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### Publication Date

2015-03-31

Peer reviewed

The published citation for this paper is:

Loftus, E.F. (2013) Eyewitness testimony in the Lockerbie Bombing case. *Memory*, 21, 584-590.

The doi is: <http://dx.doi.org/10.1080/09658211.2013.774417>.

Here is the final manuscript. For a pdf of the publication, email the author at [eloftus@uci.edu](mailto:eloftus@uci.edu)

## Eyewitness Testimony in the Lockerbie Bombing Case

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One day in late May, 2012, I and millions of others woke up to the news that one of the world's most notorious men had died of cancer in his family villa in a posh neighborhood in Tripoli, Libya. He was connected, in the minds of many, with the horrifying 1988 wreckage that resulted from a midair attack that blew up Pan Am flight 103 over Lockerbie, Scotland. The attack killed 259 people who were on the plane, and another 11 who were on the ground. The man who died was 60 years old, and his name was Abdel Baset Al-Megrahi. Just three years before Al-Megrahi's death, he had been serving time in a Scottish prison, but was released on humanitarian grounds after doctors claimed he had prostate cancer and would live only a few months longer. The anger expressed by many over his release would loom large, and overshadowed any publicity or discussion of the merits of his conviction.

I never met Al-Megrahi personally, but I did know a great deal about his case. Our worlds intersected in 2001 when an attorney representing him sent me documents and asked for an opinion about the eyewitness aspects of the case. Interestingly, that attorney redacted all information that would have revealed who his client was so that my opinion would not be sullied by knowledge of the horrendous nature of the crime. It was easy to spot serious issues with that

eyewitness testimony. A trial ensued, at which I did not participate, and to my knowledge neither did the attorney who had originally contacted me. But jump ahead a half decade, during which Al-Megrahi had been convicted, and new lawyers would consult with me as part of a post-conviction review of the evidence in Al-Megrahi's case. In this article, I describe the eyewitness evidence in this famous case, and the scientific analysis of it that was provided. Many of the details surrounding the eyewitness testimony in this case can be found in the police reports, trial court opinion, and appellate court opinion in this case (see Al Megrahi v. Her Majesty's Advocate, 2002).

### The Eyewitness Evidence against Al-Megrahi

To reiterate, Pan Am flight #103 exploded over Lockerbie on December 21, 1988. There is little doubt but the key to convicting Al-Megrahi at his trial, held over 12 years later, was the testimony of a man named Mr. Gauci, a Maltese shopkeeper. Al-Megrahi had allegedly purchased trousers, pajamas, and other clothing from Mr. Gauci at Mary's House in November or December of 1988. Those items were thought to be packed in the Samsonite suitcase that contained the explosives which themselves were hidden in a Toshiba radio cassette player.

Mr. Gauci was first interviewed on September 1, 1989, nearly nine months after the clothing purchase (Trial Court Opinion, hereafter TC). The police reports reveal that upon being shown pajamas with a distinct pattern, Gauci then recalled that one day in Winter 1988 he had been working alone in the shop when a man came in shortly before the 7 pm closing time. The man did not seem to care what he bought, saying that the items were not for him. The shopper paid in cash, about 56 Maltese pounds. He walked out of the shop with his umbrella opened as it was raining. The man returned, and then the two of them brought the purchases out to a taxi. Gauci described the shopper as six feet or more in height, big chest large head, clean

shaven, wearing a dark colored two-piece suit, and speaking Libyan. Gauci couldn't remember the day or date but thought it was a weekday. He went on to say that he thought he would be able to identify the man.

Less than two weeks later, on September 13, 1989, Gauci went to the police headquarters and tried to make a photofit likeness of the shopper. After viewing the photofit created by the office, Gauci felt the hair and forehead were close, as were the nose, mouth, shape of face and thickness of neck. The shopper's eyes were a bit bigger than in the photofit. Gauci said that the shopper was about 50 years old and the man in the photofit looked to be between 45 and 50. The photofit construction is shown in Figure 1a.

- Insert Figure 1 about here -

Later that same day, Gauci worked with a police artist to produce a sketch, which he felt was slightly better than the photofit. Later he said the artist sketch looked quite like the shopper, with exactly the same hair, nose and eyebrows. That sketch is shown in Figure 1b.

A day later, on September 14, 1989, Gauci again went to police headquarters and looked at two cards of photos, containing a total of 19 photos. He identified one man as similar but said that he was too young to be the shopper. If only older by 20 years, the man in that photo would look like the shopper. The photo that Gauci selected was in the second card, top row, #2, shown in Figure 2.

-Insert Figure 2 about here -

There were other viewings of photographs, one of which was telling. On December 6, 1989, Gauci looked at a set of photos that included a man named Abo Talb, but he did not make an identification. But subsequently, since in 1989, Gauci's brother showed him a story from the

Sunday Times (Nov 15, page A15) which contained a photo of Abo Talb. This time Gauci thought he resembled the shopper. That magazine photo is shown in Figure 3.

