

Science and Justice Vol. 43 (3) 2003

<http://www.forensic-science-society.org.uk/contents43-3.pdf>

Presentation Given by Iain McKie to the Forensic Science Conference

The Oxford Hotel, Oxford: 20 March 2003

Title:

*'There's nane ever fear'd that the truth should be heard
but they whom the truth would indite'*

Author:

**Iain A J McKie BA, Dip.Counsel, BACReg, UKRC, MCOSCA.
27 Donnini Court,
South Beach Road,
Ayr KA6 1JP**

Short Title: *'There's Nane Ever fear'd.....'*

***‘There’s nane ever fear’d that the truth should be heard
but they whom the truth would indite’*** Robert Burns [1]

Introduction

I’d like to open by thanking the Forensic Science Society and the California Association of Criminalists for inviting me to this Murder Mystery weekend.

I am looking forward to contributing along with my fellow authors Colin Dexter, P D James, Val McDermid. and Lynda La Plante

I thought I would use this morning to introduce you to the plot of my latest blockbuster the ‘Finger of Suspicion.’

The story is purely fiction of course and I would not like any of you to leave with the impression that this could really happen in a country that so values truth, openness and accountability.

The plot surrounds a brutal murder in the fictional town of Kilmarnock in Scotland.

The hero is a tall young and good looking ex -policeman Iain McKie, father of the heroine Shirley McKie, a police detective who has been accused of leaving her fingerprint at the murder scene. Sources tell me that George Clooney is lined up to play the father in the film.

The ‘heavies’ operate within the SCRO (Scottish Criminal Records Office) an organisation whose activities are shrouded in mystery. Their experts identified Shirley’s print and for six years have refused to admit their mistake..

My problem in completing this mystery story is I haven’t managed to work out a convincing motive for SCRO’s actions. Perhaps having heard the general plot you will be able to help me.

[1] Mackay J A: Robert Burns - The Complete Poetical Works’: - Alloway Publishing – 1997.

All Because of a Fingerprint

On a dark winter's afternoon in December 1998 my daughter Shirley stood quietly at the edge of the sea near her home in Troon.

A bitterly cold wind blew off the snow-covered peaks on the Island of Arran a few miles out to sea but Shirley felt nothing as she contemplated her future.

Once a highly rated Detective she was facing the ultimate nightmare for a Police officer – prison.

Shunned by her former boy friend and Police colleagues, bullied by senior police officers - the might of the Scottish Prosecution System lined against her.

Six months away from trial for perjury at Glasgow High Court.

No defence other than 'the silly little girl' defence suggested by her lawyers. "Just say you were there and must have forgotten. It is your only chance."

Years of fighting for the truth to end in a lie – all because of a fingerprint.

Shirley contemplated the water lapping at her feet and for the first time in her life saw oblivion as an option – the only escape from a living nightmare.

God knows what lights our way at times like this but Shirley turned from the raging sea and left the windswept beach to continue her search for the truth.

The Campaign

Our campaign to have the truth heard started in February 1997 when a fingerprint found at the scene of the brutal murder of spinster Marion Ross in her bungalow in a quiet district of Kilmarnock was identified as Shirley's. Although she had been a police officer working on the investigation she denied ever having been in the house.

Four experts from the Scottish Criminal Records Office, known as SCRO, made the identification. At first I believed them because as a detective I well remember that a fingerprint identification was a cause for celebration and an early arrest.

Today six frightening and frustrating years later my faith in the infallibility of experts has been destroyed.

Two incidents are etched on my memory.

I was on a Ferry returning from holiday in Ireland in March 1998 when Shirley phoned to say she had been arrested in a dawn raid. Two female Police officers had watched her doing the toilet and showering. She was taken to a police office where I had been the commanding officer and where friends worked, was searched to her underwear and thrown in a cell.

I felt helpless I had let my daughter down.

Shirley's three week trial for perjury in May 1999 was a nightmare. The gut wrenching fear of losing my daughter was overwhelming and only increased as days passed into weeks.

Less than a month before the trial we had traced Pat Wertheim and David Grieve two world renowned fingerprint experts in the USA. They flew into Glasgow and unanimously agreed that the fingerprint was not Shirley's – SCRO was wrong. Despite their testimony and my certainty of Shirley's innocence the fear would not subside.

The unanimous 'Not Guilty' verdict came on my birthday 14, May, 1999 a day I will never forget. Our family left the High Court with Lord Johnston's words ringing in our ears.

“Shirley McKie.....personally I would like to extend to you my respect for the obvious courage and dignity which you have shown throughout this nightmare.....I very much hope you can put it behind you. I wish you all the best.” (Lord Johnston) [2]

[2] Lord Johnston: High Court of Justiciary at Glasgow - Charge to the Jury – Friday 14 May1999.

Foolishly we thought the ordeal was over. Apologies would follow, the problems at SCRO would be sorted out and Shirley would get on with her Police career.

Soon after the trial I wrote to Lord Hardie, who as Lord Advocate was responsible for criminal prosecution in Scotland and was in charge of the Lockerbie Pan Am investigation. I asked him to review Shirley's case and take action against the Scottish Criminal Records Office.

He replied,

'I can confirm that the Lord Advocate does not propose to prevent the citation as prosecution witnesses.....officers from the SCRO who gave evidence for the crown in this case. The Lord Advocate does not propose to instruct the review of the findings of those officers in relation to other cases.....The Lord Advocate does not intend to publish details of his investigations.' [3]

Such is the power of a fingerprint and the arrogance of the Scottish Justice System. Hundreds of letters to Police, SCRO and Government followed but still the same arrogant and uncaring replies.

We conducted our campaign in the full glare of the media spotlight and had it not been for the media I doubt if the truth would ever have been heard and the guilty revealed. Others hid from that glare and then complained that they were not fairly represented.

BBC 'TV' broadcast two 'Frontline Scotland' and two 'Panorama' programmes demanding an enquiry into the SCRO and we gave dozens of TV and radio interviews.

Hundreds of articles appeared in newspapers and magazines and we never missed an opportunity to hold press conferences at critical times.

[3] Hardie A R Lord, Lord Advocate: Letter to Iain McKie dated 12 July 1999.

The Internet gave us a voice denied by the system and hundreds of experts contributed opinions from across the world.

Our local Member of the Scottish Parliament Michael Russell fought shoulder to shoulder with us in and out of Parliament.

Her Majesty's Inspector of Constabulary's Inspection

Finally in February 2000 following three years of campaigning the authorities were forced to act and the Association for Chief Police Officers (Scotland) (ACPOS) called in Her Majesty's Inspector of Constabulary (HMIC) Mr William Taylor.

On 22 and 23 May 2000. he conducted an inspection of the SCRO.

In an August report [4] the HMIC concluded on the evidence of independent international experts – Arie Zeelenberg, Head of Netherlands National Fingerprint Unit and Torger, Rudrud Assistant Chief of Police in Norway:

'That the mark was not made by Shirley McKie. It is (the independent experts) view that decision could have been reached at an early point in the comparison process.' [5]

In a comprehensive critique of the SCRO he made 25 recommendations and 20 suggestions covering issues like

- Structure within the Bureau
- Corporate identity and independence
- Procedural Guidelines
- Administrative Support
- Supervision
- Training
- Competency Testing

[4] Scottish Criminal Record Office: The Fingerprint Bureau Primary Inspection 2000 - A Report by Her Majesty's Inspectorate of Constabulary – August 2000

[5] Scottish Criminal Record Office: The Fingerprint Bureau Primary Inspection 2000 - A Report by Her Majesty's Inspectorate of Constabulary – August 2000 para. 1.2.6

- Quality Assurance
- Standards
- Audit
- Openness/Accountability
- Conflict Resolution

Main Recommendations

Among the more notable recommendations were:

- *‘that a centralised model for a national fingerprint service be considered.’*
(paragraph 2.15.11)
- *‘that a national Guidance Manual on Fingerprint Standards and Procedures be issued.’* (paragraph 5.11.3)
- *‘that an independent review process to deal with all erroneous and disputed fingerprint identifications be developed.’* (paragraph 5.20.4)
- *‘that all fingerprint experts within the SCRO Fingerprint Bureau should undergo competency testing provided and managed by an external provider as soon as possible.’* (paragraph 8.8.3)
- *‘that managing the change to a non-numeric standard should be addressed at a very early point.’* (paragraph 6.9.3)
- *‘that the important area of court presentation skills be given a new impetus.’*
(paragraph 6.9.3)

ACPOS formed a committee to see this change through and when the HMCI re-examined the Scottish Criminal Records Office (SCRO) only 5 months later in December 2000 he concluded:

'Taking into account the performance of SCRO as a whole HMIC considers that in terms of Section 33(3) of the Police (Scotland) Act 1967 SCRO is efficient and effective.' [6]

Only five months after the most damning indictment of a British fingerprint unit had been delivered and while the criminal enquiries had not been completed and the supervisors and experts were still refusing to admit they had made a mistake SCRO had suddenly become effective and efficient.

And so the story ends or does it?

As the battle to have the truth heard enters its sixth year it is revealing to look at some of the evidence SCRO and their supporters are denying.

- When stress forced Shirley to stop working a few months after the Marion Ross murder Strathclyde Police asked Professor Colin Espie one of Scotland's leading clinical psychologists to examine her psychological state:

He reported:

'After seeing Ms. McKie on 30th July 1997, I was convinced of two things. First, that she was psychologically normal; and second, that she was telling the truth.' [7]

The Professor was so concerned that he followed up his written report with a telephone call outlining his concerns and that his examination pointed to the possibility that the fingerprint identification was wrong.

'I was told that this was regarded as an "unthinkable" explanation, because of its implications.' [8]

[6] Scottish Criminal Record Office: The Fingerprint Bureau Primary Inspection 2000
A Report by Her Majesty's Inspectorate of Constabulary – December 2000

[7] Espie C Professor, Glasgow University: letter dated March 2002 to the Minister for Justice Mr Jim Wallace QC

[8] Espie C Professor, Glasgow University: letter dated March 2002 to the Minister for Justice Mr Jim Wallace QC

No enquiry, no second opinion. