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**Jonathan Embleton 15 Years in Prison – Conviction Quashed – Police Non-Disclosure**

Jonathan was today 21/12//2016 cleared and released from prison by judges at London's Court of Appeal after new evidence emerged which cast serious doubt on the safety of the conviction. Lady Justice Macur said a police report, which fundamentally undermined the reliability of a crucial prosecution witness' evidence, had not been disclosed. She quashed the conviction and refused a prosecution request for a retrial - because it would "not be possible" for a fair trial to take place. The Criminal Cases Review Commission referred the murder conviction of Jonathan Embleton to the Court of Appeal. Mr Embleton and two co-defendants pleaded not guilty but were convicted at Teeside Crown Court in November 2000 of the joint enterprise murder of Mohammed Sharif. Mr Embleton was sentenced to life imprisonment with a minimum term of 15 years. Mr Embleton appealed against his conviction but the appeal was dismissed in April 2003. He applied to the Commission for a review of his case in November 2010. Having conducted a detailed review, the Commission decided to refer the case to the Court of Appeal because it considered that there was new evidence which raised a real possibility that the Court would quash the conviction. The referral was based on sensitive information. That information was therefore provided by the Commission to the Court of Appeal and to the Crown Prosecution Service in a confidential annex to the Statement of Reasons. Mr Embleton and his legal team were provided with a copy of the Statement Reasons but they had not been given the confidential annex. Mr Embleton has been represented in his application to the CCRC by Tremletts Solicitors, his barrister Nicholas Atkinson QC said at the time, "I know less about this case than anybody in the courtroom"

The Reference Paras 37 through 54 (Embleton, R. v [2016] EWCA Crim 1968 (21/12/2016)

• We remind ourselves that in the case of non-disclosure, the first question for this court is whether the material withheld from the defence was material which ought to have been disclosed. If the answer is yes, the second question is whether, in the light of such non-disclosure, the appellate court considers that the conviction is unsafe. (See R v Pendleton [2001] UKHL 66; Mushtaq Ahmed v The Queen [2002] EWCA Crim 2899; R v Burridge [2010] EWCA Crim 2847; R v Jason Garland [2016] EWCA Crim 1743.)

• The single ground on which the reference is made relates to information recorded by DC Todd as provided on 21 May 1999 by Mrs Clark, with whom the appellant had deposited stolen property for safe keeping, and after she had been informed by DC Todd that the appellant had been arrested on suspicion of murder. See paragraph 23 above. DC Todd described the information he recorded on the report as "significant".

• This evidence is admissible in the appeal pursuant to section 23 of the Criminal Appeal Act 1968. That is, (i) the evidence appears capable of belief; (ii) it may afford ground for allowing appeal; (iii) it would have been admissible in proceedings on issue subject to appeal; and, (iv) the prior non-disclosure provides a reasonable explanation for failure to adduce it at trial.

• Mrs Clark gave evidence at trial concerning the visit and said she was certain as to the date of the visit by reference to a benefits book. In her statement of 21 May she said that the first payment of her new book was cashed on 5 May and she was clearly able to remember one full page covering two payments left in old book. On this basis, she stated that the appellant's visit with an injured hand had been during the early hours of 21 April 1999, and at a time which would otherwise have provided the appellant with an alibi to the murderous attack upon Mr Sharif.

• With all due exception to the point of timing of the visit, which leading defence counsel understandably deployed to undermine the prosecution case against the appellant, the fact of the appellant's appearance with an injured hand and reference to assault on a date which Mrs Clark settled upon and was the day of the murder was obviously significant and compelling evidence, probative of guilt.

• In summing up her evidence to the jury, the trial judge said: "Now the important question is, when did this visit take place?"

• The first appeal against conviction had been launched on the basis of "a lurking doubt", it being argued that the jury must have rejected Mrs Clark's evidence as to the visit, which gave the appellant an alibi, since the timing of the murderous assault would not have enabled his presence some distance away at 3 – 4 am. On 3 April 2003 the Court of Appeal rejected the submission saying: "..we do not accept these submissions. Mrs Clark's evidence was capable of supporting both sides cases if she got the date right. If she had got the time slightly wrong it supported the Crown. If she had got it right it destroyed the appellant's alibi but gave him another one. The judge directed the jury as to these possibilities…."

• Clearly, the issue and nature of the non-disclosure had not then emerged. The Court of Appeal reasonably considered the possibility of the jury accepting Mrs Clark's evidence regarding date but accepting an error of timing. In these circumstances, her evidence was corroborative of other strands in the prosecution case which were admissible against the appellant.

• We accept, without hesitation, that the fact that the appellant injured his hand on the 29 April 1999 does not preclude an earlier injury on the 21 April. The appellant was not averse to settling his disputes with his fists, and commented during interviews that an old injury over his knuckles had the tendency to open up. The fact that he said he was intent on going to the hospital did not mean that he did. Apparently, he had mentioned a similar intent in relation to the injuries he and Tracy sustained during the car accident on 20 April to another individual earlier on that day, although this did not involve an injury to the hand, and which was not followed through. We accept that Mrs Clark was convinced of her dates by reference to an extraneous source associated with what she said was the habit and custom of the appellant, and that several unsatisfactory factors implicit in her, and DC Hopson's, dependence on the same were investigated at trial. We observe that DC Todd questioned his own record when, one year after the event Mrs Clark challenged the accuracy of the contact note. We are aware of the vagueness of expression which refers to 2-3 weeks and which should not necessarily be endowed with precision of an actual date and that details concerning the assault on the 29 April were not explored at trial, and the appellant's denial of any similar visit to Mrs Clark as recalled by her young daughter, albeit on a different date would not necessarily have carried the day. However, we are not persuaded that these submissions of Mr Brooke, ameliorate the impact of the newly disclosed material, adequately or at all, when considering the safety of the conviction.

• We are satisfied that Mrs Clark's evidence as to the date of the visit is undermined significantly by the information now disclosed. Although there were three confirmed incidents when the appellant assaulted different individuals proximate to the date of the murder, only on one of those occasions, namely on the 29th April 1999, was there an assault which it is accept-

ed was witnessed by 'Tracy'and which did result in a hospital visit on that day. These two associated factors entirely preclude the visit reported by Mrs Clark to be the assault upon Mr Sharif. As it is, but not bearing the same weight for the reasons indicated above, the visit to the hospital on 29 April, actually does fall within the time frame suggested by Mrs Clark. We consider Mrs Clark's first recorded recollections to be entirely consistent with this particular assault on 29 April, but for the timing of the visit. Since that timing was dubious whether on the prosecution or defence case, we assess the import of her account to be the description of the wounds, that the appellant was said to have reported that Tracy was present at the time of the relevant assault, and the stated intention of the appellant to obtain medical treatment for it.

• We are entirely dismissive of the validity of the subsequent investigation into this report some 12 month later and the resultant claim of Mrs Clark that she was misquoted or of Mr Todd that he may have been mistaken. It is not suggested that, on 21 May 1999, DC Todd had independent knowledge of the assault which took place on 29 April in the presence of Tracy and did result in a hospital visit. He would not have been in a position to elide two visits into one. Mrs Clark may have done, as is clear from an examination of the transcripts of her evidence. That is, she did indicate that the appellant had visited on days other than a Wednesday. She did refer to a visit on another occasion at an unusual time in which to deposit stolen goods.

• We are satisfied, however, that the fact of the investigation into the detail of this log recognised rightly the significance of the information contained within it. This detail was unknown to the jury. Speculation as to whether defence counsel actually would have made use of the material does not inform this court's determination.

• We have considered the strength of the other admissible evidence which the prosecution relied upon against the appellant, namely Ham's evidence and the fibres found on his clothing, independently of Mrs Clark's evidence.

• In his summing up the trial judge described Ham's evidence as "obviously highly controversial, virtually in its entirety" and to be treated "with great care". The Court of Appeal in 2003 thought that there were "obviously good reasons for saying [Ham's] evidence was wholly unreliable". Having regard to the chronology of his many and differing accounts, including in oral evidence, we agree. We bear in mind, however, as did the Court of Appeal in 2003, that Ham "stuck to his account" in oral evidence at trial.

• As to the fibres, despite the re-examination of the same which was able to make more positive attribution of origin to Mr Sharif's jumper, the prosecution expert did not change his opinion that the number of fibres only provided "moderate support" of his presence at the scene. That is level 5 on a 7 tier scale, with 7 as the weakest.

• Whilst the appellant's predisposition to violence and admitted lies concerning other matters are unattractive in the scope of a murder trial, we do not consider that they strengthen the prosecution case. The failure of Tracy to provide evidence of a certain alibi is irrelevant for our consideration, the more particularly so by reason of an unsatisfactory mode of interview and the absence of any intervention on behalf of a vulnerable minor, as she was, by her solicitor, appropriate adult or representative of the Youth Justice Service. That factor aside, Tracy did not absolutely refute the alibi.

• We conclude that Mrs Clark's evidence was pivotal to the prosecution case against the appellant, in shoring up the otherwise weak case against him. The new disclosure throws her evidence into doubt on a crucial point. The remaining evidence is dubious as indicated above. We are not satisfied that the conviction is safe. • We allow the appeal and quash the conviction.



**Is Forensic Bitemark Identification to be Abolished as a Form Of Trial Evidence?**

*Michael J. Saks, Oxford University Press:* The public holds exaggerated views of the quality of the scientific foundations of a surprising number of forensics sciences, as well as of the courts' scrutiny of that evidence. The most significant of the weaknesses were made plain in a report by the US National Academy of Sciences (NAS), which concluded, "The bottom line is simple: In a number of forensic science disciplines, forensic science professionals have yet to establish either the validity of their approach or the accuracy of their conclusions… Much forensic evidence including, for example, bite marks and firearm and tool mark identifications is introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing." Studies of wrongful convictions based on DNA exonerations have found forensic errors and exaggerations to be second only to eyewitness errors.

Several forensic techniques that had long been welcomed into American courts are now dead, found by scientific review committees to lack sufficient validity. The eulogy for voice-prints was given by the NAS in 1979, following which the FBI ceased offering such experts, and the discipline slid into decline. More recently, comparative bullet lead analysis met the same fate. And, over a continuing period, numerous "indicators" of arson have been determined to lack validity and have been laid to rest. A likely candidate to join those techniques in the cemetery of departed forensic sciences is forensic odontology – which compares bitemarks (usually found in the flesh of crime victims) with the dentition of suspects. Forensic dentists claim the ability to associate a bitemark to the one set of teeth in the world that could have produced the crime scene bitemark. However, no sound basis exists for believing they can perform such a feat. As the NAS Report observed, "the scientific basis is insufficient to conclude that bite mark comparisons can result in a conclusive match."

Remarkably, no American court has excluded bitemark evidence based on its failure to meet the legal standard for admission of expert testimony. Only in rare instances have judges expressed doubts about its trustworthiness. This is changing. In a series of high-profile cases, often involving DNA exonerations, bitemark identifications have been exposed as erroneous. The Texas Commission on Forensic Science has called for a "moratorium" on the use of bitemark testimony in court and is auditing old cases that had involved the use bitemark evidence. Most recently, the US President's Council of Advisers on Science and Technology recommended that, in the absence of sound research supporting the reliability and validity of bitemark identification evidence, prosecutors not offer it and, if offered, that courts not admit it.

Here are the major scientific deficiencies of bitemark identification expert evidence:

*Source.* Adult dentition consists of 32 teeth, each with 5 anatomic surfaces, creating 160 dental surfaces that could contain identifying characteristics. But a typical crime scene bitemark offers only a fraction of that information – only 4 to 8 teeth are involved in biting. Compared to other types of forensic evidence, less information is available to work with.

*Substrate. Bitemark*s typically occur during struggles, where skin is stretched and contorted. When the skin returns to its normal shape, the impression of the biter's dentition is distorted to an unknown extent. Even without such distortion, skin is a poor substrate for registration of tooth impressions.

*Methods of Comparison*. When a forensic dentist compares a bitemark with a suspect's dentition, numerous techniques may be used, including drawing images by hand. "The issue of the multiple methods of bitemark analysis continues to thwart any attempts to standardize procedures to any sort of 'gold standard.'"

*Evaluation of an Inclusion.* If the decision reached by the examiner is inclusion of the suspected source, the next step is to evaluate the meaning of that inclusion. Its probativeness

depends upon how many others in the population could also have produced markings that are equally similar in appearance to the crime scene marks. Virtually no data exist on the population distribution of dentition attributes.

*Uniqueness.* The conventional solution to the problem of assessing the meaning of an inclusion has been to assume uniqueness. If no two biters could be mistaken for each other, an inclusion would lead directly to the conclusion that the source had been found. But, as the NAS Report notes, there is "no evidence of an existing scientific basis for identifying an individual to the exclusion of all others."

*Examiner Reliability.* The American Board of Forensic Odontology recently conducted a reliability study of the judgments of experienced, board-certified forensic dentists making basic decisions about bitemarks. The researchers selected 100 photographs of suspected bitemark injuries from actual cases. These were examined by 38 ABFO-certified odontologists. The examiners were asked three questions about each of the 100 injuries. (1) Is the injury a bitemark? (2) Is it a human bitemark? (3) Does the bite mark have distinctive features to enable individualization? No one can know which answers were correct; all we can know is the extent to which examiners agreed or disagreed with each other. Taking all three questions together, for just under half of the cases, not even 50% of the examiners agreed on the same trio of responses. For only 14 of the 100 cases did at least 80% of the examiners agree on the trio of responses. If there is little agreement (low reliability) among examiners, there can be little validity in their judgments.

*Examiner Accuracy.* Over approximately four decades in which forensic dentists have been testifying and claiming the ability to identify the individuals who inflicted bitemarks, only a handful of studies were carried out to assess their accuracy. Those tests presented practitioners with "questioned" bitemarks that are placed in materials that are more stable than living human flesh. The task is to try to match questioned bitemarks to a possible source (a bitemark lineup). Error rates in these studies are unimpressive and sometimes dreadful.

*Lack of Standards.* No standard exists for the type, quality, and number of characteristics required to conclude when a bitemark has reached a threshold of evidentiary value. In comparing images of questioned and known bites, examiners are left to their own subjective judgment. It is hard to understand how forensic bitemark expert evidence continues to be admissible in court. The probability that it soon will be excluded seems to be increasing rapidly.

**R v Docherty (Appellant) [2016] UKSC 62 On appeal from [2014] EWCA Crim 1197**

Background to the Appeal: The appellant Shaun Docherty was convicted on 13 November 2012 of serious violent offences under s.18 of the Offences against the Person Act 1861. He had displayed a clear pattern of aggressive offending and posed a high risk of serious further violence. The nature of Docherty's offences was such that he fell under the scheme of preventative sentencing for "dangerous offenders", defined by the Criminal Justice Act 2003 ("CJA 2003") as those who are convicted of specified offences and who present a significant risk to the public of serious harm from further serious offending. The statutory maximum sentence for the offences of which Docherty was convicted is, and has been for well over a century, life imprisonment.

The scheme under the CJA 2003 included inter alia a possible indeterminate sentence of imprisonment for public protection ("IPP"). This required the judge to specify a minimum period to be served before the IPP prisoner could be eligible for release on licence, providing that the Parole Board was satisfied that it was no longer necessary for the protection of the public that he be detained. The CJA 2003 also provided a form of extended sentence known as an extended sentence for public protection ("EPP"). That scheme was later replaced by the Legal Aid, Sentencing and Punishment of Offenders



Act 2012 ("LASPO"), which introduced new discretionary and mandatory life sentences and a new form of extended determinate sentence ("EDS"), while abolishing IPP and EPP. A Commencement Order specified the commencement date as 3 December 2012 for the new scheme, and included transitional provisions that IPP and EPP would still be available for anyone convicted but not yet sentenced before 3 December 2012, as in the case of the Appellant. The Appellant was sentenced to IPP on 20 December 2012, with a specified minimum period of five years and four months.

The Appellant contended that he ought to have been sentenced instead to EPP, and that the Commencement Order was unlawful to the extent that its transitional provisions preserved IPP for him. He argued the Order was unlawful for three reasons. Firstly, the new scheme was less severe, so to apply the harsher, earlier scheme was contrary to an international principle of "lex mitior" binding on English courts by virtue of article 7 of the European Convention on Human Rights ("ECHR"). Secondly, because the purpose of LASPO was to remove IPP as a sentencing option, preserving it to any extent was outside the authority given by LASPO. Thirdly, it was unlawful discrimination contrary to Article 14 ECHR to impose IPP on him but not on a person convicted after the specified commencement date. The Court of Appeal dismissed all of the Appellant's arguments and the Appellant appealed to the Supreme Court. The Supreme Court unanimously dismisses Mr Docherty's appeal. Lord Hughes gives the judgment, with which the rest of the Court agrees.

Reasons for the Judgment: The Commencement Order setting out transitional provisions for the introduction of LASPO was lawful. It did not breach Article 7 ECHR, it was legitimately made and was rational, and if it was discriminatory (which was doubtful) then it was justifiably so. With the exception of a mandatory life sentence for murder, English criminal sentencing is a matter for the judge. Statute prescribes the statutory maximum, within which the judge may sentence, taking into account the relevant guidelines. The judge must sentence according to the law and practice prevailing at the time of sentence, regardless of when the offence was committed. Thus if the maximum sentence has been reduced by statute since the offence was committed, the court will sentence within that now current maximum, or if sentencing practice has moved downward, the court should sentence in line with that.

Article 7 ECHR requires that there be no punishment without law. This has always said, explicitly, that no sentence may be imposed which exceeds that to which the defendant was exposed at the time of committing the offence ("lex gravior"). Since the statutory maximum for the Appellant's offences was the same at the time of offence and sentence, the principle of lex gravior is not offended. The principle of "lex mitior", in contrast, is that if provision is made by law for a lighter penalty, subsequent to the commission of the offence, the offender shall benefit from that lighter penalty. The Strasbourg court has held in 2010 in Scoppola v Italy (No 2) (2010) 51 EHRR 12 that Article 7 also requires compliance with this principle. There are some difficulties in establishing the exact meaning which the court gave to lex mitior, but it is not necessary to resolve them because it is clear that the English practice of sentencing according to current law and practice, subject to the statutory maximum obtaining at the time of the offence (if lower) complies with it. The Strasbourg court cannot have meant that it is necessary to examine all intervening rules or practices between the offence and the sentencing process, and to sentence according to whichever is the most favourable. That would not accord with good reason or with the rationale of lex mitior, or with the English practice. Lex mitior is in any event of no assistance to Docherty because it does not involve anticipating the commencement of a new and more favourable sentencing scheme [42-49].

The reading of the provisions of the Commencement Order, together with the provisions of LASPO is clear: IPP and EPP disappear from the sentencing armoury on 3 December 2012, except for anyone already convicted but not yet sentenced, as in the case of the Appellant.

There was no breach of Article 7 ECHR. In any event, the Appellant's argument that he should benefit from the accelerated removal of IPP from the old scheme but claim the preservation of another part of it (EPP) is inconsistent [58].

Further, there was nothing contrary to LASPO's statutory purpose in the Commencement Order's transitional provisions. s.151 of LASPO enables such an order to be made, and that it may make transitional provisions. The phased commencement of the new sentencing scheme was both legitimate and rational. The Appellant's discrimination argument also fails. It is doubtful whether being subjected to a different sentencing regime to another prisoner, due to a different date of conviction, could amount to a sufficient status to bring it within the anti-discrimination provision of Article 14 ECHR. Even if it could, the differential treatment is clearly justified by the need for all sentencing changes to start somewhere [61-63].

**Privatisation of Probation Service Has Left Public at Greater Risk**

Alan Travis, Guardian: The public have been left more at risk by the privatisation of the probation service with some offenders not seen for weeks or months and others lost in the system altogether, according to an official watchdog. In her most critical report yet, Dame Glenys Stacey, the chief inspector of probation, said that a recent inspection of probation work in the north of London found a simple, unacceptable lack of management attention to whether offenders turned up to appointments and whether their offending behaviour was being challenged. Her inspection report published on Thursday 15th December 2016, said probation services in north London have deteriorated since a community rehabilitation company took over the supervision of medium- to low-risk offenders in 2014 and was now poorer than any other area that had been inspected this year. "A combination of unmanageable caseloads, inexperienced officers, extremely poor oversight and a lack of senior management focus and control meant some offenders were not seen for weeks or months, and some were lost in the system altogether," concluded the report.

Stacey said: "Delivering probation services in London is never an easy task, but services have deteriorated of late, largely due to the poor performance of the London Community Rehabilitation Company. Services are now well below what people rightly expect, and the city is more at risk as a result." Her highly critical report came after the justice secretary, Elizabeth Truss, acknowledged criticism of the privatised probation companies across England and Wales by demanding the rapid completion of an official review into the performance. The London CRC, which is owned by MTCnovo, supervises 28,750 offenders, a 12% reduction in the past 12 months. The National Probation Service is responsible for a further 10,071 higher-risk offenders. But the inspection found that caseloads for individual probation officers ranged from 50 to 100 cases each and some senior probation officers were overseeing more than 900 cases. Despite the 12% fall in the number of offenders it supervised, the London CRC still had a 20% vacancy rate and was heavily reliant on agency staff. Officers were doing little more than "firefighting" rather than prioritising those offenders who posed the most risk of harm to the public.

Many individual probation officers had themselves received no formal supervision for many months and the sickness rate trebled between May and August this year from 23 to 70 off for more than three weeks. "The lack of a credible system to monitor the cases when responsible officers were off sick had meant that too many service users had not been seen for weeks or months and, in some cases, had been lost in the system entirely," said the official inspection report. The watchdog's report judges the overall effectiveness of the London CRC as "poor" and in particular criticises a lack of awareness of domestic abuse and child safeguarding issues. Stacey said the publicly-run National Probation Service was delivering services better in London, but with plenty of room for improvement. The quality of work was mixed, but inspectors were pleased to find that, overall, public protection work was satisfactory. The delivery of court services was not entirely without problems. "We expect the company to make every effort now to deliver the inviolable requirements – the basics of probation – consistently well, and as quickly as possible. We welcome work begun during our inspection to begin to bring about much-needed improvements, and will be back in 2017 to check on progress," said Stacey.



Justice minister, Sam Gyimah, responded to the inspection findings, saying: "I met senior managers at London CRC and told them this is totally unacceptable. An urgent improvement plan is now in place and I will not hesitate to take more action if necessary. We are also working closely with the mayor's office for policing and crime. "We are currently looking at all contracts and are carrying out a comprehensive review of the probation system in England and Wales. This will improve the quality of our probation service, putting the focus on reducing reoffending by getting offenders off drugs and into training or work. Findings from the review will be published in April."

Napo, the probation union, said the inspectorate had confirmed that privatisation would lead to greater public risk with its most damning report to date. Ian Lawrence, Napo general secretary, said: "This report is a damning indictment of this government's reckless social experiment. We urgently need probation services to be reviewed and publicly scrutinised to ensure public safety, quality service delivery and value for money to the taxpayer." Helda Swindenbank, London CRC's director of probation, responded to the report saying: "The number one priority for London CRC is public protection, which is at the core of all that we do. Since the Inspection, we have continued to make significant progress in reducing caseloads managed by our staff, prompt enforcement, and quality of offender supervision. "This is all informed by the high priority we give to protecting the public. We have already taken steps to ensure that every single case is being actively managed to further protect the public. It's important to recognise that only 40 cases were inspected, just 0.13%, of London CRC's caseload."

**How the Law Became an Instrument of the State** *Josie Appleton, The Justice Gap*:

The new criminal law is not composed of precisely delimited powers or definitions of crime. The new officials are not 'servants of the law'. Instead, law or powers are described as 'tools' which allow them to do what they want to do: to stop and search, to move on, to confiscate, to ban. In policy circles a new power will be described as a 'great new tool': the official decides what they want to do then looks for a power that allows them to do it. The official is the subject, the law an object in their hands which they apply for their own purposes. More precisely, law is described as a 'toolkit': a new power is described as a 'great addition to the toolkit' or a 'valuable part of a menu of options'. What is valued is that officials have a free hand: that in any given circumstance they have plenty of options to choose from, that they never find themselves at a loss or want to do something and cannot. This concern with choice of action shows how the criminal law has pursued the freedom of the official, their freedom of movement and action, as an end in itself. This is why the use of powers is also described as 'creative'.