-Insert Figure 3 about here –

On August 31, 1990, over 1.5 years after the clothing purchase at Mary's House, Gauci examined more photos with no identification. The next month, Gauci examined 39 photos in an album, including a photo of Abo Talb, with no identification.

On Feb 15, 1991, Gauci went to police headquarters to look at more photos. He was asked to try to picture the man in his mind and told that the shopper may or may not be in the set. As he examined the card containing 12 photos, his first impression was that the photos were all of younger men. When urged to look carefully, he pointed to #8 and said he was similar to the shopper, but his hair was too long. Gauci thought #8 looked about 30 years old, and said he would have to look at least 10 years older to look like the shopper. The array of 12 is shown in Figure 4. It contains Al-Megrahi's passport photo from 1986 (who was 34 years old when that photo was taken). This highly tentative identification of Al-Megrahi, thus, occurred more than two years after the clothing purchase.

-Insert Figure 4 about here -

In late 1998 or early 1999, Gauci saw a magazine photo showing a man with glasses. Gauci said it "looked like" the shopper, but without glasses. Educated speculation suggested that this photo was of Al-Megrahi and had appeared in Focus magazine (and is reproduced in Figure 5).

-Insert Figure 5 about here -

Two subsequent viewings of Al-Megrahi were crucial. In April, 1999 Gauci attended a lineup in the Netherlands, and said that he "thinks number 5" which was Al-Megrahi. At trial in

2000, Gauci was asked if he saw the shopper in the courtroom, and he pointed to Al-Megrahi saying “He is the man on this side. He resembles him a lot,” (Gauci trial testimony).

### Scientific Factors Relevant to the Gauci testimony

Based upon these case facts, there are numerous factors that are relevant that an eyewitness expert might have testified about, if one had been called at trial. These factors were described by me in a report prepared for attorneys for Al-Megrahi during his post-conviction appeals.

#### Exposure Time

Gauci’s first ‘identification’ of Al-Megrahi occurred on February 15, 1991, over two years after the clothing purchase. This is an extraordinarily long period of time. Not only does memory fade substantially over this time period, but the memory becomes increasingly vulnerable to post-event information (which I discuss later). Studies of the recognition of faces of strangers have shown poor performance after a year has passed. Of particular interest was the study by Brigham et al (1982), in which store clerks were exposed to a customer for several minutes, and an identification was attempted a day later. Most of the clerks performed so poorly that the researchers shortened the delay to two hours.

#### Post-event Information

When people were exposed to information after an event is over, that new information can become incorporated into the witness’s memory and can cause an alteration, distortion, or even a supplementation to the memory. If a long period of time has passed since a key event has occurred, the memories are even more susceptible to post-event contamination (See Loftus, 2005 for a review). It is of interest that Gauci made his first tentative identification of Al-Megrahi in

February, 1991, but identification him from a lineup in April, 1999. A few months prior to the lineup, Gauci had been exposed to a photo of Al-Megrahi. Did the photo o serve as post-event information, causing Al-Megrahi to look familiar when Gauci viewed him at the lineup? Did Gauci see other photos of Al-Megrahi prior to making his identification? For example, did he happen to see any of the numerous dead-or-alive wanted posters (or matchboxes) that were available in Libya and its neighboring countries, that contained photos of Al-Megrahi. Post-event information may also be responsible for other changes in Gauci's "memory," which I discuss later.

Discrepancies between the Gauci's initial description and the appearance of Al-Megrahi Gauci initially described the shopper as 6' or more tall, and about age 50. But Al-Megrahi is only 5'8", and would have been 36 years old at the time of the clothing purchase in 1988. Interestingly, by the time of trial in 2000, Gauci's recollection was changing to be more in line with the Al-Megrahi's characteristics. Gauci said, for example, that the shopper was "below six feet." When he was confronted with his prior statement in which he had previously said "6' or more" he insisted that he has always said 6" but not said more than 6". Assuming that the police report is not in error, this may be an example of "hindsight bias" in which people tend to think that the current recollection is one in which they knew before.

### Confidence

The confidence of an identification and the accuracy of that identification are often only weakly related to each other. Moreover, the phenomenon of "malleability of confidence" seems quite relevant. When witnesses get feedback about their identification (e.g., "That's the suspect, good job) they become more confidence about their identification (Wells et al, 2003). That enhanced confidence makes their identification more impressive to a trier of fact. In his

trial testimony in 2000, Gauci said “He is the man on this side.” This expression exudes more confidence than Gauci was providing at the time of his initial tentative identification of Al-Megrahi when he said “he was similar” but the person in the photo was too young.

#### Photo-biased identification

Consider what can happen when a witness views an individual during a crime, and later sees a photograph of a potential suspect. The photograph viewing can influence what happens thereafter. When the person in the photo is seen live (as in a police lineup), he can look familiar and that familiarity can result in a positive identification, even though the identified individual is innocent. This is sometimes called a photo-biased identification, and this phenomenon may have occurred in the current case, since the viewing of a photo of Al-Megrahi occurred within months of the lineup. In one study showing the dangers of viewing photographs, the results were fairly dramatic. Of the persons in the lineup who had never been seen before, 8 percent were mistakenly “identified” as criminals. However, if a person’s mugshot had been seen before the lineup, the chances of being falsely identified as a criminal rose to 20 percent. (Brown et al, 1977).

#### Cross-Racial Identification

Gauci is Maltese. He made an identification of a Libyan who purchased items from him. It has long been known that when a member of one race tries to identify a stranger of a different race, more mistakes are made than occur with same-race identifications. The studies have been done with Blacks, Hispanics, Asians, Israeli-Arab identifications, and other cross-race groups, but not explicitly with the Maltese-Libyan combination. However, it is not unreasonable to hypothesize that there might be a kind of cross-race effect here as well.



## Memory for Other Aspects of the Case

Aside from the identification of the shopper, Gauci gave other testimony that was critical to the likely guilt of Al-Megrahi. Some of that testimony concerned the date that the shopper bought items from Mary's House, and whether it was raining that day. On September 1, 1989, some nine months after the purchase, Gauci said that the purchase happened "one day in the Winter of 1988." He explicitly said that he couldn't remember the day or date, but thought it was a weekday. In subsequent interviews, Gauci had no recollection of the date. Later it was decided that the date must have been November 23, 1988 or December 7, 1988.; Al-Megrahi was apparently in Malta only on the latter date.

A key detail that might help distinguish whether the shopper came on the November date or the December date was whether Christmas decorations were up. In his initial testimony, Gauci said the decorations were not up. But by his trial testimony in 2000, Gauci now recalled "there were Xmas lights on already, I'm sure." His altered testimony was now favoring the later date which would incriminate Al-Megrahi.

Another key detail that might help distinguish whether the shopper came in November or December was whether it was raining or not on the day of the clothing purchase. At his initial interview, Gauci explicitly remembered that the shopper opened the umbrella when he left the store since it was raining. Later, meteorological analyses suggested that rain was more likely on the early date than the later one. By trial, Gauci's testimony had changed. He would then "remember" that it was not raining when the shopper arrived, but then it started dripping.

These changes in Gauci's recollections naturally should cause us to wonder about their explanation. Was it because he had been exposed to new information that altered his memory, in

the direction of making it consistent with the government's position that Al-Megrahi was the shopper?

## Final Comments

My analysis identified a number of areas in which Gauci changed his testimony from one point in time to another. More specifically, the statements he gave relatively early on (nine months after the crime) before Al-Megrahi was a suspect differed in many respects from what Gauci would recall later after Al-Megrahi was a suspect. While the Defense attorney did, at trial, point out some of the changes, it might have been useful to compile them and show the entire collection. Since one of the major reasons why someone's testimony changes from one point in time to another is that they have been supplied with new details, it would have been important to try to discover the new details that Gauci had been exposed to. After investigators began to look for Libyans, and began to suspect Al-Megrahi, what kind of information did Gauci receive, either deliberately or inadvertently?

This information, and more, was presented to the Scottish Criminal Cases Review Commission, a Commission that reviews cases post-conviction, and did so in this case. The Commission is an independent, public body, which was established in 1999, and bears the responsibility for reviewing alleged miscarriages of justice in Scotland. The Commission has the power to refer to the High Court of Justiciary any conviction regardless of whether appeals of that conviction have been heard previously. The Commission refers cases when it believes that a miscarriage of justice may have occurred. In Al-Megrahi's case, the Commission expressed deep reservations about the conviction and concluded that it may have been a miscarriage of justice (Adams, 2007; Oliver, 2007). Much of the world knows less about this turn of events,

but much more about a different turn, namely that al-Megrahi was released from prison in 2009 and sent back to Libya on Compassionate grounds because of advancing cancer. That turn sparked outrage. Al-Megrahi lived with his cancer for a few years, and, as noted earlier, died in 2012. One can't help but wonder whether the outrage over his release might be tempered if those angry individuals were to seriously examine the suspicious eyewitness testimony that led to Al-Megrahi's conviction in the first place. My examination has led me to wonder: Is the Lockerbie bomber still out here?

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## Figures

Figure 1 Gauci's attempts to remember the shopper

a. Photofit construction of the shopper.



b. Artist sketch of the shopper



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Figure 2 Photos shown to Gauci



Figure 3 Magazine photo of Abo Talb



Figure 4 Photo array containing Al-Megrahi's passport photograph



Figure 5 Magazine photo of Al-Megrahi

