the deceased were strangers to her and that she had seen them only very briefly as she drove past. She had not seen the girl's face and, while her description of the colour of her upper clothing fitted that of the deceased, there was a possible difficulty about her not having seen, if it was the deceased, the prominent logo on the back of that garment. She had had only a fleeting glance of the male and, while she had picked out the appellant's photograph from a number of others, there were serious questions about the reliability of the procedures which had been adopted by the police - by the use of photographs at all, by the nature of the particular photographs used and by the failure to hold an identification parade.

[124] Yet, there were elements in Mrs Bryson's identification as narrated above which could found a valid identification of the appellant as the male she had seen and at least a possible identification of the deceased as the female. Even if her evidence is taken in isolation, it cannot be said that for the jury to conclude that she had reliably made such identifications would have been irrational. But her evidence was not to be taken in isolation. The deceased had left home saying she was going to meet the appellant and that they were intending "mucking about up here", that is, in the vicinity of the Easthouses settlement. She had left home at a point of time which would be consistent with meeting the appellant at about the time when the male and the female were seen close to each other at the place where they

might, if intending to "muck about" in the Easthouses area, be expected to meet. The use by the appellant of his mobile phone at 1654 that afternoon was consistent with his having left home by that time with a view to meeting the deceased. If the arrangement was to meet with a view to spending time together in the Easthouses area, a rendezvous at that end of the Roan's Dyke Path would have been natural; it was a place at which they had regularly met before. There was, in these circumstances, ample evidence on which the jury could reasonably draw the inference that the male and the female whom Mrs Bryson saw were indeed the appellant and the deceased.

[125] Once that inference was drawn there was ample evidence, among the adminicles discussed in relation to sufficiency, to allow the jury reasonably to conclude that the deceased's killer was the appellant. We highlight only a few of these. There was evidence that he was next seen at the west end of the path about 50 minutes after having been seen by Mrs Bryson. The murder scene was just off the route between these points; the diversion from the path to reach it was one which, it could reasonably be inferred, the deceased was more likely to make with a person whom she knew. If he did meet the deceased at about 1655, his telephone call to the deceased's home at 1740 could reasonably be said to be consistent only with an attempt to conceal his dealings with her. His conduct while with the search party, particularly when seen against the foregoing factors, could reasonably be taken to point to prior knowledge of the location of the body, as did his ability to describe items in that area. The mysterious disappearances of his knife and his jacket point to concealment of potentially incriminating materials. His prior statements about homicide and the use of a knife could reasonably be said to be consistent with his being instrumental in the manner of the deceased's death. In these circumstances, the jury having on this aspect of the case been properly directed on all relevant matters, the verdict they returned was one which a reasonable jury, so directed, could have returned. Ground of appeal 3A must accordingly be rejected.

Discussion of ground of appeal 5

[126] Ground of appeal 5 cannot stand on its own. "Unfairness", falling short of inadmissibility, of a particular line of evidence is not of itself a relevant ground of appeal. It goes only to reliability and weight. In relation to Mrs Bryson's evidence, we have discussed the approach which the jury acting reasonably were entitled to take to that evidence. As regards the evidence of Miss Fleming and Miss Walsh, similar considerations apply. While there were difficulties, highlighted by Mr Findlay before the jury, about their evidence, these difficulties went only to reliability and weight, which had to be considered in light of other evidence of sightings in that general area. They were not such as to give rise to a miscarriage of justice. Ground of appeal 5 must accordingly be rejected.

Ground of appeal 6

[127] Ground of appeal 6 is in the following terms:

"That the learned trial judge erred in admitting evidence of the finding of several bottles containing urine in the Appellant's bedroom in the course of a search of 203 Newbattle Abbey Crescent on 4 July 2003. The Advocate-Depute sought to elicit this evidence firstly in the course of the examination-in-chief of Crown Witness Number 164, Mahasweta Roy. Said evidence was wholly irrelevant to the proof of the crimes with which the Appellant was charged. There was no probative value which could be attached to such items. The presence of said bottles was not capable of providing any clue, link, key or motivation to or for the charge of murder. The Crown did not lead any evidence that the presence of the bottles within the Appellant's bedroom was of any significance per se. Said evidence was liable to produce revulsion in the minds of the jurors and may have influenced the jury in their deliberations. The finding of the bottles was widely and pejoratively reported in the media and suggested that the Appellant was of bad character. In repelling Senior Counsel's objection to the admission of this evidence, the learned trial judge stated that the matter was of doubtful relevance."

[128] The background to this matter is fully disclosed in the report from the trial judge. During the search of 203 Newbattle Abbey Crescent on 4 July 2003 a number of bottles containing liquid were found in the appellant's bedroom, some on and some under the bed. This was a cabin type bed and the appellant slept on the upper level. Some of the bottles could be seen in a book of photographs containing photographs of the appellant's bedroom. Forensic examination indicated that the liquid was urine. During the evidence of Mahasweta Roy, a forensic scientist, she was asked by the Advocate depute about the relevant passage in a forensic science report.

[129] Counsel objected to the leading of this evidence. It was submitted that the fact that the bottles contained urine was wholly irrelevant to the proof of the Crown case. In response the Advocate depute indicated that he sought in particular to lead the evidence in order to address a line which counsel for the appellant had taken during the cross-examination of a previous witness, David High. This witness, a schoolfriend of the appellant, was asked in cross-examination about photographs of the appellant's bedroom in the relevant book of photographs. The witness agreed that there was nothing striking to be seen in these photographs. Counsel had asked the witness, for example, about what could be seen in photograph Aj - a collection of key rings, model cars and a picture of the appellant on a horse - apparently to vouch the proposition that this was a totally ordinary young man occupying an ordinary bedroom. Once the line had been developed by counsel the Advocate depute submitted that he was entitled to lead evidence about the contents of the room. He had already done so in re-examination of

David High, who was asked about an object on a shelf below the bunk in another photograph and who said that there were two rats in a glass container. Mr Findlay, in reply, indicated that his intention in cross-examining David High had been limited to showing that there was no evidence of anything relating to the Satanic or the occult or to violence. In addition he had a particular concern in raising the objection, arising from certain questions advanced by police officers in an interview of the appellant on 14 August 2003, that the evidence might be used to suggest some sexual motivation behind the keeping of the urine bottles. The Advocate depute indicated that the Crown had no intention of suggesting that.

[130] The trial judge repelled the objection. In doing so he said, *inter alia*:

"Evidence has already been led about some of the contents of the accused's bedroom and it may be that the jury take that as an invitation to draw certain inferences. It appears to me to be legitimate to draw their attention to other items which were found in the room in order to enable them to have a complete picture before deciding whether or not to draw any particular inference. At this stage the matter does appear to be of doubtful relevance but I am not persuaded that it is so wholly irrelevant that I ought to sustain the objection."

In his report to this court he has explained in relation to the last-quoted sentence:

"By this I meant that I would not have regarded it as open to me to exclude evidence as being inadmissible unless it was clearly irrelevant to the issues at trial. There were numerous issues, and it could not be said at this stage that the finding of bottles with urine was not relevant to any of them."

[131] At a later stage the Crown sought to lead a passage from a police interview with the appellant on 14 August 2003 in which the appellant explained why he had kept the bottles - broadly, that he had started urinating in bottles because one time he had fallen off his bed when he got up to go to the toilet during the night, that he had hurt his head and had woken everyone up in the house. Again objection was taken on behalf of the appellant on the basis that the evidence was irrelevant, but potentially prejudicial. The Advocate depute indicated that in circumstances where the evidence was that on 14 April 2004 there were still numbers of bottles filled with urine in the bedroom, notwithstanding that the appellant was no longer sleeping on the upper level of the cabin type bed, he was seeking to lay a basis for a possible challenge to the veracity of the appellant's explanation in the event that he gave evidence. By this stage evidence had indeed been given by PC Anita Dow that during a search of the

house on 14 April 2004 a number of bottles containing urine were found in the bedroom. No objection was taken to the leading of this evidence.

[132] The trial judge repelled Mr Findlay's objection, saying:

"Given that I have noted evidence relating to the finding of what was in the accused's bedroom, and in light of the Advocate depute's explanation of the use he intends to make of this passage of the transcript, when the accused was asked about the bottles of urine, I propose to admit that passage. Any question of potential prejudice can be addressed in due course by an appropriate direction to the jury."

[133] In the event, this particular matter was not referred to again either in evidence or in the speeches of counsel. The appellant himself did not give evidence. In the course of his charge to the jury the trial judge said, *inter alia*:

"I must ask you to approach the task calmly and carefully and not to allow yourself to be swayed by any prejudices which might distract you from that task. Put out of your minds anything you may have heard or read about this case either before or during the course of the trial: concentrate dispassionately on your recollections and impressions of the evidence. As is often said, this is not a court of morals: you are not here to judge the accused on the basis of his personal conduct or habits or lifestyle, except to the extent that these may be relevant to the issues of fact which you have to decide."

[134] In support of the appeal to this court, Mr Findlay essentially rehearsed the ground of appeal as stated. He stressed again that in asking questions of David High his intention had only been to emphasise that there was no evidence of any Satanic posters or the like in the room. The leading of the evidence by the Crown, including evidence of the relevant passage of the interview, was unnecessary and unfair. It was accepted, however, that on its own this ground of appeal could not be said to have led to a miscarriage of justice.

[135] The Advocate depute submitted that it could not be said that the trial judge had erred in relation to the repelling of the objection when it was first taken, given the evidence which had been taken from David High. The same could be said in relation to the objection which had been taken to the relevant passage of the police interview, although it was not clear that the ground of appeal as stated related to that. It was to be noted that evidence had been led of the finding of bottles of urine on 14 April 2004

without objection. In any event the matter was not of any significance by the end of the trial and, if there was any prejudice, it was removed by the careful directions of the trial judge.

[136] We have reached the clear view that there is no merit in this ground of appeal. On the information before him, and in light of the apparent cross-examination of David High by counsel for the appellant, we consider that the trial judge cannot be faulted in allowing the questioning to proceed. Counsel's intention may have been subjectively limited but that would not have been self-evident on the face of his apparent cross-examination. Nor, in light of the claimed potential use of the relevant part of the police statement, can it be said that the trial judge erred in allowing evidence to be led of it. Indeed, it is not obvious that the ground of appeal extends to criticism of the trial judge's decision in that respect and, as the Advocate depute noted, evidence was earlier led without objection of the finding of bottles of urine in the bedroom on 14 April 2004. In the event the matter was not further developed or mentioned by the Crown in any way, and if there was any residual prejudice we are satisfied that it was removed by the careful directions of the trial judge.

Ground of appeal 7

[137] This ground of appeal is in the following terms:

" That the learned trial judge erred in admitting the evidence of a tape recorded interview with police officers on 14 August 2003. The transcript of said interview comprised Crown production No. 44. Objection was taken to the leading of said interview from the thirteenth page until its conclusion. No objection was taken to pages 1 - 12 of said interview. The interview with the appellant, who was 15 years of age, was conducted out with the presence of his solicitor and in circumstances which were wholly and manifestly unfair. In particular, the approach of the police officers conducting the interview changed significantly from page 13 of the transcript and became provocative, misleading and hectoring in nature. The tactics adopted by the police officers amounted to bullying in the context of the interrogation of a young man.

It was accepted by the Crown that it would be inappropriate to lead certain sections of the interview because they contained strong assertions of opinion by the police officers, made reference to material which was inaccurate or misleading, and contained allegations for which there was no basis in evidence. The Crown however sought to make use of other portions of the interview and therefore to 'cherry-pick' portions thereof.

The leading of said interview in this manner amounted to a serious misrepresentation of the facts and circumstances of the matter to the jury. Sections of the interview were led in evidence which, although apparently conducted in a civilised and courteous fashion, had in fact been preceded by sections where the approach and tactics adopted by the police officers was manifestly unfair. The defence was then placed in a position where it was impossible to place the interview in its proper context without making reference to material which was either irrelevant or inadmissible. In such circumstances, the learned trial judge erred in admitting the evidence of said tape recorded interview."

Submissions for the appellant on ground of appeal 7

[138] Mr Findlay made clear that this ground of appeal related only to a part of the interview conducted by police officers with the appellant on 14 August 2003 between 1050 and 1337 hours. The interview was conducted by three police officers, Detective Constable George Thomson, Detective Constable Russell Tennant and Detective Sergeant David Gordon. Apart from the police officers present, a senior social worker from the Dalkeith Social Work Department was present, as an appropriate adult, having regard to the age of the appellant at the material time, it having been considered that the appellant's mother could not properly undertake that responsibility since she was a potential witness in the criminal investigation. The appellant had been under detention at the time of the interview in terms of section 14 of the 1995 Act. It was made clear that, in the submission of the appellant, the interview had been unfair as regards that part of it which commenced at page 12 of the transcript, Crown production 44. Accordingly, that material ought not to have been admitted in evidence. It was accepted that the objectionable part of the interview had not been played to the jury, nor had the trial judge listened to it. The issue arising out of this ground of appeal had been dealt with by the trial judge between paragraphs [160] and [168] of his report to this court. The appellant's submission was quite simply that the objections taken on his behalf should have been sustained by the trial judge.

[139] Counsel then proceeded to draw our attention to the transcript of the interview, from page 14 onwards. An example of the outrageous questioning conducted by the police interviewers was to be found at page 20 of the transcript. In the lengthy question on that page, numerous points had been put in a conflated manner, without the interviewer waiting for the suspect to give an answer. The inference was that the interviewer had not actually been interested in obtaining an answer to the various points in the question, but had rather been putting pressure upon the suspect, with a view to extracting some admission of significance from him. Similar questioning occurred at pages 21 and 22. At page 17, the suspect had, following a barrage of questions to which the questioner had not awaited any answer,

conceded that his mother and brother had had a fire on the night of 30 June 2003 in the log burner in the back garden of the house where the suspect lived. At page 21 the suspect had, following multiple assertions by the questioner of knife-carrying by the suspect, agreed that a knife shown to him, Crown label production 301, was his fishing knife. More questioning of an unfair nature was to be found at page 25 of the transcript. At page 27 a further composite question was put making very serious allegations to the suspect. Much of the questioning was of a repetitive nature. At pages 28 to 29 there was more questioning of a bullying and badgering nature. It was submitted that the police questioning was quite plainly a deliberate pre-planned attempt to provoke the appellant, which, it was hoped, would result in him incriminating himself. There could be no other explanation for the character of the questioning. It was evident from some of the appellant's answers that he had been riled and provoked by the police questioning into giving coarse and abusive answers to them, which might be thought to reflect badly upon him. In the course of some passages, police officers had put to the appellant suggestions that were not in fact vouched by any evidence in their possession. An example of that was to be found at the bottom of page 40 of the transcript. The questioning at page 45 of the transcript concerning the finding of the body of the deceased was grotesquely unfair. That and the material at page 46 was crucial to the Crown's case and had been used by them. The Crown had also made use of the passage between pages 63 to 65 of the transcript, concerning the actions of the appellant after the deceased had not appeared for the meeting that he had contemplated would take place. That had been preceded by more bullying questioning at pages 47 to 48 of the transcript. Passages at pages 53 and 55 demonstrated that the police had, quite simply, not been interested in receiving answers to their express questions; the questions were put in a bullying and overbearing manner, with the view to endeavouring to extracting damaging admissions from the appellant. On page 61 more inaccurate propositions had been put to the appellant. At page 70 there was a passage relating to the appellant's call to the speaking clock, upon which the Crown relied. At page 65 of the transcript, the interview had reached a stage when Detective Sergeant David Gordon had entered the room. There followed what might be called the "good cop, bad cop" routine. That was quite simply a trick designed to extract an admission from the appellant. Associated with the arrival of Detective Sergeant Gordon the questioning had moved on to the alleged sexual satisfaction which the appellant might have enjoyed from killing the deceased.

[140] The fact that the Advocate depute had led evidence concerning the interview under consideration showed that the Crown was using the things said at the interview for the purpose of supporting its case, rather than providing material which could be used in cross-examination, were the accused to have decided to give evidence. If the Advocate depute had simply wished to make use of the transcript of

the interview in cross-examination of the appellant, were he to have given evidence, that could have been done by putting it to the appellant as a prior inconsistent statement. Examination of the Advocate depute's speech to the jury at pages 119 to 124 of the transcript demonstrated that the Crown were using the material in the interview to assist the Crown case.

[141] In elaborating his submission that the trial judge's decision to admit the parts of the interview objected to in evidence was wrong, counsel referred to *Lord Advocate's Reference (No. 1 of 1983)* 1984 J.C. 52. What had been said in that decision at page 58 could have been devised with this particular interview in mind. The police in the present case had fallen far short of all that was required of them. There had been unfairness, cross-examination, pressure, deception, or at least carelessness in questioning, and bullying. The police had plainly embarked upon a campaign to try to force a confession from the appellant. The trial judge had failed to recognise that state of affairs.

Submissions of the Advocate depute on ground of appeal 7

[142] The Advocate depute submitted that nothing elicited in the course of the interview, even if elicited unfairly, could amount to a miscarriage of justice. In any event, there was very little that was elicited during the course of the interview that was not already before the jury, having been led from other sources. There had been eight passages from the interview that the Advocate depute had sought to lead in evidence. None of these eight passages affected the issue of sufficiency of evidence. Rather, the material elicited from the interview had been used only to discredit exculpatory statements made by the appellant to the police. Further, none of the eight passages occurring after page 12 of the interview had been the subject of specific objection, as appeared from what the trial judge said in paragraph [165] of his report.

[143] Furthermore, it was submitted that nothing had been elicited which was new material. The passages which had been led in evidence could be seen from the transcript of proceedings on 30 December 2004 from page 1716 onwards. The record of the objection and the submissions made in connection with it could be seen from page 1557 and following pages of the transcript of proceedings on 29 December 2004. At page 1662 and following pages of that transcript, it was made clear that the only possibly new material elicited from the interview related to the telephone call by the appellant to the speaking clock and to the photograph of the knife which figured in the interview.

[144] The first passage that had been founded upon by the Crown was to be found at page 17 of the transcript of the interview, where the appellant agreed that on 30 June 2003 his mother and brother had had a fire in the log burner. However, there had been evidence of that fire from Mr and Mrs Frankland and also from Mr Ramage. The second passage relied upon was at page 21 of the transcript

of the interview and related to the knife owned by the appellant. A photograph of the knife had been shown to him. That photograph had not featured elsewhere in evidence, but the knife itself had done so, for example, at page 106 of the transcript of the earlier part of the interview, Crown production 42, which had not been objected to. A further passage relied upon was to be found at page 35 of the transcript in which the appellant had explained why he did not telephone the now deceased to see where she was when she failed to meet him. It was submitted that this passage had not made any new contribution to the evidence, since the appellant had said to David High that that was the case. Reference was also made to the transcript, Crown production 40, pages 70, 120 and 143. The fourth passage relied upon by the Advocate depute was at pages 36 to 37 of the transcript, where the appellant was asked why he had not telephoned Jodi Jones when he had got home after playing with his friends. There had been nothing in that passage which had not appeared elsewhere in the evidence. The fifth passage relied upon appeared at pages 39 to 40 of the transcript of the interview, where the appellant had been asked about what he had said to David High when he met him and why he appeared to know that David High had said to the police that the appellant had said to him that Jodi was not coming out on the night in question. The fact was that the appellant had not agreed that he had said this at all. In any event, there had been no overbearing behaviour on the part of the interviewers at that point. Further, the appellant had said to Judith Jones that he had thought that Jodi had been "grounded". A further passage founded upon appeared at page 46 of the transcript and concerned the position of the appellant relating to the events just before the finding of the body of the deceased. It was to the effect that the four members of the search party had gone past the "V" shaped break in the wall when the appellant went back to it. This response by the appellant was given without any overbearing behaviour on the part of the questioning police officers. In any event, his position on that had been before the jury in a variety of other forms. In that connection reference was made to page 17 of Crown production 155, page 129 of Crown production 40, page 155 of Crown production 40, pages 100 to 101 of Crown production 42 and page 11 of Crown production 44, to which no objection had been taken. So, even if there had been any unfairness in the manner of questioning which elicited this material, no consequence attached to that. In particular, no miscarriage of justice had occurred. A further passage relied upon by the Advocate depute was that at pages 63 to 65 of the transcript. It related to the explanation given by the appellant as to what he had assumed when the deceased had failed to meet him, as arranged. Those answers had already been given elsewhere in a form which had not been objected to. In that connection reference was made to Crown production 40 at page 108. Accordingly, this passage could not constitute a miscarriage of justice, even if unfairly elicited, which it had not been. The final passage relied upon by the Advocate depute was at page 70 of the transcript. It related to the seeking of an explanation from the appellant as to his use of his mobile telephone to

telephone the speaking clock. He had given no explanation of that. However, there had been nothing unfair about the questioning which elicited the answer that the appellant could not explain why he had done that.

[145] It was true that it had not been necessary for the trial Advocate depute to elicit these passages for the purpose of cross-examination of the appellant, in the event that he gave evidence. However, it may have been anticipated that the accused would not himself give evidence. In that situation it was entirely comprehensible that the Advocate depute might have wished to elicit the material as part of a mixed statement by the appellant. The purpose of the Advocate depute's exercise was essentially not about the character of the appellant, but his credibility.

[146] It had been within the province of the trial judge to form a view as to whether the material founded upon had been unfairly obtained. He had concluded that it had not and this court should be slow to interfere with the trial judge's decision. He had not had the benefit of hearing a trial within a trial in relation to this matter, since that had not been requested by the appellant. If nothing elicited could be shown to be causally linked to what could be viewed as unfair questioning, then there could be no practical result flowing from any unfairness in questioning. In any event, if the appellant had sought to demonstrate that the conduct of the interview was unfair and that the results of it were inadmissible, that matter should have been explored before the trial judge at a trial within a trial. It was too late to raise that matter in an appeal, that not having been done. In that connection reliance was placed upon *Beattie* v *HM Advocate* 1995 J.C. 33 at pages 40 to 41. In *L.B.* v *HM Advocate* 2003 J.C. 94, at paragraph [15] of the Opinion of the Court, it was indicated that a decision as to the fairness of the proceedings in which an accused person answers questions put to him by the police was, in the first place, a question of fact for the trial judge to determine. Where such a decision had been made by a trial judge, an appeal court would interfere only if the trial judge had erred in law, or if his decision had been manifestly unreasonable. Neither of those things could be said in this case. In the present case, the trial judge's reasons for reaching the decision which he did were available in paragraph [168] of his report. The appellant had plainly not, in fact, been intimidated, or successfully bullied, by the police. Indeed, it could be said that he had given as good as he got. He made no admission of guilt. In any event, of the eight passages founded upon by the Crown none had been evoked by unsatisfactory questioning. The fact was that any unsatisfactory questioning had not elicited any useful information. Before answers could be held to be inadmissible, it was necessary to show that they had been extracted by unfair means. In that connection reliance was placed on *Lord Advocate's Reference (No. 1 of 1983)*. Reference was also made to *C.W.A.* v *HM Advocate* 2003 S.C.C.R. 154.

[147] The Advocate depute frankly admitted that some of the police questioning in the course of the interview had been quite terrible, the police officers putting multiple questions to the appellant and not furnishing him with the opportunity to answer each part of those questions. That appeared, for example, from pages 55, 56 and 61 of the transcript. However, nothing of any value had been elicited by these questions. In any event, leaving aside the issue of fairness, it could not be contended that any miscarriage of justice could arise out of the terms of the interview, since almost all of the material that had been relied upon was before the jury, having been obtained from other sources.

Discussion of ground of appeal 7

[148] It is appropriate, at the outset, to set out the criteria which are to be applied in the resolution of an issue, such as that raised by this ground of appeal. For present purposes, it is sufficient to refer first to what was said by the Lord Justice General (Emslie), in *Lord Advocate's Reference (No. 1 of 1983)*. At page 58 he said this:

"A suspect's self-incriminating answers to police questioning will indeed be admissible in evidence unless it can be affirmed that they have been extracted from him by unfair means. The simple and intelligible test which has worked well in practice is whether what has taken place has been fair or not? (See the opinion of the Lord Justice General (Clyde) in *Brown* v *HM Advocate* 1966 S.L.T. 105 at p.107). In each case where the admissibility of answers by a suspect to police questioning becomes an issue it will be necessary to consider the whole relevant circumstances in order to discover whether or not there has been unfairness on the part of the police resulting in the extraction from the suspect of the answers in question. Unfairness may take many forms but 'if answers are to be excluded they must be seen to have been extracted by unfair means which places cross-examination, pressure, and deception in close company' (see my own opinion in *Jones* v *Milne* 1975 J.C. 16). For the avoidance of doubt I should add that where in the opinions [in] the decided cases the word 'interrogation' or the expression 'cross-examination' are used in discussing unfair tactics on the part of the police they are to be understood to refer only to improper forms of questioning tainted with an element of bullying or pressure designed to break the will of the suspect or to force from him a confession against his will."

At page 59, the Lord Justice General continued:

"... I wish to say that upon a consideration of an accurate transcript of an interview of a suspect under caution, whether or not it has been tape-recorded, it may appear, for one of a number of reasons, that certain answers must be excluded from consideration by a jury. One such reason might be that the answers disclose that the suspect had previously been convicted. Another such reason might be, for

example, that certain particular answers had been extracted from the suspect by particular questions which were plainly improper questions of the kind which has been discussed earlier in this opinion. The point to be made is that the presence in a transcript of an interview with a suspect under caution of certain answers which, for a sound reason, must be withheld from a jury will not by itself normally justify a trial judge from excluding from the jury's consideration the remainder of the transcript."

That latter passage is of some importance in the context of the present case in which it was argued on behalf of the appellant that the whole of the interview in question after page 12 of the transcript should have been excluded from the jury's consideration.

[149] Where, as here, the issue of whether certain replies to police questions should have been excluded from the consideration of the jury arises in this court, as opposed to before a trial judge, it is important to understand the approach which this court should take to a decision reached by a trial judge in this regard. In that connection we refer to *C.W.A.* v *HM Advocate*. At paragraph [16] of the Opinion of the Court, the Lord Justice Clerk (Gill) said this:

"In our opinion, this ground of appeal is unfounded. Where objection is taken to the fairness of a police interview and there is a trial within a trial, the question of fairness is pre-eminently a question of fact for the trial judge. We can interfere with his decision on that matter only if he has erred in law or if his decision is manifestly unreasonable. In this case, the trial judge had the advantage of hearing the tape recording of the interview and of seeing and hearing the police officers in the witness box. In our opinion, we could not even consider the soundness of the trial judge's decision since we have been referred only to the transcript of the interview.

[17] In any event from the terms of the trial judge's report we can see no reason to think that his judgment was unsound in any respect."

[150] A similar view was taken by this court in *L.B*. v *HM Advocate*. At page 102, delivering the Opinion of the Court, Lord McCluskey said this:

"[15] In our opinion, it is clear that the assessment of the fairness of the proceedings in which an accused person answers questions put to him by the police in a police station, whether the suggestion is that the methods employed produced unfairness or that the personal vulnerability of the person being questioned had that result, is in the first place a question of fact for the trial judge to determine at the trial within the trial. The decision as to fairness is one for him to make in the light of the facts as determined by him: *Thompson* v *Crowe*. The role of this court in an appeal against the trial judge's decision was restated in *C.W.A.* v *HM Advocate*, where the Lord Justice-Clerk, delivering the Opinion of the Court said [at this stage his Lordship quoted the passage from that case to which we have just

referred]. In our opinion, those observations properly describe the appeal court's approach, whether the unfairness is said to derive from the methods used or from the circumstances of the person interviewed."

[151] In both *C.W.A.* v *HM Advocate* and *L.B.* v *HM Advocate* the circumstances were that a trial within a trial had been held before the trial judge. In the present case, of course, no such procedure was undertaken. Indeed, although willing to do so, the trial judge was not even invited to listen to the tape recording of the interview in question. In these circumstances, the trial judge, as he himself observes in paragraph [168] of his report to this court, had to make what he could of what appeared on the printed page. Notwithstanding that state of affairs, we are of the opinion that the criterion set forth in paragraph [16] in *C.W.A.* v *HM Advocate* remains cogent, since what this court is being asked to do is to review an exercise of discretion by the trial judge. There being no alleged error of law in his approach, the question for us must be whether his decision was manifestly unreasonable.

[152] Turning then to the decision of the trial judge, recorded in paragraph [168] of his report, it is to be noted that, although the appellant was but 15 years of age at the time of the interview, there was present at it, apart from the police officers involved, a senior social worker from the Dalkeith Social Work Department, who was there as a responsible adult, it being inappropriate that the appellant's mother should undertake that responsibility. Before coming to consider, so far as necessary, the details of the interview, it is appropriate to make some general observations. In that part of it which was objected to, commencing at page 12 of Crown production 44, undoubtedly some of the questions put by the police officers can only be described as outrageous. One of the clearest examples of what we mean is to be found at page 55 of the transcript. There, D.C.2, having shown to the suspect a video of the murder scene and having elicited from him certain answers, poses what purports to be a question as follows:

"You say you recognise it as Jodi and you say you can see that it had throat and you said you could see it was completely naked. Now what's nonsense cause you've just watched that and you cannae tell that, you say you can see you barely see something there. What you've said you're a liar, you're a liar. Everything you've been constantly lying to us all the way through this interview. You've lied to us about using cannabis - you use cannabis all the time, we've had loads of people tell us you use cannabis three times as much as anybody else would. You buy. We know who you buy the cannabis from, do you think we've no done an enquiry blah blah blah blah blah. We know who you bought the cannabis from, we know the amounts he sells it to you, we know the people that you sell it to a day after, we know that. You've lied about that, you've lied about all these knives, you say well I dinnae have these knives there's, as I say, 45 people telling us you had knives, you, are they all lying as well?

These, the three people down the path, Alice, Steven and Janine, are they lying as well? That video reconstruction there shows that you could not have seen Jodi and recognise it as Jodi."

It will be seen from this purported question that, quite apart from its incoherence, the questioning officer sought to obtain a response on a range of disparate points. Yet, the appellant was given no opportunity to deal with each point as it was raised. Indeed, it is apparent to us from the nature of the questioning that the questioner did not seem to be seriously interested in the responses that separate parts of the question might evoke. One is driven to suppose that what was happening when questions, such as that quoted, were asked was that the questioning police officer was endeavouring to break the appellant down into giving some hoped-for confession by his overbearing and hostile interrogation. Examination of the parts of the interview objected to shows that the interviewing police officers asked a number of similar questions. We are driven to conclude that their purpose was as we have described.

[153] It might be that, if any effects of the improper questioning could plainly be said to have persisted and, for example, if the appellant had in fact confessed guilt during the course of this interview, the view could have been taken that the whole of the part of the interview objected to was unfair and that any confession that might have been made was improperly obtained. However, that is not what happened. Examination of the appellant's answers shows quite clearly that he was not cowed or overwhelmed by the improper questioning to which he was subjected. Indeed, he can be said to have responded forcefully, from time to time using colourful language as an expression of his disapproval of what was happening. It is also worth observing that the social worker who was present at the interview, as a responsible adult, at no time felt it necessary to intervene to protect the appellant. In these circumstances, we consider that the trial judge was justified in concluding that that part of the interview objected to, as a whole, was not unfairly obtained and hence tainted. The argument that the whole relevant part of the interview was vitiated was, of course, put to us. That is an argument which we must reject.

[154] In these circumstances, it is necessary to consider the position in relation to those particular parts of the appellant's replies to questioning that the Crown founded upon during the course of the trial, with a view to seeing whether those individual replies were given to questions which ought to be regarded individually as unfair. The first of these replies is that at page 17 of the transcript concerning the fire at the log burner in the back garden on 30 June 2003. The appellant agreed that his mother and brother had had a fire. Looking at the questioning to which that reply was given, no unfairness strikes us as being involved. Furthermore, evidence of the existence of such a fire had been laid before the jury from Mr and Mrs Frankland and Mr Ramage. The second particular passage to be considered is that at page

21 of the transcript relating to the subject of knives. The appellant accepted that he had a fishing knife. The context of that admission does not suggest to us that it could be said that the questioning that led up to that admission was unfair. In any event, the jury had already heard evidence about the knife in question, evidence which had not been objected to. The third passage to be considered appears at page 35 of the transcript. It concerns what the appellant had said to David High. Looking at the questioning which evoked the particular answers to which attention was drawn, we do not consider that there is anything unfair about them, so far as the transcript shows. Attention was focused on a fourth passage at pages 36 to 37 of the transcript where the appellant was asked as to why he had not telephoned Jodi Jones when he got home after playing with his friends. Once again, looking at the questioning which elicited the appellant's responses, it does not appear to us that it was unfair in any respect. The fifth passage to be considered appears at pages 39 to 40 of the transcript. There the appellant was asked about what he had said to David High. It was put to the appellant that he had said that "Jodi's not coming down tonight". Again, there appears to us to be nothing about the questioning that occurred at that point in the interview to suggest that it was unfair. In any event, when the question was put the appellant simply denied that he had said such a thing. At page 46, the appellant was asked in detail about what had happened on the pathway shortly before the finding of the body. This had been the subject of evidence from a number of sources. Various propositions were put to the appellant, but he robustly rejected them. We see in this part of the interview nothing to suggest that the questioning was itself unfair. In any event, the same matter was the subject of questioning at page 11 of the transcript, which was not objected to. At pages 63 to 65 of the transcript of the interview the appellant was questioned in relation to what he had assumed when Jodi Jones had failed to meet him as previously arranged. Once again, we see nothing in the questioning in this particular part of the interview that suggests that it was unfair. Furthermore the appellant gave clear and robust answers to the questions. Finally, at page 70 of the transcript, the appellant was asked as to why he had used his mobile telephone to telephone the speaking clock. The questioning about that was straightforward; there was nothing to suggest to us that it was unfair. The appellant simply indicated that he could not explain why he had done that.

