

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M. VICTORIA CUMMOCK, in her own)
right, and as personal representative of)
the ESTATE of JOHN CUMMOCK,)
deceased; CHRISTOPHER JOHN)
CUMMOCK; MATTHEW DAVID)
CUMMOCK; and ASHLEY)
MICHELLE CUMMOCK,)

Plaintiffs,)

v.)

Case No. 96-CV-1029 (CKK)

THE SOCIALIST PEOPLE'S LIBYAN)
ARAB JAMAHIRIYA; LIBYAN)
EXTERNAL SECURITY)
ORGANIZATION, a/k/a JAMAHIRIYA)
SECURITY ORGANIZATION; LIBYAN)
ARAB AIRLINES; ABDEL-BASSET)
ALI AL-MEGRAHI, a/k/a MR. BASET,)
a/k/a AHMED KHALIFA ABDUSAMED,)
a/k/a ABD AL-BASIT AL-MAQRAHI;)
and LAMEN KHALIFA FHIMAH, a/k/a)
AL AMIN KHALIFA FHIMAH, a/k/a)
MR. LAMIN,)

Defendants.)

**PLAINTIFFS' STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE
IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT
BASED ON COLLATERAL ESTOPPEL
AS TO DEFENDANT ABDEL BASET AL-MEGRAHI**

Pursuant to LCvR 7.1 and 56.1 and in conjunction with Plaintiffs' Motion for Summary Judgment Based on Collateral Estoppel as to Defendant Abdel Baset Al-Megrahi and the Memorandum of Points and Authorities in support thereof, Plaintiffs hereby proffer the following statements of material facts as to which there is no genuine issue. The facts set forth

below are derived from the 82-page decision of the three-judge panel of the Scottish High Court of Justiciary from January 31, 2001 in which Defendant Al-Megrahi was found guilty on 270 counts of murder for his role in the bombing of Pan American Airlines Flight 103 en route from Heathrow Airport in England to John F. Kennedy International Airport in New York on December 21, 1988. The opinion of the Scottish High Court of Justiciary is appended hereto as Exhibit A and is specifically referenced throughout the statement of facts.

I. The Bombing of PA103

1. “At 1903 hours on 22 December 1988 PanAm flight 103 fell out of the sky.” Exhibit A, at 1.
2. “The 259 passengers and crew members who were on board and 11 residents of Lockerbie where the debris fell were killed.” *Id.*
3. “It is not disputed, and was amply proved, that the cause of the disaster was indeed the explosion of a device within the aircraft.” *Id.*, at 2.
4. “[T]he cause of the damage [to the aircraft] was the detonation of an explosive device within the fuselage.” *Id.*, at 3.
5. The Court found that the clear inference to be drawn from the evidence at trial was “that the conception, planning and execution of the plot which led to the planting of the explosive device was of Libyan origin.” *Id.*, at 75.

II. The Location of the Explosive Device

6. The port side forward cargo bay was loaded with containers constructed of either aluminum or fiberglass that were approximately 5’ x 5’ x 5’ in dimension and were filled with luggage. *Id.*, at 3.

7. After reassembly of the pieces of the containers that were discovered in the debris, it was found that “there was unusual damage to an aluminum container AVE 4041 and a [fiberglass] container AVN 7511.” *Id.*, at 3-4.

8. Containers AVE 4041 and AVN 7511 were situated next to one another in the port side forward cargo bay of PA103. *Id.*, at 4.

9. “[T]he physical evidence of damage to the hull, the container [AVE 4041], and...the contents of the container satisfies us beyond any doubt that the explosion occurred within the container, and the calculations [provided in court testimony by (a) forensic scientists with the Royal Armaments Research and Development Establishment; (b) an expert on the effects of blast; and (c) the chief scientist for the Defence Evaluation and Research Agency] serve merely to confirm that view.” *Id.*, at 6-7.

10. The Court credited the testimony of Dr. Douse, an expert in the trace analysis of drugs and explosives, who concluded that traces of PETN and RDX, which are chemicals used in the manufacture of plastic explosives including Semtex, were found on specific pieces of the outboard base frame member of container AVE 4041. *Id.*, at 7-8.

11. “During the course of the massive ground search, a large quantity of luggage and clothing was collected and labelled [sic].” *Id.*, at 8.

12. “Fifty-six fragments which showed various signs of explosives damage were identified as forming part of what had been a brown hardshell Samsonite suitcase of the 26” Silhouette 4000 range (‘the primary suitcase’). The nature of the damage indicated that it had been inflicted from within the suitcase.” *Id.*, at 9.

13. The Court agreed “beyond doubt” with forensic evidence that the explosives were contained with a Toshiba RT-SF 16 BomBeat radio cassette player. *Id.*, at 10, 14-15.

14. In addition to the Toshiba RT-SF 16 BomBeat radio cassette player, the Court found that the following items of clothing and other items were also contained in the brown Samsonite suitcase: a) a white Abanderado brand T-shirt; b) a pair of size 34 Yorkie brand trousers; c) a grey Slalom brand shirt; d) a shirt “similar to a Slalom brand shirt”; e) a second pair of Yorkie brand trousers; f) a tweed jacket; g) a pair of Panwear brand pajama pants; h) a Primark brand Babygro with the identification of “made in Malta”; i) a black nylon umbrella; and j) a knitted brown woolen cardigan sweater with the label inscription “Puccini design.” *Id.*, at 11-15.

15. The Court heard testimony of Mr. Tony Gauci, one of the partners of a clothing store named “Mary’s House” located on Tower Road in Sliema, Malta. *Id.*, at 15.

16. In his testimony, Mr. Gauci recalled a Libyan individual entering his store “about a fortnight before Christmas 1988” and purchasing “two pairs of Yorkie trousers, two pairs of striped [pajamas] of the same brand as the Panwear fragment, a tweed jacket, a blue Babygro, two Slalom shirts collar size 16½, two cardigans, one brown and one blue, and an umbrella.” *Id.*, at 15.

17. The Court was “entirely satisfied that the items of clothing in the primary suitcase were those described by Mr. Gauci as having been purchased at Mary’s House.” *Id.*, at 16.

18. On January 13, 1989, a piece of charred material was found at the crash site near Newcastleton and given the police number PI/995 and subsequently label 168. *Id.*, at 16.

19. This item was examined initially on May 12, 1989, and it was determined to be a portion of the neckband of a Slalom shirt. *Id.*, at 17.

20. Embedded in the material was found a fragment of green-colored circuit board. *Id.*, at 17.

21. The Court accepted the conclusion of forensic scientists that the fragment “originated from an area of the connection pad for an output relay of a circuit board of single solder-mask type of an MST-13 timer.” *Id.*, at 19.

III. The Provenance of the Brown Samsonite Suitcase

22. Air Malta was the baggage handling agent for all flights coming out of Luqa Airport in Malta. *Id.*, at 39.

23. “Air Malta tags could be used for flights of other airlines, in certain circumstances.” *Id.*, at 39.

24. Check-in for Flight KM180 from Malta to Frankfurt, Germany opened at 0815 and closed at 0915. *Id.*, at 41.

25. Based on documentary evidence provided by interline baggage handlers employed by Pan Am at Frankfurt airport, the Court found that there was an “inference that an item which came in on KM180 was transferred to and left on PA103A” en route from Frankfurt to Heathrow Airport in London. *Id.*, at 33.

26. Based on evidence and testimony propounded during the trial, the Court found that “there is a plain inference from the documentary record that an unidentified and unaccompanied bag traveled on KM180 from Luqa airport to Frankfurt and there was loaded on PA103A.” *Id.*, at 33.

27. Baggage container AVE 4041, which contained the explosive device, was set aside to receive interline baggage in the Pan Am interline shed at Heathrow airport in London. *Id.*, at 24.