Open-ended powers have been drawn up with little thought as to how these powers will be used. The expansion of powers becomes the primary criminal-justice strategy and the answer to a wide variety of social problems. Independent social life is seen as the realm of latent criminality: anything hidden, anything free or unregulated, is latently criminal. By the same accounts the official's intervention (or realm of intervention) has the civilising force of anti-crime or crime-

prevention strategy. The confidence in officials is not specific, justified on the basis of their personal qualities or the quality of their institution. Instead, there is a blind faith in the non-specific 'official' of no particular institution, only because they represent the negation of civic life. It is the negativity towards civil society which drives a blind faith in power-bearing officials.

There has been an expansion of civil powers to 'order'. Here state power is detached from the criminal law – from the enforcement of general laws which are violated in the criminal act – and becomes a personalised mechanism for directing the behaviour of particular individuals. The powers to order are quintessential busybody powers, a matter of meddling and not law enforcement. In the UK, there are civil injunctions (the new ASBOs), community protection notices (an on-the-spot ASBO), public spaces protection orders (an on-the-spot bylaw to ban public activities), control orders (which impose conditions on somebody suspected of terrorism), crime-prevention orders, sexual offences-prevention orders, dispersal orders (to remove people from a locality), parenting orders (which could require parents to go to counselling), football-banning orders (which ban an individual from attending football matches). In the USA there are a variety of orders which can ban individuals from particular areas of town, including private property, such as parks exclusion orders, stay out of area orders and trespass admonishments. In Australia there are prohibited-behaviour orders.

Shadow justice - Once an order is issued it has the force of law: for that individual, it becomes a criminal offence to do whatever is prohibited in the order, such as to cross a particular street, to use a particular word or to wear a cap. The order represents the breakdown of the criminal law as a standardised and predictable set of rules for the conduct of social life. Each order is a personalised intervention by the state in the conduct of an individual. Orders become a shadow justice system, a parallel system for the use of state power which is founded on a quite different basis. These contracts and orders total tens of thousands each year. There were 4,000 community protection notices and 8,000 community protection warnings issued in one year in the UK; there are 25,000 parenting contracts issued each year. In the city of Seattle there are 10,000 trespass orders issued each year.

The criminal law itself starts to approximate the system of orders, with the deliberate creation of offences so broad as to allow the law to be invoked in almost any case. The definition of a crime is designed to be a catch-all that allows for orders to be issued in specific cases, rather than a specific description of behaviour meriting criminal sanction. Sexual-offences law, for example, means that almost everybody has committed a sexual offence: it is a crime for a 15-year-old boy to kiss his girlfriend of the same age. Law professor Andrew Ashworth says that this was a relatively conscious attempt to give prosecutors the widest latitude possible: 'prosecutors don't like there to be things they cannot prosecute'. Similarly, UK councils have created laws prohibiting 'any object which could cause harm', 'standing in a group of two or more unless waiting at a bus stop', and 'shouting'. These offences cannot be enforced with any consistency, nor are they intended to be: the aim is to provide a broad remit which allows orders to be issued for people to move on or discontinue their activity.

The US legal academic William J Stuntz argues: 'When legal doctrine makes everyone an offender, the relevant offences have no meaning independent of law enforcers' will. The formal rule of law yields to the functional rule of official discretion.' The will of the official becomes in itself the law. Taken together, these changes represent a new kind of criminal law, a change in the basis of punitive powers. Modern criminal law is traditionally grounded in the unit of the autonomous individual: this is the unit from which all its forms are derived, including forms



of legal procedure and definitions of crime. The definition of a crime in a modern state was: the individual act which wilfully harms or violates the liberty of another person. Whereas customary injunctions are based only on the question of obedience or disobedience, a legal code is based on the elements of responsibility, harm, and equivalence.

Criminal justice has been detached from its origins, but has not been replaced with any alternative logic. Punitive powers float unhinged on the top of society, without principles governing their use. The idea that law is a 'tool' suggests it is merely a detached coercive instrument, lying around, which can be picked up and used for this or that. There is nothing in the instrument which suggests that it need be used for a particular purpose. Its quality comes only from what it can 'do' (i.e. the specific restrictions it can induce); the question of its use is left entirely open. The means of coercion have become separated from any system governing the use of that coercion, which is to say from social relations and determination.

Law has collapsed into the subjectivity of officials: there is nothing standing over their heads, judging and holding them to account. Law is immediately one with the exercise of coercion; it is simply whatever is backed up with sanctions. Coercive powers do not come with the sharp specification of legitimate and illegitimate use, such that every coercive power or law has as its inverse a domain of right. Criminal law starts to become random in its operations. People don't know when they are committing an offence or when or why they will be picked upon. They are often surprised when they are fined by busybodies; they had no idea they were committing an offence. They didn't know that the park was a no-dog zone or that it was a crime to drink on the beach. As Philip Johnston argues in his book Bad Laws, the law seems designed to catch you out, and on a certain level people start to accept the notion that most things are probably a crime and they no longer understand the law.

Punishment becomes a fitful and erratic business, reversing the trend of millennia which was towards a greater systematisation and standardisation of punishment in order to fit the crime. From the earliest codes, which laid down the punishments corresponding to each criminal act; to the development of forms of trial to establish the facts of a case; to the development of criminal codes or systems of precedent; to the creation of an impartial system of judges without personal ties or allegiance to the sovereign: the tendency over time has been the increasing predictability of criminal justice. In primitive societies 'punitive reactions' are 'free from procedural formality or rule', says the sociologist Max Weber, but 'A slow subjection to rules occurred'.

Whim is now returning as the mainstay of criminal justice, and punishment is again becoming summary, random and pecuniary. Law is no longer a 'system', says Harold J Berman in Law and Revolution, but a 'fragmented mass of ad hoc decisions and conflicting rules' and 'basically an instrument of the state'. The relation between state and society is inverted. In classic liberal law, civil society is assumed to be free, and the state is restrained by the law. In the officious state, civil society is restrained by red tape and bans, and the state is made free through the law. The essence of officious law is only: restriction for citizens, freedom for the state.

**HMP Birmingham Riot – Prison Officers Stood Back and Let It Happen**

[MOJUK – It is quite clear from the Minister of Justice's, statement below that prison officers stood back and let the riot happen. Specifically note Ms Truss's, sentence in second paragraph of her statement to parliament, 'When staff intervened, one of them had their keys snatched. At that point, staff withdrew for their own safety. This was very early, just an hour after the prisoner's protest began and could and should have been contained. According to prisoners, this kind of action is common, rather than prison officers, deal with the situation, they let it get out of

hand and it becomes a bargaining tool for more pay and an increase in staff.

Steve McCabe MP, asked the minister (para 44) if she would, confirm that G4S has made a profit at HMP Birmingham because it has reduced the number of experienced but more expensive staff and replaced them with cheaper but less experienced officers? The minister declined to give a comprehensive answer.]

Elizabeth Truss Secretary of State for Justice - Disturbance at HMP Birmingham.

This was a serious disturbance. I have ordered a full investigation and have appointed Sarah Payne – adviser to the independent Chief Inspector of Probation and former Director of the Welsh Prison Service – to lead this work. I do not want to pre-judge the outcome of the investigation. As we currently understand it, at 9.15am on Friday at HMP Birmingham 6 prisoners in N wing climbed onto netting. When staff intervened, one of them had their keys snatched. At that point, staff withdrew for their own safety. Prisoners then gained control of the wing, and subsequently of P Wing. G4S immediately deployed two Tornado teams. At 11:20, Gold Command was opened, and a further seven additional Tornado teams were dispatched to the prison. At 1:30pm, prisoners gained access to two more wings. Gold Command made the decision that further reinforcements were needed and dispatched an additional four Tornado teams to the prison. At 2.35pm, the police and Prison Service secured the perimeter of all four wings, which remained secure throughout the day. Shortly after 3pm, there were reports of an injured prisoner. Paramedics and staff tried to intervene but were prevented from doing so by prisoners. During the afternoon, a robust plan was prepared to take back control of the wings, minimising the risk to staff and prisoners. It is important that in this type of situation the right resources are in place before acting. At 8.35pm, ten Tornado teams of highly trained officers swept through the wings. Shortly after 10pm, the teams had secured all four wings.

**Former Soldiers to be Prosecuted for IRA Man's Murder** BBC News

Two former soldiers are to be prosecuted for murder in relation to the fatal shooting of an Official IRA man in Belfast in 1972. The defendants, known as Soldier A and Soldier C, are the surviving members of the Army patrol which shot Joe McCann. They are aged 65 and 67, and were in the Parachute Regiment. They are from England, but are expected to appear in court in Northern Ireland in the next few months. Joe McCann was a prominent member of the Official IRA. He was 25 when he was shot near his home in the Markets area of Belfast. The original police investigation was conducted in the early 1970s and no-one was prosecuted. Prosecutors have reviewed the case after the Northern Ireland Attorney General, John Larkin, referred it to the Director of Public Prosecutions in March 2014. This followed a report in 2012 by a police team which investigated alleged crimes from the Troubles. A spokesperson for the Public Prosecution Service said the decision to prosecute the men for murder was reached "following an objective and impartial application of the test for prosecution".

**ECtHR Accepts Complaints About Curfew Measures in Turkey**

The European Court of Human Rights (the ECtHR) has decided to communicate various complaints to the Turkish Government in 34 applications concerning the curfew measures taken in Turkey since August 2015 and has asked them to submit their observations. The complaints which have been communicated are related, among other things, to allegations of: unlawful killings and failure to take steps to protect the right to life; ill-treatment; and, unlawful deprivation of liberty on account of some of the applicants' confinement to their homes for extended periods. They rely on Article 2 (right to life), Article 3 (prohibition of inhuman or degrading treatment) and Article 5 (right to liberty and security) of the European Convention on Human Rights. Some of the applicants also complain about the arrest and detention in prison of their legal representative and the Government's alleged failure to comply with a number of interim measures under Rule 39 of the Rules of Court, in breach of Article 34 (right to individual application).



The ECtHR started receiving these 34 applications in December 2015, including more than 40 requests for interim measures from (or on behalf of) over 160 persons in the context of the curfews imposed by local governors in certain towns and villages of south-eastern Turkey (see also the press releases of 13 January 2016 and 5 February 2016). Most of the requests concerned incidents that had taken place in the towns of Cizre and Sur. Notably, five of those requests for interim measures were subsequently accepted and the ECtHR indicated to the Turkish Government to take all measures within their powers to protect the lives and physical integrities of five injured applicants who were waiting to be taken to hospitals. Following the deaths of four of the applicants, allegedly because of the Government's failure to comply with the interim measures to take them to hospital, and the taking into hospital of the fifth applicant, the ECtHR lifted the interim measures.

A further 43 persons in six of the applications, claiming to have been injured and trapped in the basements of three buildings in Cizre at the time of the introduction of their applications, lost their lives shortly afterwards, allegedly when the buildings in which they had taken refuge were bombed by members of the security forces. Relatives of some of those deceased persons expressed their wish to pursue the applications. In the context of its examination of the requests for interim measures, the ECtHR decided to give priority treatment to the majority of these 34 applications in accordance with Rule 41 (order of dealing with cases) of the Rules of Court.

**Misinformation Effect: How Multiple Eye Witnesses Can Make the Same Mistake**

Dara Mojtahedi, The Justice Gap: It should come as no surprise to anybody that the witnesses of a crime would often talk to one another straight after the event. A recent survey indicated that 86% of eyewitnesses had discussed the event with co-witnesses straight after the crime had taken place, and why shouldn't they?

Experiencing a crime is not a routine activity. In most instances, the event happens unexpectedly and can leave eyewitnesses feeling scared and vulnerable. As a result, it is very common for eyewitnesses to be in a state of shock (especially when witnessing a violent crime) and this can leave the individuals turning to others for both reassurance and also for an explanation as to what they had just witnessed. However research indicates that a post-event discussion between co-witnesses can have detrimental effects on the investigation process. • Almost 100 people a year could be convicted of a violent or sexual crime that they did not commit as a result of unreliable eyewitness evidence, according to research conducted by Dara Mojtahedi, an investigative psychologist at the University of Huddersfield – reported on the Justice Gap here.

It is well acknowledged that eyewitnesses can often be wrong in their recollection. Causes for inaccurate statements can stem from eyewitnesses having a poor memory, a less than perfect view of the event or even from being misled by the investigators. Police officers can usually identify if an eyewitness statement is inaccurate if it contradicts the statements of other eyewitnesses who were present. However, according to the New York based Innocence Project in 39% of cases of misidentification, there were multiple eyewitnesses giving the same incorrect statement. The probability of multiple eyewitnesses in an event making the exact same errors in their judgements appears at first glance highly unlikely. Instead, researchers argue that the false recollection of one eyewitness

can contaminate the statements of others, if a post-event discussion ensues.

The misinformation effect: To most people, the idea of conforming to misinformation from a co-witness can seem very unlikely, why would anybody take the word of someone else over their own in such a serious setting? What many individuals fail to understand is that during such occurrences, the eyewitnesses who conform to misinformation from others are not consciously aware that they are being influenced by someone else. Instead they would be convinced that they witness the misinformation first hand – leading eyewitness expert Elizabeth Loftus described this act of influence as the misinformation effect.

To understand how the misinformation effect works we must first understand the problems with memory encoding. When exposed to new information, an individual will be able to remember when and where that information was learnt, this is known as source monitoring. However, as time elapses the individual will be less likely to accurately remember the source from which the information was first discovered. Within an eyewitness setting, the memory of the witness will often be distorted (for reasons mentioned above). As a result, there would be gaps within their memory recall of the event. Due to these absences of information, it would become increasingly more difficult later on for eyewitnesses to be able to differentiate between information that they witnessed and information that they were exposed to afterwards. Therefore due to source attribution errors, eyewitnesses who are exposed to a post-event discussion will be at risk of mistakenly reporting misinformation from others in their own statements.

The negative effects of such errors can lead to the conviction and incarceration of innocent individuals. It is worrying then that in 48% of the misidentification cases, the real perpetrator had gone on to reoffend. This statistic can be extremely worrying when we take into account that within the UK, there are over 26,000 cases of violent or sexual crimes per year. The main point of our research was to create a series of experimental paradigms to observe the behaviours of eyewitnesses when exposed to misinformation. Working under the supervision of Dr Maria Ioannou & Dr Laura Hammond, we were able to make multiple groundbreaking discoveries about the cognitive processes that influence eyewitnesses to conform to misinformation.

We created an eyewitness simulation, where participants would witness a real fight breaking out in a bar. Through the use of actors disguised as participants, the study was able to administrate misinformation to the real participants. The study manipulated the characteristics of the actors as well as the relationship the co-witnesses shared with each other to identify what factors induce memory influence. The emerging results indicate that eyewitnesses will use any available social cues given off by their co-witness to form a stereotypical judgement of their abilities to recall information accurately. This judgement acts as the deciding factor for whether the eyewitness will conform to their misinformation. Additionally the researchers measured the personality traits of participants to determine if certain characteristics increased the participant's risk of being influenced. The results found that participants who scored highly on being submissive and indecisive were significantly more likely to conform to misinformation.

We are starting to establish what drives an individual to recall false information without being aware of it, however this is just the start. The aim of our work is not to just identify the problem but to help fix it. The research team aims to start working on policing intervention strategies to help reduce the prevalence of co-witness influence. Research has found that the rapport between the interviewer and the eyewitness a key tool for helping them filter out any misinformation that they did not witness.



**Hospitals Fail Too Often to Investigate Deaths, NHS Watchdog Finds**

*Denis Campbell, Guardian:* Hospitals are failing to investigate far too many deaths and frequently ignore and exclude relatives of patients who have died, a major NHS inquiry has found. The health service's failure to properly look into deaths is "a system-wide problem" that means hospitals are not learning from their mistakes and thus stopping other tragedies from occurring, its report says. The Care Quality Commission report, ordered by health secretary Jeremy Hunt, is scathing about hospitals' shoddy and insensitive treatment of bereaved relatives' requests for information and to be involved in an inquiry. One relative told the CQC that they encountered "more courtesy at the supermarket checkout" after their loved one's death. Prof Sir Mike Richards, the CQC's chief inspector of hospitals, said: "Families and carers are not always properly involved in the investigations process or treated with the respect they deserve. We found this was particularly the case for families and carers of people with a mental health problem or learning disability which meant that these deaths were not always identified, well investigated or learnt from." Deborah Coles, director of the charity Inquest, which investigates deaths in custody, said the review of how hospitals respond to deaths had exposed "a defensive wall surrounding NHS investigations, an unwillingness to allow meaningful family involvement in the process and a refusal to accept accountability for NHS failings in the care of its most vulnerable patients".

The CQC, the care watchdog for England, intends to overhaul how hospitals look into unexpected patient deaths or deaths owing to mistakes by staff. Investigations in future should be more thorough, more open and involve families much better, it promised. Hunt told the CQC to undertake the inquiry after it emerged that Southern healthcare NHS foundation trust only investigated 1% of all deaths among patients with learning disabilities over a four-year period and even fewer – 0.3% – of of over-65s with mental health problems. "Yet throughout the review process we have heard from families who had to go to great lengths themselves to get answers to these questions, who were subjected to poor treatment from across the healthcare system and who had their experiences denied and their motives questioned," said Dr George Julian, the regulator's special adviser on family and carer experience. This was particularly the case for relatives of patients who had had either a mental health problem or learning disabilities. One parent told the CQC: "I was put in a room. I shall never forget what the nurse in the room told me. She said, 'You have got to accept that his time has come.' Bearing in mind my son was just 34 years old."

Katherine Murphy, the chief executive of the Patients Association, said the report confirmed that too many hospitals did not honestly and openly investigate complaints from relatives. "These families have already lived through heartbreaking times – watching their loved one pass away – and they simply should not then be treated with so little respect and consideration," she said. The review team based their findings on assessing how 12 NHS trusts responded to unexpected or unusual patient deaths or deaths where errors had occured, discussion with more than 100 families and a survey of all NHS trusts in England. When the team reviewed 27 investigations hospitals had undertaken they found that the families' views had been taken onboard in just three cases. Many relatives were not kept informed about how investigations were progressing, often causing further distress.

The Academy of Medical Royal Colleges, which represents doctors, will help the CQC draw up an agreed system for investigating unusual deaths. Coles said a truly independent investigation framework was needed to tackle head-on the dangerous systems and practices which were "costing people's lives". Problems the CQC found included families' involvement in investigations being merely "tokenistic", the views of NHS staff being given greater weight than that of relatives and hospitals seeing family members as "antagonistic" if they sought too much information or involvement.

**EU Data Retention Ruling Goes Against UK Government**

The UK government says it is "disappointed" after the European Court of Justice said the "indiscriminate" collection of data was against EU law. EU judges said communications data could only be retained if it was used to fight serious crime. Its verdict came after a legal challenge to the UK government's surveillance legislation. The challenge was initially championed by Brexit Secretary David Davis, who was then a backbench Conservative MP. The Lib Dems said the ruling proved the government had "overstepped the mark" with its Data Retention and Investigatory Powers Act, branded the "snoopers' charter" by critics, which requires communications companies to retain data for 12 months. 'Proper scrutiny' - The ECJ has ruled that a "general and indiscriminate retention" of data is against EU law and can only be done under certain conditions and "solely for the purpose of fighting serious crime". Its ruling confirms a preliminary verdict in July. The case now returns to the UK Court of Appeal, which had referred the case to the ECJ for clarification. Mr Davis, who had long campaigned on civil liberties issues, left the case after Theresa May appointed him to her cabinet in July. Tom Watson, Labour's deputy leader, who is one of those bringing the case, said: "This ruling shows it's counter-productive to rush new laws through Parliament without a proper scrutiny." The Home Office said it would be putting forward "robust arguments" to the Court of Appeal.

**Robin Garbutt - Family Continue to Protest His Innocence**

Bob Woffinden: In April 2011, Robin Garbutt was sentenced to life imprisonment for the murder of his wife Diana at the village Post Office they ran together in Melsonby, North Yorkshire. The fact that this entirely innocuous man has been in prison ever since perfectly illustrates just how defective the UK criminal justice process now is.

'A regrettable lack of professionalism' - On 23 March 2010, Diana Garbutt, the postmistress in the small village of Melsonby, was killed by three blows to the head from a heavy blunt weapon. Her husband, Robin, told police that, at 8.31am, after disabling the overnight security system on the Post Office safe, he heard a noise from the rear of the shop. He expected to see Diana, but was instead confronted by a gunman in a balaclava who said, 'Don't do anything stupid. We've got your wife'. He was told to fill a black holdall with the contents of the safe, about £16,000. The gunman left, and Garbutt sprinted upstairs to his wife, only to find her bloodied and unconscious on the bed. He dialled 999. Because he was distraught, the operator advised that he should ask for a neighbour's help. He hammered at Pauline Dye's door and she came to assist. They turned the body over but, as the paramedics were arriving, it was clear that Diana had died.

That was Garbutt's account of his wife's tragic death. Unfortunately, North Yorkshire police didn't believe it; his story didn't make sense to them. Why would a gunman and his accomplice go into the living quarters at all? Wasn't it simpler just to hold him up and make off with the money? No one saw intruders making their escape. Nor had Robin activated the alarm, even though it was noiseless and he could have done so without alerting the gunman. They later suspected that Diana had been having affairs and the business was in financial difficulties. They concluded that Garbutt had invented the gunman and that he himself was the murderer. He was put on trial, found guilty by a 10-2 jury majority and sentenced to life imprisonment. Since then, there has been a resolute campaign by family and friends to reopen the case. What about the clump of hair beside Diana's outstretched hand? This was the most vital piece of evidence in the case – but where was it? And whose DNA was on the murder weapon? It certainly wasn't Garbutt's.

Robin Garbutt was born on 7 August 1965, and brought up in Tholthorpe, a village north of York. He became the manager of an electrical supply company and met Di Kiefer at a colleague's house in York. She had served in the army, though was by this time working for Group 4, taking prisoners to and from court. They hit it off, became a couple, and she moved into his house in Huby, south of Easingwold. After getting married in 2003, with a ceremony at Allerton Castle, they bought a Post Office and shop with living rooms on the first floor. Their intention was that Robin would take care of the shop while Di became the postmistress. As the years passed, however, Di's interest in the business faded a little, but Robin found he loved the work and his time was increasingly taken up with it.

The Post Office was in Melsonby, a small village of about 700 people eight miles south of Darlington. Although the premises were very small, the location was particularly good. Melsonby was at the heart of a thriving farming community. It was also only a mile from the major road junction of the A1 and A66 trunk roads at Scotch Corner, and was almost at the point where the A1 became the A1(M). Drivers diverting into the village from the A66 would go down West Road to the junction with Moor Road, which ran north-south through the village. It was at this crossroads that the Post Office was sited. Garbutt generally opened up about 5.00am, and would quickly be serving a succession of stable boys, farm hands and others.

On 17 March 2009, at about 8.30am, the Garbutts had suffered an armed robbery. Post Office safes are centrally locked and cannot be opened until then; obviously, criminals are well aware of this. Garbutt was ordered at gunpoint to fill a bag and, on that occasion, £11,000 was stolen. He had never been involved with policing or crime in any way and this incident unnerved him. He was tempted to sell up, though villagers persuaded him to stay. Brian Willis, a retired postmaster who sometimes acted as holiday relief, said that Garbutt 'gave generous, perhaps over-generous, service to the community'. Another villager added that the Garbutts ran 'an idyllic village store'. Garbutt was concerned, though, about the parish notice-board, which was directly outside the shop and prevented him from properly monitoring activity outside; the council understood his anxieties and moved it. He also asked the Post Office to provide extra security, but they refused his request. He then considered installing CCTV equipment himself, but Di had different priorities.

'They didn't put CCTV in purely and simply because Di wanted a new kitchen', recalled Mark Stilborn, a local garage owner who is Garbutt's brother-in-law. So, by March 2010, there had been a succession of workmen in their property, helping to modernise it and put in the new kitchen. At that time, the Garbutts were looking forward to a three-week break in the US. They had booked to fly on 2 April to Las Vegas, where they would renew their marriage vows. It's a small point – but possibly a hugely significant one – that on the evening of Monday 22 March they not only had the contents of their kitchen stacked in the bedroom but also had partly-packed suitcases spread out on their bed. So, they were sleeping in the spare bedroom. That evening, Garbutt drove to the cash-and-carry at Stockton. On the way back, he called in for fish and chips in Darlington. When he got home, he and Di had their supper together. As usual, Garbutt was in bed by nine o'clock.

Two days after the murder, a rusty iron bar was found on top of a wall on the other side of West Road, opposite the rear of the Post Office. From the roadside, the wall was eight feet high and so anything on top would not easily be seen. On its other side, however, the wall was only about three feet high (as the land rose relatively sharply into garage premises that were set back from the road). Consequently, it is a little surprising that it took two days for this iron bar to be noticed. At the time, however, no one seems to have attached much significance to it. The police did not ask the Forensic Science Service to conduct tests and only did so, four months later, at the behest of the prosecution barrister. These belated tests then demonstrated that this was the murder weapon. The first consequence of this discovery was that the trial, originally set for October 2010, was delayed until the

following year. On the metal bar, scientists found Diana's DNA and the DNA of an unidentified male. However, the unidentified DNA turned out to belong to a police officer. This could have been masking the DNA of the murderer. It was merely the first in a series of blunders that raise serious doubts about the competence of the entire investigation.

At an early hearing before magistrates, Garbutt was denied bail on the grounds that police had found bloodstained boxer shorts. Later, the prosecution had to admit that this apparently-incriminating underwear was not Garbutt's; it actually belonged to a neighbour. The whole case turned on the time of death. The original estimate of time of death, as recorded by the police themselves, was 6.00am at the earliest. If this was correct, then Garbutt could not have killed his wife; the till-roll showed an almost unbroken series of transactions from then until the discovery of the body.

At the trial, held at Middlesbrough in April 2011, the prosecution argued that death occurred closer to the middle of the night than – as was indicated both by Garbutt's account and the police's own original estimate – towards daybreak. Their assumption was based on three factors: rigor mortis; hypostasis; and the analysis of stomach contents. The evidence of the paramedics who attended the scene was that rigor mortis, the stiffening of the limbs, had set in by the time they saw the body. They also noted hypostasis: after death, blood stops circulating round the body and so, under the force of gravity, sinks to the lower parts, resulting in paleness on the top of the body and purple staining underneath. The defence argued that this evidence was based on mistaken impressions rather than careful scientific observations. Pauline Dye, the neighbour who had touched the body, attributed stiffness in Diana's hand to congealed blood sticking the fingers together. Also, if Diana had been dead for some time, lying face down, then why was the purpling starting to appear on the back of her body and not the front? The principle factor that led to the time of death being changed was the analysis of stomach contents. Police officers purchased a portion of fish-and-chips from the Darlington shop, mashed it all up, and weighed it. They also found the wrappings from the Garbutts' meal, and estimated how much was left over. The prosecution's time-of-death expert deducted the amount not consumed from the overall weight of the meal and, judging by what was left in the stomach, she estimated the time of death as between 2.30 and 4.30am.

No doubt readers from outside the UK will be astonished to learn that such cavalier standards can apply at trials within the UK. Yet this calculation is even more bizarre than it seems for two reasons. Firstly, police officers, true to form in this case, had taken the wrong fish-and-chip wrappings. Just as with the boxer shorts, the ones they looked at had actually come from a bin outside; the Garbutts' own wrappings were in a bin-bag in the hallway waiting to be put out with the rubbish. Secondly, the standing of the prosecution's expert in this field of science is rather uncertain; forensic archaeology appears to be her particular speciality.

Bernard Knight, emeritus professor of forensic pathology at Cardiff University, is one of the country's leading experts in this field. He has examined the papers. 'There is a wide variation in the passage of food through the intestines', he told me. 'I am very wary of setting strict limits on the time of death, especially in situations like this, where elements like fear or injury may greatly distort the normal times.' If Garbutt had been the murderer, what was his motive? The Crown sought to argue that he had been provoked to murder by Diana's 'affairs'. They alluded to three. Di had told Craig Hall that, because Robin was all shop and no sex, her marriage was going through a rough patch. Hall testified that there was no more to their relationship than 'banter which fizzled out'. Kevin Heapey, who was married to Diana's cousin, said that at a party in March 2009 they went outside together and ended up kissing, but Di felt uncomfortable. John Illingworth said they had a casual encounter in December 2008, and



were kissing on the settee. He said that he'd been so drunk he didn't really know how far things had gone, though he could recall Diana saying to him, 'Stop, this is wrong'. Diana rang him to say that she'd told Robin the next day. From her computer, the police extracted the information that she had contacted an online dating website. This surprised all those who knew her. However, her interest seems to have been fleeting; she hadn't sent any messages or furthered her involvement in any way at all.

Locals spoke of them as a loving and happy couple.'Robin is the original Mr Nice Guy', said Stilborn. 'If you sat and talked to him for an hour, he'd be your best mate. If you asked what his interests were, Di was his interest. He just wanted to make her happy.' Roslyn Shedden, who had gone to the Glastonbury festival with Diana the previous year (2009) to see Bruce Springsteen, said there was nothing to suggest their relationship was in trouble. 'This is a village community', explained Barry Conachy, one of Garbutt's neighbours. 'If she had had an affair, it would have been known about – there would have been evidence.' The story of Diana's 'affairs' was enthusiastically peddled by the more credulous newspapers; but it was just nonsense. As suggestions of infidelity dissolved, the prosecution switched tack and instead tried to place emphasis on a financial motive: the business was in difficulties and Garbutt was stealing from it.

'It is the prosecution case', Mr Justice Openshaw told the jury, 'that money was being stolen from the Post Office and that the theft was concealed by false declarations as to the amount of money in the safe.' The suggestion was that, as funds were being stolen, increasing amounts of cash had to be requested from the Post Office to cover the shortfall. Because the Garbutts were about to go away, the prosecution argued, an independent audit would be carried out during their absence and this would reveal the discrepancies. Like the extramarital affairs, this analysis too was completely wrong. The relevant figures showed that cash deliveries to the branch had actually decreased from £259,500 in 2006 to £139,500 in 2009. Further, this decrease had occurred during a period in which the amount paid out by the branch (in benefits and suchlike) had increased from £340,670 to £396,926. So these figures now proved that the business was being run efficiently. Certainly, no one was stealing from it. At this time there was a series of cases in which postmasters were wrongly accused – and, in several unfortunate instances, wrongly convicted – of having defrauded their own businesses. The computerised Post Office accounts needed to be carefully scrutinised, and in the Garbutt case that could not happen as the financial records were not disclosed to the defence until after the trial. 'The defence ought to have had [the full financial records]', the judges at the Court of Appeal later acknowledged. Despite this, they did not quash the conviction, arguing that the jury had obviously rejected the gunman scenario put forward by Garbutt.

One of the customers whom Garbutt served early that morning was Brian Hird, a civil servant who works for the environment agency. That day, 23 March, was a designated 'free' day when he has time off to carry out work that benefits the environment. Consequently, he arrived at the Post Office at about 6.45am, later than he would normally have done. While he was there, he heard a woman's voice shout 'Robin!' He said that Garbutt then replied either 'Yes, Di', or 'Yes, dear', but was preoccupied with serving customers. Hird didn't know Di, so he cannot say that it was her voice that he heard. But he definitely did hear a female voice and, logically, the voice can't have been anyone's but Diana's. If Hird heard correctly, then Garbutt cannot have been the killer. Moreover, he should have heard correctly because his hearing is particularly acute. As a keen environmentalist, he is a bird listener and can recognise different birds' song.

That morning, in the time before the discovery of the body, sixty transactions were recorded. Just about everyone who went into the shop spoke of Garbutt appearing completely normal. The prosecution tried to use Garbutt's failure to use the alarm as part of its case but its logic is

bewildering. Supposing Garbutt had been the murderer, why wouldn't he have used the alarm? After all, he raised the alarm anyway. He simply said he hadn't used it because he was momentarily so fearful that he was not thinking clearly. On the evening before the murder, a lady who was out walking her Labrador at about ten o'clock said she saw Robin coming towards her carrying something like an overnight bag under his arm. She was surprised to see him, as she knew he was not usually out at that time, and was doubly surprised by the fact that, when she said hello, he did not acknowledge her, other than with, perhaps, a curt grunt.

So here was a suggestion that Garbutt was perhaps engaged in some shady night-time activity. However, even if the evidence was accurate, it is difficult to understand how it fitted into a prosecution narrative. But, once again, it was not accurate. David Andrews, another local resident, was at that time walking his dog. Seeing a woman with a large Labrador approaching, he picked up his own much smaller dog to avoid a confrontation. He added that he had certainly not seen Robin, whom he knew well, as he walked round the local green. So the explanation of this fleeting incident was that the woman appeared to have confused him with Robin; the two men were about the same height and build. However, Andrews was unable to give evidence as he was abroad by the time the case came to trial. The fact that the evidence was tendered at all provides an insight into the barrel-scraping that characterised the prosecution case. The prosecution asserted that the absence of any sightings of suspicious people that morning showed that his account was not credible. Even the Court of Appeal judges, however, later acknowledged that a lack of sightings could just be down to 'sheer chance'.

However, there wasn't a lack of sightings; actually, there were plenty. It's just that in the context of this shoddy investigation they were never analysed properly. There were suspicious car sightings of, for example, a blue car, variously described as 'electric' or 'metallic'. Someone had noticed it earlier just before 8.30, parked by the entrance to the old quarry. One woman, who was on her way to work, noticed what appears to have been the same car, which was stationary close to the Post Office. She said that she noticed the car especially as the driver flashed her to move across. She said that he was 'a white male in his mid-20s', who wore 'a beanie style hat' and was seated low down, as if shielding himself from view. Another witness said, 'a blue car came behind me, it came from nowhere'. A blue car was seen, being driven 'erratically', on the back roads towards Darlington. CCTV revealed that a car was behind Garbutt's on four different cameras on the Monday evening as he headed towards the cash-and-carry in Stockton. Then, astonishingly, as he returned to Melsonby from Darlington, CCTV recorded this same car behind him on four more cameras. Strangely, by the end of the week, this car had been sold.

At the Court of Appeal, the judges gave, as one of their reasons for rejecting the appeal, that 'there would be no reason for [robbers] to go upstairs to the living quarters'. Yet there was a very good reason for robbers to go up to the bedrooms; there was a second safe upstairs. Those of a criminal persuasion might have noticed as much from the depression in the shop's ceiling. As it happened, it wasn't being used because the Garbutts had lost the key, but thieves weren't to know that. It is certainly possible, with the work then being carried out in the Garbutts' home, that there had been loose talk locally about this second safe. If robbers had done some cursory reconnaissance, they would have been expecting the Garbutts to be sleeping in the end bedroom and so, on entering the middle bedroom, would have been startled by Diana's presence there. One can well imagine her being awoken by the intruder or intruders, and a struggle ensuing. The prosecution tried to assert that there wasn't a struggle, but this too is wrong. Pauline Dye gave evidence that she picked up pictures that had fallen to the floor and a standard lamp that had been knocked over.

James Hill QC, Garbutt's barrister, described the crime scene management as 'a comedy of errors', a clichéd description that does not appear apt to me. (There was nothing comic about it.) The judge, Mr Justice Openshaw, acknowledged that the police stewardship of the crime scene displayed 'a regrettable lack of professionalism'. There was blood spatter on the pillow, and a trace of a DNA profile. Although this was incomplete, the profile didn't match either Diana or Robin's DNA. The clump of hair on the pillow is visible in the scene-of-crime photographs. Those who knew her believed that Di, with her army background, would have tried to resist an attacker. She may well have pulled out some of his hair. If so, the clump would be bound to yield a profile of the attacker's DNA and, accordingly, it was the single most important piece of evidence in the case. But the hair could not form part of the overall picture at trial because, vital as it was, the evidence had disappeared. The police had lost it. This was the most catastrophic blunder of all. 'Those pieces of hair should have been carefully bagged', the judge said. 'They were not. The hair has been lost.' 'It was like a light-brown clump of hair', explained Sallie Wood, Garbutt's sister. 'It was not Di's colour, she's quite dark, and Robin's hair is grey and short, so it was definitely neither of theirs.'

Other aspects of the scene-of-crime preservation were equally poor. For some reason, police removed two bedside lamps from their positions and put them into a wardrobe, where they were forgotten about for some time. When they were finally examined, tiny bloodspots were found on one of them. Nor were either the bedside mirror or the carpet next to the bed examined for blood spatter; it is likely that both may well have provided significant evidence. What is known is that there was no blood spatter on Garbutt himself or his clothing.

To summarise just a few of the glaring key points: there was DNA on the murder weapon but it was not Robin's; there was DNA on the pillow of an unidentified male, but it was not Robin's; there was a clump of hair on the pillow that was not Robin's; there was blood spatter at the scene but no blood spatter on Robin; there was very good witness evidence of an unknown driver in a car parked just outside the Post Office who was shielding himself from view; there was overwhelmingly consistent evidence that Robin was acting entirely normally as he served customers that morning; there was very good witness evidence that the voice of a woman, who could only have been Diana, was heard after the time when Robin was supposed to have killed her; and the police's own original estimate of time of death also showed that Robin could not have killed her. 'Having no Di for the rest of my life is a nightmare I have to face', Garbutt wrote to me. 'We have all lost a beautiful lady we love dearly, and a soul mate I will miss terribly to my dying days.' He feels that justice for her is even more important than justice for himself. 'We all owe it to her to identify those responsible', he said. 'I know if she was in my place she would never give up.'

Hostages: Andrew Malkinson, Michael Ross, Mark Alexander, Anis Sardar, Jamie Green, Dan Payne, Zoran Dresic, Scott Birtwistle, Jon Beere, Chedwyn Evans, Darren Waterhouse, David Norris, Brendan McConville, John Paul Wooton, John Keelan, Mohammed Niaz Khan, Abid Ashiq Hussain, Sharaz Yaqub, David Ferguson, Anthony Parsons, James Cullinene, Stephen Marsh, Graham Coutts, Royston Moore, Duane King, Leon Chapman, Tony Marshall, Anthony Jackson, David Kent, Norman Grant, Ricardo Morrison, Alex Silva,Terry Smith, Hyrone Hart, Glen Cameron,Warren Slaney, Melvyn 'Adie' McLellan, Lyndon Coles, Robert Bradley, John Twomey, Thomas G. Bourke, David E. Ferguson, Lee Mockble, George Coleman, Neil Hurley, Jaslyn Ricardo Smith, James Dowsett, Kevan & Miran Thakrar, Jordan Towers, Patrick Docherty, Brendan Dixon, Paul Bush, Alex Black, Nicholas Rose, Kevin Nunn, Peter Carine, Paul Higginson, Thomas Petch, Vincent and Sean Bradish, John Allen, Jeremy Bamber, Kevin Lane, Michael Brown, Robert Knapp, William Kenealy, Glyn Razzell, Willie Gage, Kate Keaveney, Michael Stone, Michael Attwooll, John Roden, Nick Tucker, Karl Watson, Terry Allen, Richard Southern, Jamil Chowdhary, Jake Mawhinney, Peter Hannigan, Ihsan Ulhaque, Richard Allan, Carl Kenute Gowe, Eddie Hampton, Tony Hyland, Ray Gilbert, Ishtiaq Ahmed.