[155] Having considered all of the various passages which, in one way or another, had been made use of by the Advocate depute, derived from the interview, we can find nothing to suggest that the replies of the appellant were obtained by unfair means. In this situation, having considered the whole circumstances of the interview, our conclusion is that the trial judge's decision to repel the objection to the admission of the passages in it sought to be adduced in evidence by the Crown cannot be said to be manifestly unreasonable, albeit we would have to question his apparent lack of criticism of certain

of the questions put in the course of the interview. Certainly, we ourselves are not persuaded that the answers which were led could be said to have been inadmissible. We can identify no reason why we should interfere with that decision. In any event, we would not have been persuaded that the admission of the particular passages which were led in evidence could be said to have led, given their content, to a miscarriage of justice. Accordingly, we reject this ground of appeal.

Ground of appeal 9

[156] Ground of appeal 9 is in the following terms:

"That the Learned Trial Judge erred in admitting the evidence of Crown Witness (139) Michelle Lindsay a police officer. Appointed as a family liaison officer to the Appellant's family, the witness and the police body as a whole failed to make clear that as an investigating officer this witness could and would be investigating the Appellant and his family in particular. The propriety of a police body to use an officer in a position of trust to further their investigations without affording an individual proper and recognised safeguards is manifestly unfair and any evidence flowing from such exchanges should be ruled inadmissible. Fairness demands moreover that where suspicion has crystallised on any individual he or she ought to be cautioned before being questioned on any matter relevant to the crime under investigation.

It is submitted that this witness failed to properly explain her role to the Appellant and his family. Moreover it is submitted that the Learned Trial Judge erred in ruling that suspicion only crystallised in respect of the Appellant on the evening of the 3rd July 2003. Evidence of exchanges in the absence of a police caution between this witness and the Appellant from the 1st to 3rd July 2003 ought not to have been admitted in evidence."

[157] Once again the background to this matter is fully described in the report from the trial judge. Detective Constable Michelle Lindsay was called as a Crown witness. She gave evidence that she had worked in the Family Protection Unit since April 2002. After the death of Jodi Jones, she was appointed as family liaison officer for the Mitchell family. It was usual for a family liaison officer to be appointed, for example to the family of a victim of a crime, and in this instance because the appellant had been Jodi Jones' boyfriend and had found her body. She was appointed on 1 July 2003 and contacted the Mitchell family that evening. She spoke to the appellant's mother, Corinne Mitchell. She went to see the family, and visited regularly afterwards. She was at their house on Wednesday 2 July 2003 and was present when there was a news item on the television. The appellant was there and she spoke to him about the content of the news item. At that stage she knew where the body had been found. She

asked the appellant where Jodi Jones would have gone, and he offered to draw a sketch plan. At the point at which the Advocate depute asked her to look at the sketch plan Mr Findlay objected both to the question and to the line of evidence, and the trial judge heard counsel in the absence of the jury and the witness.

[158] Objection was taken on the basis that any evidence as to the sketch plan was not admissible since the appellant, on whom suspicion had crystallised, should have been cautioned. After further discussion it was agreed that the trial judge would hear evidence in a trial within a trial. In the course of the trial within the trial evidence was led from three police officers, including DC Lindsay. One of the witnesses, Detective Inspector Thomas Martin, gave evidence that he was the force co-ordinator and spokesperson in respect of family liaison officers. He said that these might be appointed in a range of circumstances. A family liaison officer might be appointed to the victim of a serious crime, if this was thought to be beneficial to the conduct of an investigation. A family liaison officer might also be appointed to someone who had been closely associated with a victim. There was a special national training course for family liaison officers. Their primary role was as investigators. Their duties included getting all of the information about a family and its associates and the family circle. They would take statements, interview people, act as consultants on legal matters, provide information about the state of the investigation and gather intelligence about the family. They would offer and provide support. The witness explained that family liaison officers were trained that, where a person was a suspect, their role differed. Consideration would be given to the experience of the family liaison officer, closer monitoring and the safety and welfare of the family liaison officer. It would also be ensured that there was corroboration at all times by having two officers present.

[159] Following evidence in the trial within the trial the trial judge repelled the objection. In giving his decision he said, *inter alia*:

"In the present circumstances, I propose to assume, without deciding the matter for any other purpose, that suspicion had centred on the accused no later than the afternoon of 3 July 2003, when Detective Superintendent Dobbie gave the above instructions, including the administration of a caution to the accused when he was interviewed the next day. Had it centred any earlier? I am satisfied, on the balance of probabilities, that it had not. Suspicion is a state of mind. To say that suspicion centred on someone is to say that there was the state of mind of the police both collectively and individually. Detective Superintendent Dobbie gave an account, which I accept, of the considerations which came to his notice on 3 July 2003 and led him to give these instructions. It was only then, in my view, that

the stage had been reached that suspicion had formed to the extent that it was appropriate to treat the accused as a suspect, rather than as a witness who required to be eliminated from the enquiry, if possible. It is consistent with this that Detective Constable Lindsay, whose duties included the investigation of the Mitchell family, was not accompanied on 1 or 2 July 2003 by a corroborating officer, as would have been done had a member of the family come to be suspected of the murder. Her evidence was that she was treating the accused as a witness on those dates.

The only significant factor which might militate against this is what happened in the early hours of Tuesday 1 July 2003. The accused and his mother were interviewed at Dalkeith Police Station, while Alice Walker, Janine Jones and Steven Kelly, the other members of the search party, were interviewed at Newbattle Police Station. No significance appears to me to attach to the use of different police station, the decisive factor being proximity to home addresses.

At the conclusion of the interview with the accused, which was not under caution and in respect of which evidence had been led without objection, he agreed to the taking of his clothes by the police and the examination of his person and the taking of a blood sample by a police surgeon.

None of these steps was taken at the time in relation to the other three, two of whom, Steven Kelly and Alice Walker, had gone through the 'V' into the crime scene, and indeed Alice Walker had touched the deceased.

I do not, however, draw the inference from this that the accused was treated differently - as he was - because suspicion had by then centred on him. The officers who interviewed him no doubt followed best practice, but they took their own decision as to how to proceed, without reference to any superior.

By then the enquiry team had not been formed. There was no directing mind in the shape of a senior investigating officer or one of his deputies; and there is no evidence of co-ordination between the officers who interviewed the accused and his mother and those who interviewed the other three at a different police station.

Accounts no doubt require to be taken of the condition of each person, and this, I accept, would have contributed to the manner in which each was treated, even if - with hindsight - it might have been done better.

In short therefore I am satisfied on a balance of probabilities that suspicion had not centred on the accused on Wednesday 2 July 2003; that no caution required to be administered to him by Detective Constable Lindsay before he made any statement to her; that the requirement of fairness had been

fulfilled; and that the line of evidence relating to the statement is admissible. For these reasons I repel the objection."

[160] Thereafter the evidence of Detective Constable Lindsay proceeded. She said *inter alia* that she went to the house at about 11 o'clock on 2 July. On the television in the livingroom there was a news item about the killing of Jodi Jones. She asked the appellant a question as to which way Jodi would have walked. He replied that she would have come out of the house, walked down the side of the janitor's house (i.e. Roan's Dyke House), past the back of the school, and down the Roan's Dyke Path. Detective Constable Lindsay said she knew the path. She asked him where this was. The appellant offered to draw her a sketch of the route, which was production No. 14. He marked Jodi's house with a cross, and then showed arrows from there, past the janitor's house (Roan's Dyke House) on to the junction with the Lady Path and thereafter on the other side of the wall from the Roan's Dyke Path which he marked with a hatched line and the word "path", to the point which he marked with an X and the words "body found". The wall was shown as a solid line. Detective Constable Lindsay said that the appellant told her he was aware that there was a hole in the wall at the junction and a small path close to the wall. The arrows were shown on the woodland side of the wall. She asked him if he had been down this route. He said that there was not a very good path and he had only been a short way down.