28. Based on testimony proffered at trial, “container AVE 4041 contained both interline baggage which had been placed in it in the interline shed, and baggage unloaded from PA103A.” *Id.*, at 24.

29. The Court found that “it has been proved that the primary suitcase containing the explosive device was dispatched from Malta, passed through Frankfurt and was loaded onto PA103 at Heathrow.” *Id.*, at 74.

IV. Testimony of “Abdul Majid”

30. In August 1988, the witness known by the name of “Abdul Majid” (hereinafter “Majid”) contacted the U.S. Embassy in Malta indicating a willingness to provide the United States with information about Libya’s activities pertaining to terrorism. *Id.*, at 43.

31. Majid joined the Jamahiriya Security Organisation (hereinafter “JSO”), later named the External Security Organisation, which is the Libyan intelligence organization, in 1984. *Id.*, at 42.

32. Majid was appointed assistant to the station manager of Libyan Arab Airlines, the state-owned airline of the Socialist People’s Libyan Arab Jamahiriya, at Luqa Airport in Malta in December 1985. *Id.*, at 42.

33. The Court accepted testimony by Majid that, in 1985, Ezzadin Hinshiri was the director of the central security section of the JSO, Said Rashid was the head of the operations section of the JSO, Nassr Ashur was the head of special operations in the operations section of the JSO, and Megrahi was the head of the airline security section of the JSO until January 1987. *Id.*, at 43.

34. The Court further accepted Majid's testimony that, when Megrahi left his post as head of the airline security section of the JSO, he moved to the strategic studies institute of the JSO. *Id.*, at 43.

35. Though he testified on a variety of matters that would circumstantially tie the two individual defendants to the bombing of PA103, the Court was "unable to accept Abdul Majid as a credible and reliable witness on any matter except his description of the organisation of the JSO and the personnel involved there." *Id.*, at 47.

V. MST-13 Timers

36. MEBO AG was the name of the company that made the MST-13 timer that had been used in conjunction with the explosives that caused the destruction of PA103. *Id.*, at 47.

37. "MEBO AG was formed in the early 1970s by Edwin Bollier and Erwin Meister with offices in Zurich, Switzerland. *Id.*, at 47.

38. During the mid-1980s, the principal customer of MEBO AG was "the Libyan Government and in particular the Libyan military security." *Id.*, at 47.

39. "[I]n or about July 1985 on a visit to Tripoli [in Libya], Mr. Bollier received a request for electronic timers from Said Rashid or Ezzadin Hinshiri and that he had military business dealings in relation to the Libyan Government with Ezzadin Hinshiri since the early 1980s." *Id.*, at 50-51.

40. The Court credited Bollier's testimony that he supplied the twenty electronic timer samples to Libya in three batches. *Id.*, at 52.

41. Bollier personally delivered five samples to Libya in 1985 in a visit to Tripoli. *Id.*, at 52.

42. In 1985, Bollier delivered five additional samples to the Libyan Embassy in East Berlin. *Id.*, at 52.

43. “In 1986 [Bollier] delivered the remaining ten personally in Tripoli.” *Id.*, at 52.

44. The Court credited testimony by Bollier that he “attended tests carried out by the Libyan military in the Libyan desert at Sabha which involved, *inter alia*, the use of MST-13 timers in connection with explosives and in particular air bombs” in either 1986 or 1987. *Id.*, at 54.

45. The Court further credited the testimony of Bollier that MEBO AG “rented an office in their Zurich premises some time in 1988 to the firm ABH in which [Megrahi] and one Badri Hassan were the principals.” *Id.*, at 55.

VI. Testimony of Tony Gauci

46. Mr. Gauci, the proprietor of Mary’s House, the clothing store located in Sliema, Malta, was first interviewed by the police on September 1, 1989. *Id.*, at 56.

47. In his statement to police on September 1, 1989, he gave information about the circumstances of the sale, the date of the sale, and the description of the purchaser. *Id.*, at 56.

48. Mr. Gauci gave another statement to police on September 13, 1989, that he believed the purchaser was about 50 years of age. *Id.*, at 57.

