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Executive has a case to answer on McKie fiasco

FOCUS

LORD MCCLUSKEY

RECENT events and initiatives from the Scottish Executive make one wonder about the quality of the legal advice ministers receive and act upon.

The most glaring example, in terms of public awareness, is the handling - over a very long period - of the Shirley McKie case. Officers of the Scottish Criminal Records Office mistakenly concluded that a fingerprint found at a crime scene was that of Detective Constable McKie, and on the basis of that error she was prosecuted for perjury, in 1999.

David Asbury's conviction for the related murder was then quashed on the basis of the unreliability of the fingerprint evidence. Having been acquitted when the error was demonstrated, Det Con McKie sued for damages and, in 2006, received a payment of £750,000 - of taxpayers' money - though the Executive still refused to admit liability.

The cost to the public purse of bringing the misconceived prosecutions and fighting the civil litigations (of which there were two) has not been revealed. Nor has it yet been disclosed how much public money was wasted by taking the latest case to the wire: it was settled on the eve of the hearing, by which time the costs must have risen dramatically, as they always do in the last weeks before the case calls before a judge. But the waste - the costs incurred on both sides - must have run into tens of thousands of pounds. A judge (Lord Hodge), a court, and various other precious and scarce resources had been set aside for a five-week hearing, which was rendered superfluous by the last-minute decision to settle the case and prevent the facts from being explored in evidence in a public court.

I need add nothing to the widespread bewilderment at the waste, the delays, the failure to hold anyone to account: these have been widely commented upon by politicians, journalists and others including the main victim of this deplorable saga. But, as one who was concerned for decades in the administration of justice, as a prosecutor, as a defence advocate, as a Law Officer of the Crown, and as a judge, I am dismayed by the failure of ministers to recognise the relevance and importance of one of the fundamental principles underlying the rule of law in a mature democracy, the principle that justice must be seen to be done. Justice in such a case cannot be done in secrecy: the transparency of the justice process is fundamental.

The reputations of the SCRO, and by association, the Scottish criminal justice system as a whole, have been severely damaged. If I were a judge having to give directions to a jury about how they might approach disputed fingerprint evidence, I would have great difficulty in knowing what to say. This whole sorry episode has so entered the public consciousness that it cannot be

simply swept under the carpet. The issue is NOT, as the First Minster and the Lord Advocate are misleadingly suggesting, about a public re-examination of the exercise by the Lord Advocate of his prosecutorial discretion: informed commentators do not seek that.

What is at issue is the internal faulty working of the SCRO. Did officers lie, or just make a mistake? If they made a mistake in such a matter - when the evidence repeatedly given to juries by SCRO fingerprint "experts" is and always has been that the chances of a mistake are billions to one - how on earth could the McKie mistake have happened? When the mistake was challenged, and more particularly, when it was demonstrated by outside experts, why did it take years to acknowledge that a "mistake" had been made? Are those who perpetrated this serious error, and those who backed them up in various ways, still presented to juries as "experts" of unimpeachable reputation? If lawyers representing accused persons have to challenge "expert" fingerprint evidence on the basis of error, or incompetence, or worse, will they be allowed to test the reliability and credibility of the evidence by using court discovery processes to reveal the possible involvement of the "expert" witnesses in the McKie saga? Will the whole background thus emerge not in the controlled and civilised environment of a judicial inquiry but in the gladiatorial dust of a criminal trial?

The point is that these issues will not go away. They are not party political issues. They cannot be approached on the basis that the critics have some personal or political axe to grind. They go to the heart of public trust in the criminal justice system. We cannot just "move on". I remember a competition for the dullest possible newspaper headline: the winner was, "Small earthquake in Patagonia: nobody hurt". It would not be difficult to "move on" from that. But this is different: it has been a huge earthquake; there are casualties; there are continuing aftershocks. We need to know what happened and to decide how to avoid the risk of recurrence.

Ministers should think again. If they are getting legal and political advice behind the scenes to the effect that it will all go away, then they should reject that advice. The public must wonder if some of those tendering or receiving the advice may be trying to protect their own backs. The disclosure of the truth must be in the public interest. What is needed is a judicial inquiry - possibly by a judge from another jurisdiction, as happened after the Surjit Singh Chhokar cases: that method of proceeding would not even involve Scottish judges. It would not even have to be held entirely in public: the presiding judge could be accorded discretion to hear some evidence in private, if there were convincing reasons for doing so.

I repeat: Justice must be seen to be done. The present miasma of secrecy threatens to choke the Scottish criminal justice system.

• Lord McCluskey is a retired High Court judge and former Solicitor General of Scotland

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