[161] In presenting this ground of appeal Mr Findlay submitted that in the circumstances the appointment of a so-called family liaison officer (and her actings) could be seen as part of the overall failure of the police to treat the appellant fairly. Whatever the position of the appellant as a matter of law he was, for all practical purposes, under suspicion from shortly after the finding of the body. He had been treated differently when first interviewed from the other members of the search party, as described by the trial judge. The term family liaison officer was misleading, given the apparent investigatory role. If such an officer was to have such a role, fairness demanded that the appellant's family should have been left in no doubt as to the investigatory role and the administering of a caution could have been appropriate. Nevertheless, on reflection, counsel did not now seek to suggest that the trial judge had erred in repelling the objection to the admission of the relevant evidence, nor could it be said that any unfairness in this matter - looked at on its own - could be said to be such that a miscarriage of justice had resulted.

[162] In light of the above, we can therefore deal shortly with this ground of appeal. The trial judge's decision that the appellant was not a suspect at the relevant time and thus that no caution required to be given is not now impugned, nor it is maintained on any other basis that the court should have held

the relevant evidence to be inadmissible. Although it is said in the grounds of appeal that the officer should have explained properly her role to the family and to the appellant (and it may be that the term family liaison officer could be regarded as potentially misleading), this was not, at any rate clearly, a ground of objection to the admissibility of evidence at the trial, and in any event (as the Advocate depute pointed out) the witness gave evidence, in cross-examination (at page 1369), that she explained to the family that part of her duties involved the gathering of evidence and taking statements from them, and that the statements and enquiries she was making were to assist with the investigation. In any event, it must have been plain to the appellant that in asking him to draw the sketch and in asking the related questions she was seeking his assistance in relation to the investigation. There was no evidence that he was in any way misled. Nor could the information provided be regarded, given the other evidence led in the trial, as being of particular significance by itself. As the trial judge informs us, the appellant told the police at interview on 4 July 2003 that he and Jodi would sit on the other side of the wall from the Roan's Dyke Path near to the gap in the wall at the junction of the two paths and "have a cigarette or whatever". In the same interview he said that there was "a tiny wee path ... that folk walk along in the inside of that wall", i.e. on the other side from the Roan's Dyke Path. There was evidence, indeed, that just inside a gap in the wall at the junction of the paths stood a small tree with the initials JJ and LM carved in its bark. A witness David Stirling described an occasion in early June 2003 when he was with friends and they met the appellant at the junction of the paths. They went down the inside of the wall (towards the "V") for some distance, then sat and smoked cannabis. Another witness, John Ferris, said that on two occasions when the appellant telephoned asking for quantities of cannabis, they arranged to meet at the opening in the wall at the junction of the paths. On one of these occasions when they met the appellant said that he was waiting for Jodi. For all these reasons there is no merit in this ground of appeal.

Ground of appeal 10

[163] Under this ground of appeal the appellant seeks to challenge decisions by the trial judge to permit the Advocate depute, in the face of objections on behalf of the appellant, (a) to examine the appellant's mother, Corinne Mitchell, and (b) thereafter to lead certain evidence - all in relation to events on 7 October 2003 when the appellant, accompanied by his mother, obtained a tattoo at certain premises in Edinburgh.

[164] The essential background relating to this matter is fully described in the report by the trial judge, and was expanded upon to some degree by reference to relevant transcripts in the course of the hearing before this court. Corinne Mitchell, who was listed in the Crown list of witnesses, was led in

evidence by the Advocate depute. Her evidence began on 13 January 2005, about half way through the court day, and continued for most of the following day. Her evidence, so far as the events of 30 June 2003 were concerned, was supportive of the appellant's alibi. In brief, it was to the effect that when she arrived home after work at about 1715 hours the appellant was in the kitchen making the dinner. In these circumstances the Advocate depute, it is plain, treated her throughout her examination-in-chief as a hostile witness. At one point in the course of her evidence on 14 January 2005 she answered a number of questions put to her by the Advocate depute (without at that stage objection on behalf of the defence) about whether the appellant had a tattoo. She agreed that he had, but could not recall where he had got it. He could have been 15 at the time but she approved of this, notwithstanding that by law the minimum qualifying age was 18. She went with him to a shop in Cockburn Street in Edinburgh when he got his tattoo. This could have been in October 2003. The tattoo which was chosen was one which showed a skull with teeth and flames coming out of it. She could have said to the girl in the shop when it was shown to the appellant, "That's really him".

[165] When the Advocate depute sought to put further questions about what the witness may have said to the girl in the shop, Mr Findlay objected. This objection was initially on the basis that the girl in the shop was not a witness. The trial judge heard Mr Findlay and the Advocate depute in the absence of the jury and the witness. The Advocate depute informed the court that after the commencement of the trial certain information had been passed to the procurator fiscal about the circumstances in which the tattoo had been obtained. In light of that information the police had carried out enquiries which included the taking of statements from staff at the premises in Cockburn Street. This information was passed to the procurator fiscal. The information was to the effect that the receptionist had had a discussion with Mrs Mitchell and asked her if the appellant was over 18 years old. Mrs Mitchell said he was. In the presence of Mrs Mitchell, a consent form was then obtained and filled out by the appellant in the name of Ian Tytler. This was the name of a friend of Mrs Mitchell. Identification in due course was produced in the form of a document with a photograph and a birth certificate in the name of Ian Tytler. The Advocate depute explained that he sought to put questions to the witness on the basis of this information with a view to challenging her credibility, in particular in a context involving the giving of assistance to her son. If the information was denied by the witness (although it had not been so far) he reserved the right to make an application to lead the appropriate evidence under section 268 of the Criminal Procedure (Scotland) Act 1995. No such motion was being made at this stage.

[166] Mr Findlay maintained his objection. His objection was not to the line of evidence but as to how it was being pursued. In particular the information which formed the basis of the questions should have been disclosed by the Crown to the defence, at least before the start of Corinne Mitchell's evidence.

Although he accepted he could seek an adjournment during which precognitions could be taken and documents examined, and that he himself could seek to introduce additional material, he could not have Mrs Mitchell precognosced in the middle of her evidence. He would have to cross-examine her blind. A section 268 application should have been made before she gave evidence. In addition, what was sought to be put was inadmissible hearsay.

[167] The Advocate depute in response submitted that it was untenable to suggest that the line of questioning relating to the credibility of the witness could not be pursued because information came from a person not on the witness list. It was enough that the questioner had information to justify the questions put. There was no obligation to disclose all information on the basis of which a witness's credibility might be attacked.

[168] The trial judge repelled the objection. He explained that he did not accept that the Crown required to give notice of every line which might be pursued with a witness with a view to testing credibility. No authority had been cited for the proposition that fairness required the disclosure of each and every item of information that might be put to a witness. He could see no reason why this should be so. It was not difficult to think of instances in which a witness might more readily tell the truth in answer to a question if taken by surprise than if given the opportunity, by precognition or otherwise, to rehearse an answer. It appeared to him to be no more objectionable that the Advocate depute should seek to put this information to a Crown witness in her examination-in-chief than in cross-examination had she been called as a defence witness.

[169] When Mrs Mitchell was recalled she gave further evidence about the visit to the tattooist. Although her evidence was not at all times consistent, it was essentially to the effect that although she could not recall being asked about the appellant's age, she would not have said that he was over 18. She agreed that the name Ian Tytler had been given. This had been because of all the publicity in the press relating to the appellant. Although she had no particular recall of any consent form, she accepted that any such form should be filled out truthfully, and that if a form was filled in in the name of Ian Tytler it would have been by the appellant. She was with the appellant when the tattoo was carried out. Although she could not recall him being asked for identification, they did not have any such documentation with them. They were, in particular, not in possession of a birth certificate and any other document in the name of Ian Tytler.

[170] In cross-examination she explained that Ian Tytler was someone she knew as a friend and she used the name because she did not want the tattooist to know who the appellant was. It was put to her

that maybe some lies were told to obtain a tattoo. She agreed with the suggestion that, if they were, it would not make any difference to anything or anybody.