49. From September 14, 1989 through September 10, 1990, Mr. Gauci was instructed by police to review photographs on four different occasions. In the dozens of photographs that he reviewed, he never positively identified the Libyan individual who had purchased the clothing from Mary’s House which was subsequently found in the Samsonite suitcase in which the bomb was located. *Id.*, at 58-59.

50. On February 15, 1991, Mr. Gauci was shown additional photographs at police headquarters in Malta at which time he positively identified a photo of Megrahi as the individual who had purchased the clothing from Mary's House in December 1988. *Id.*, at 59-60.

51. In assessing the credibility of Mr. Gauci's testimony, the Court stated, "The clear impression that we formed was that he was in the first place entirely credible, that is to say doing his best to tell the truth to the best of his recollection, and indeed no suggestion was made to the contrary." *Id.*, at 64.

52. The Court further stated, "We are satisfied that on two matters he was entirely credible, namely the list of clothing that he sold [*supra.* at para. 15] and the fact that the purchaser was a Libyan." *Id.*, at 64.

53. Based on the testimony of Mr. Gauci, and taking into consideration the testimony of experts on behalf of the defense, the Court reached the conclusion that the date of purchase of the clothing at Mary's House was December 7, 1988. *Id.*, at 65.

54. With regard to the identification of Megrahi's photo, the Court credited Mr. Gauci's identification by stating, "From his general demeanour and his approach to the difficult problem of identification, we formed the view that when he picked out [Megrahi] at the identification parade and in Court, he was doing so not just because it was comparatively easy to do so but because he genuinely felt that he was correct in picking him out as having a close resemblance to the purchaser, and we did regard him as a careful witness who would not commit himself to an absolutely positive identification when a substantial period had elapsed." *Id.*, at 66.

VII. The Standard Applied in the Criminal Case

55. In determining the guilt or innocence of Megrahi and Fhimah, the Court stated the standard to be applied in the proceeding: "the evidence against each of them has to be considered

separately, and that before either could be convicted we would have to be satisfied beyond reasonable doubt as to his guilt and that evidence from a single source would be insufficient.”

Id., at 75.

VIII. Evidence as to Fhimah

56. Fhimah’s 1988 diary was recovered from an April 1991 search of Medtours, a company set up by Fhimah and an associate. *Id.*, at 75.

57. The diary included two pages of numbered notes. *Id.*, at 75.

58. One of the numbered notes, as translated, stated “Take/collect tags from the airport (Abdulbaset/Abdussalam)” with the word “tags” written in English. *Id.*, at 75-76.

59. An entry for December 15, 1988 stated “Take tags [sic] from Air Malta” with “OK” written at the end of this entry in a different color ink. *Id.*, at 76.

60. Another entry for December 15, 1988 stated “Abdel-baset arriving from Zurich”; however, the Court concluded that Megrahi did not arrive in Malta until December 17. *Id.*, at 76.

61. On December 18, 1988, Fhimah flew from Malta to Tripoli and returned to Malta on December 20, 1988 on the same flight as Megrahi. *Id.*, at 76.

62. Fhimah received a call from Megrahi at his hotel in Sliema, Malta on December 21, 1988. *Id.*, at 77.

IX. Evidence as to Megrahi

63. The Court made clear that Fhimah’s diary entries that reflected any dealings with Megrahi would not form any part of the case against Megrahi as they would be “treated as equivalent to a statement made by a co-accused outwith the presence of the first accused.” *Id.*, at 79.

64. “On 15 June 1987 [Megrahi] was issued with a passport with an expiry date of 14 June 1991 by the Libyan passport authority at the request of the ESO [External Security Organisation]” with the name Ahmed Khalifa Abdusamad. *Id.*, at 79.

65. This passport, known as a “coded passport”, was used by Megrahi to travel to Nigeria in August 1987 and back to Tripoli via Zurich and Malta. *Id.*, at 79.