[171] After Mrs Mitchell's evidence was concluded the Advocate depute said he had a motion to make under section 268 of the 1995 Act. The trial judge heard counsel on this motion in the absence of the jury. The Advocate depute sought to lead evidence about the obtaining of a tattoo from various witnesses, whom he named, and to lodge additional productions, being a consent form, photographs of fingerprints and a joint report thereon. Mr Findlay said that at that stage he could not comment, because he had not seen the material. An adjournment was allowed. At the conclusion of the adjournment Mr Findlay said he had looked at the material. His position in respect of the motion was one of neutrality, in view of the court's earlier decision in relation to his objection. The trial judge was satisfied that the requirements of the section had been met and, having regard to Mrs Mitchell's evidence, that it was appropriate to grant the motion. Before this court Mr Findlay indicated that he had considered the question of whether to seek an adjournment to obtain precognitions from the witnesses but he took the view that they would, as he put it, say what they would say.

[172] Thereafter when James Aitken, a senior fingerprint officer, was asked to give evidence about a joint report relating to the consent form, counsel for the appellant objected. He indicated that although, standing the court's earlier ruling "in relation to this chapter of evidence", he would not take any point to the extent that the Advocate depute sought to lead evidence "which might be habile to the issue of the credibility of Mrs Mitchell", he did, however, object to the Crown leading any evidence about anything apparently done by the appellant. The evidence appeared to be in effect evidence of a crime with which he had not been charged - in particular a species of fraud in obtaining a tattoo on the pretence that he was someone over the age of 18 years of age. Although he accepted that in the circumstances referred to by the Advocate depute notice could not have been given in advance of the trial, the circumstances were nevertheless such that evidence could not be led in the absence of a charge on the indictment. Reference was made to *Nelson* v *HM Advocate* 1994 J.C. 94. The absence of notice meant that evidence in relation to the obtaining of the tattoo could not be led except in relation to the credibility of Mrs Mitchell. In response the Advocate depute submitted that the entire chapter of the evidence was directed only to the credibility of Mrs Mitchell. It touched on the actings of the appellant only so far as relevant to that. He did not accept that there was evidence of a separate crime which required to be charged. If there was any indication of dishonesty on the part of the appellant it was of a trivial and insignificant nature, and not such as to show that he was of bad character.

[173] The trial judge repelled the objection. In so doing he said, *inter alia*:
"I think on balance the evidence is admissible because I am not satisfied that it is such as to tend to show that the accused was [of] bad character. And that therefore appears to me to satisfy the concern arising from the formulation in *Nelson*."

On recalling the jury he informed them that the chapter of evidence was being led solely with a view to discredit Mrs Mitchell, in particular in respect of her evidence already given about the visit to the tattooist.

[174] The evidence continued. In summary it was to the effect that it could be said that at some point the appellant had handled the consent form. The evidence from witnesses at the premises was to the effect that after some discussion an agreement had been arrived at on a price for a tattoo which would be done freehand to a design which caused Mrs Mitchell to say "That's definitely him". The receptionist asked if the appellant was over 18 years old and Mrs Mitchell said that he was. A consent form was signed in the name of Ian Tytler, apparently in Mrs Mitchell's presence. The tattoo was carried out later that day. The appellant was asked for identification to prove that he was over 18 years of age. With his mother beside him he produced a birth certificate which showed that he was more than 18 and a photo identification card which matched the name. None of the witnesses were challenged as to the substance of their evidence.

[175] In his address to the jury the Advocate depute referred to the evidence in the context of attacking the credibility of Mrs Mitchell, and not otherwise. In his charge to the jury the trial judge said, *inter alia*:

"One of the matters raised in the course of Mrs Mitchell's evidence was the visit she and the accused made to the tattooist in Cockburn Street in October 2003. Evidence has also been led from other witnesses about that visit. As I told you during the trial, and as he made clear in his speech, the Advocate depute's purpose in leading that evidence was to seek to discredit Mrs Mitchell, and you should not treat it as reflecting in any way on the accused. Simply consider what bearing it may have on her evidence."

Submissions for the appellant on ground of appeal 10

[176] In support of the appeal to this court Mr Findlay submitted, in the first place, that the fairness of the proceedings had been compromised by the failure to disclose the relevant material before Mrs Mitchell's credibility was challenged in relation to it in examination-in-chief. The obligation of the Crown

was to disclose all material evidence for or against an accused, including information tending to undermine the prosecution case or assist the defence. Reference was made to *Sinclair* v *HM Advocate*, *McClymont* v *HM Advocate* 2006 S.C.C.R. 348; *HM Advocate* v *Higgins* 2006 S.C.C.R. 305 and *McDonald and Others* v *HM Advocate* 2008 S.C.C.R. 154. In accordance with the Practice Statement on Disclosure issued by the Lord Advocate which took effect in respect of High Court cases on 1 January 2005 (admittedly after the commencement of proceedings in the present case and after the trial began), the Crown accepted a subsisting duty to provide information likely to be of material assistance to the proper preparation or presentation of an accused's defence. The relevant material was plainly such material. In the event, the defence had instead been ambushed. The failure meant, in particular, that counsel could not precognosce Mrs Mitchell to ascertain her position and to see, in particular, if any further lines of enquiry might be suggested by her - for example in relation to possible evidence that it was not uncommon for tattoos to be obtained in similar circumstances. Counsel was in effect compelled to precognosce her in the witness box during the course of cross-examination. In these circumstances the trial judge erred in allowing the examination to continue in the face of the objection which had been raised. Secondly, the trial judge erred in allowing evidence to be led of the apparent actings of the appellant on the day in question. The evidence was suggestive of the commission of a criminal offence, indeed of a species of fraud. It was not necessary to lead that evidence. It was evidence of an apparent offence tending to show bad character (in particular relative to honesty) and in circumstances very different in time and place and character from the charge on the indictment. It thus could not be led absent a specific charge, albeit the circumstances were such that that could not have been done in the present case. Reference was made to *Nelson* v *HM Advocate*. The trial judge's directions could not be said to have cured the prejudicial effect of the evidence. Having regard to this ground of appeal alone the conviction should be quashed.

Submissions by the Advocate depute on ground of appeal 10

[177] In response, the Advocate depute submitted that it could not be said that the information which the Crown had, and intended to use, to challenge the credibility of the witness, who was in reality a witness for the defence, required to be disclosed. It was not, properly understood, material evidence for or against the accused. It was not evidence likely to undermine the Crown case or assist the defence. Reference was made to *McLeod* v *HM Advocate (No.2)* 1998 J.C. 67 and *Sinclair* v *HM Advocate*. The relevant Practice Statement on Disclosure was operative in relation to prosecutions in which the first appearance was after 6 December 2004 and did not apply to the present proceedings. It did not in any event have the force of law. It was designed as a statement of practice to assist the new procedures. It was accepted nevertheless that the information would probably have fallen to be

disclosed in terms of that Statement if it had been in operation. In any event, no substantial prejudice could be said to have been identified. The Advocate depute had given a full account of the information he had. Counsel was able to take the appellant's instructions there and then in relation to a matter entirely within his knowledge. The trial judge had indicated that he would consider any motion to allow precognition of the witness prior to her cross-examination, and the possibility of recall was open. Reference was made to pages 2488-2490 of the transcript. The witness was available for precognition when her evidence ended, at which point further full details were given. No indication had been given yet as to what evidence she might have been able to suggest. Reference was made to *McIntosh* v *HM Advocate* 1997 S.C.C.R. 389. In any event, no such evidence could have helped in relation to her apparent dishonesty in the witness box. In the event she was cross-examined on a basis which suggested that what had happened could not be disputed, and when the evidence was led following the section 268 application there was no substantial challenge to the substance of it. This was not a case where there had been no disclosure in the course of the trial. Even in a case where there was no disclosure at first instance, unfairness could be taken to be remedied in the course of the appeal process. Reference was made in particular to *Botmeh and Alami* v *United Kingdom*, a judgment of the European Court of Human Rights dated 7 September 2007, in application No. 15187/03. In the circumstances of the present case it could not be said that any miscarriage of justice had resulted. Reference was made to *Kelly* v *HM Advocate* 2006 S.C.C.R. 9. As to the second of the appellant's objections in the trial, counsel's objection had come too late. Evidence had already been led during the course of the examination of Corinne Mitchell in which the appellant's apparent involvement in matters was fully canvassed without objection on the basis later maintained. No objection was taken in the course of the trial to the relevance of that evidence for the credibility of Mrs Mitchell, nor did that form part of the written ground of appeal. In light of Mrs Mitchell's testimony it was necessary to lead evidence of the appellant's involvement in events to discredit what she had said. It was not possible to separate their actions entirely. As to *HM Advocate* v *Nelson*, at worst the evidence merely tended to show incidentally that the appellant committed an offence of a trivial or technical nature. It was not such as would have required a separate charge. The question of "fraud" was never mentioned in the presence of the jury. In any event the clear thrust of the examination of Mrs Mitchell and the leading of the evidence by the Advocate depute was to emphasise her role and to downplay that of the appellant. In these circumstance any possible prejudice was removed by the clear directions of the trial judge.

Discussion of ground of appeal 10

[178] As to the first of the arguments advanced in the appeal, it was, it seems, made clear by the trial Advocate depute at the outset that the purpose of his questions was to challenge the credibility of Mrs Mitchell as a witness. It was plain that her evidence in support of the appellant's alibi was important to the defence and that the Crown position was, and had to be, that her evidence was not credible and reliable. It is, we think, important to notice that at no time before the trial judge was the relevance or legitimacy of the line which the Advocate depute sought to pursue questioned by the defence; nor has it been before this court. Although certain concerns were originally raised about whether inadmissible hearsay was being put to the witness (concerns which, we think, were plainly unfounded), the essential basis of objection before the trial judge, and the sole argument advanced before this court, was that notice of the information should have been given when it came into the possession of the Crown and in particular prior to the examination of Mrs Mitchell.

[179] It has been recognised since *McLeod* v *HM Advocate (No. 2)* that the Crown's obligation of disclosure (consistent with the rights of an accused under Article 6 of the EHCR) extends to all material evidence for or against the accused and that for this purpose any evidence which would tend to undermine the prosecution's case or to assist the case of the defence is to be taken as material (see also *Sinclair* v *HM Advocate* at para. [33]). It is not immediately obvious that this obligation would extend to all information which could be used to undermine the credibility of a witness for the defence, and the reality is that Mrs Mitchell was, although listed as a witness for the Crown, treated as a witness for the defence. If such an obligation so extended was thought to exist it would, we consider, be likely to carry risks of prejudicing the administration of justice by frustrating the elucidation of truth and would be likely to be difficult to comply with in practice.

[180] However that may be, we are not persuaded in all the circumstances that the absence of earlier notice could be said to have led to any substantial prejudice, and thus that it could be said to have led to a miscarriage of justice (see e.g. *Kelly* v *HM Advocate*). It is of course true that counsel had not precognosced the witness on this matter before he cross-examined her. However, it seems clear that even with notice of the information he would not have been in a position to challenge its veracity. From the moment the Advocate depute informed the court what the information was, counsel had the opportunity to take the instructions of the appellant on a matter which was entirely within his knowledge. Notwithstanding that opportunity, no real attempt was made to suggest to the witness that the information was inaccurate; instead the questions were apparently put on the basis that the information

could not be disputed (and the thrust of them was that the matter was of no significance). In this context it is, we think, not without significance that, although it was made clear that the court would consider any motion for the witness to be precognosced prior to her cross-examination, no such motion was made. After her evidence was finished the witness was available for precognition. When the evidence was led as to what had taken place again there was no substantial challenge to its veracity. It was said that Mrs Mitchell might have been able to point the defence in the direction of evidence that what happened was not uncommon, but counsel was not able to say, even now, what such evidence would have been. At no stage did counsel seek an adjournment to explore the question of the availability of any further evidence along these lines. Further, any such evidence would not have assisted the problem apparently created for the witness by her own testimony, which was contradictory of the evidence from the other witnesses as to what had taken place.

[181] In relation to the second of the appellant's grounds of objection, it seems again that when the objection was taken in the course of the trial it was not taken to the potential relevance of the proposed evidence, nor does such an objection form part of the written grounds of appeal. The potential relevance plainly related to the credibility of Mrs Mitchell. It was clear from the questions put to the witness that the Crown position was not merely that she had conveyed false information as to the appellant's age, but that she was present and, it could reasonably be inferred, complicit in the signing of any consent form, and that she played a leading role in the presentation of false particulars. Further, by the end of her evidence she had, it seemed, denied making any false claims as to age, was equivocal about any knowledge of a consent form and denied that any false identification had been taken or presented. In these circumstances it would have to be accepted that a relevant challenge to her credibility would include reference to evidence as to the appellant's actions. Indeed, on one view they were a necessary part of the whole picture relating to her position on that day.

[182] The objection which was taken, and which is maintained, is based on *HM Advocate* v *Nelson*. In that case it was held that the Crown could not lead evidence of a crime not charged if fair notice required the matter to be the subject of a separate charge or otherwise referred to expressly in the complaint or indictment. This would be so, it was said, (at page 104D):

"... if the evidence sought to be led tends to show that the accused was of bad character, and that the other crime is so different in time, place or character from the crime charged that the libel does not give fair notice to the accused that evidence relating to that other crime may be led ... ".

Earlier it was said (at p. 103):
"But evidence showing or tending to show that the accused committed another crime may be prejudicial to him. This will be so, especially in a case of serious common law crimes which would be obvious to a jury, where the evidence tends to show that the accused is of bad character. This was the point which Lord Justice-Clerk Macdonald observed in *Monson* [(1893) 21 R. (J.) 5] at page 8. As he put it, such evidence may suggest that if the accused would do the one thing he might do the other. He regarded it as unsafe to allow a question which tended to prove the commission of a very serious crime as part of the incidents of a charge of another kind.

In such cases the principle of fair notice requires that the other crime ought to be charged in the complaint or indictment or at least that it should be the subject of a distinct averment. There is less reason to be concerned on this point if the evidence tends merely to show incidentally that the accused may have committed an offence of a trivial or technical nature for which no inference could be drawn that he was of bad character."

[183] In repelling the objection the trial judge formed the view that the evidence was not such as to tend to show that the appellant was of bad character. It is true that it was not, on any view, evidence likely to suggest that he was capable of committing any crime of violence, and the court was no doubt influenced by the emphasis of the Advocate depute on the attack on the credibility of Mrs Mitchell. Nevertheless, while we consider it would be wrong to overstate the significance of this matter, we are unable to agree that no inference of bad character could possibly be drawn, in particular in relation to honesty.

[184] Be that as it may, we do not consider that it can be said that any miscarriage of justice resulted from the leading of the evidence in question. Just as with the first related objection we are not persuaded that the absence of earlier notice (and it is the principle of fair notice which underlies the rule referred to in *HM Advocate* v *Nelson*) could be said to have led to any substantial prejudice. Indeed, by the time the evidence was led full details of what was proposed had been made available by the Advocate depute in support of the application under section 268, which was not opposed. Further, by the time objection was made on this basis, evidence as to what had happened in the relevant premises, including evidence of the appellant's apparent involvement, had already fully been canvassed in the evidence of Corinne Mitchell. In these circumstances we agree with the Advocate depute that the objection which was made could be said to have come too late. Further, it is clear from the evidence itself that the whole emphasis of the Crown throughout the examination of Mrs Mitchell

and indeed later in the leading of the evidence was to emphasise her part and to underplay any part of the appellant. The matter was only mentioned in the Advocate depute's speech in connection with Mrs Mitchell's credibility and not otherwise. In these circumstances it can, we think, justifiably be said that any potential prejudice was removed by the very clear directions of the trial judge.

Matters of concern taken together

[185] Mr Findlay submitted finally that, even if no particular ground of appeal on its own warranted quashing of the conviction, the matters complained of when taken together were such as should lead to that result. Anyone looking at the evidence in totality, he said, would 'be left with a sense of unease'. We have already addressed and rejected the ground of appeal based on the proposition that no reasonable jury, having regard to the totality of the evidence, could have returned a guilty verdict. As to other matters of complaint, while there may be cases (for example, where the cumulative effect of a number of criticisms of a charge amounts to a misdirection - see *Meighan* v *HM Advocate* 2002 S.C.C.R. 779 at para.[15]) where the combined effect of a series of unsatisfactory features in a trial may result in a miscarriage of justice, we are not persuaded that this is such a case. Some general concern, or unease, in relation to a particular conviction, with no further specification, has never been recognised as a basis upon which a conviction could be disturbed (*Harper* v *HM Advocate*, at para.[35]).

Disposal

[186] In the foregoing circumstances the appellant's appeal against conviction, in so far as based on the existing grounds of appeal, must be refused. In the course of the hearing of the appeal Mr Findlay moved the court to allow to be argued a proposed additional ground of appeal (1A of the appeal process). The Crown having opposed such allowance, the court on 22 February 2008 continued consideration of the appellant's motion to a date to be afterwards fixed, under direction that any further proposed evidence in support of that ground be lodged within four weeks from that date. If the appellant is to insist on his motion, a date will now require to be fixed for its consideration. The appellant also has an appeal against sentence yet to be considered.