66. The passport was also used by Megrahi in 1987 to travel to Ethiopia, Saudi Arabia, and Cyprus. *Id.*, at 79-80.

67. “The only use of this passport in 1988 was for an overnight visit to Malta on 20/21 December, and it was never used again.” *Id.*, at 80.

68. On December 20, 1988, Megrahi traveled to Malta on Flight KM231 which arrived at approximately 5:30pm. *Id.*, at 80.

69. The Court found there was no apparent reason for this visit to Malta. *Id.*, at 81.

70. On the night of December 20, 1988, Megrahi stayed at the Holiday Inn in Sliema, Malta under the name Abdusamad. *Id.*, at 80.

71. On December 21, 1988, Megrahi traveled from Malta to Tripoli aboard Flight LN147 with a scheduled departure time of 10:20am. *Id.*, at 80.

72. On December 7, 1988, Megrahi traveled to Malta on his own passport and departed Malta on December 9, 1988 en route to Prague. *Id.*, at 80.

73. The Court found that Megrahi was the individual who purchased the clothing which surrounded the explosive device at Mary’s House on December 7, 1988. *Id.*, at 80.

74. The Court found that Megrahi was a member of the JSO “occupying posts of fairly high rank.” *Id.*, at 80.

75. The Court found that Megrahi was previously head of airline security in the JSO “from which it could be inferred that he would be aware at least in general terms of the nature of security precautions at airports from or to which [Libyan Arab Airlines] operated.” *Id.*, at 80.

76. The Court found that Megrahi “appears to have been involved in military procurement.” *Id.*, at 80.

77. The Court found that Megrahi and MEBO AG’s Bollier knew one another and that Megrahi had “leased premises from MEBO and intended to do business with MEBO.” *Id.*, at 80-81.

78. Megrahi made or attempted to make a phone call to Fhimah at 7:11am on December 21, 1988. *Id.*, at 81.

79. The Court found that there was no innocent explanation for Megrahi’s trip to Malta on December 20, 1988 under a false name followed by his departure the following morning unless it was related to planting of the bomb at Luqa Airport. *Id.*, at 81.

X. The Court’s Pronouncement of Guilt as to Megrahi and Acquittal as to Fhimah

80. Based on the Court discounting the testimony of Abdul Majid and its conclusion that the Crown’s case that Fhimah was at Luqa Airport on the morning of December 21, 1988 was merely speculative, the Court stated, “there is insufficient other acceptable evidence to support or confirm such an inference, in particular an inference that the second accused was aware that any assistance he was giving to the first accused was in connection with a plan to destroy an aircraft by the planting of an explosive device. There is therefore in our opinion insufficient corroboration for any adverse inference that might be drawn from the diary entries. In these circumstances the second accused falls to be acquitted. *Id.*, at 78-79.

81. “[H]aving considered the whole evidence in the case, including the uncertainties and qualifications, and the submissions of counsel, we are satisfied that the evidence as to the purchase of clothing in Malta, the presence of that clothing in the primary suitcase, the transmission of an item of baggage from Malta to London, the identification of [Megrahi] (albeit not absolute), his movements under a false name at or around the material time, and the other background circumstances such as his association with Mr. Bollier and with members of the JSO or Libyan military who purchased MST-13 timers, does fit together to form a real and convincing pattern. There is nothing in the evidence which leaves us with any reasonable doubt as to the guilt of [Megrahi], and accordingly we find him guilty of the remaining charge in the Indictment as amended [the remaining charge was murder].” *Id.*, at 82.

82. “The verdicts returned were by a unanimous decision of the three judges of the Court.” *Id.*, at 82.

Respectfully submitted,

Dated: June 3, 2005

/S/

Ronald L. Motley, Esq.
Donald A. Migliori, Esq.
Jodi W. Flowers, Esq.
Mary F. Schiavo, Esq.
Michael Elsner, Esq.
Elizabeth Smith, Esq.
Justin B. Kaplan, Esq.
John M. Eubanks, Esq.
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
(843) 216-9000
Fax: (843) 216-9450

Attorneys for Plaintiffs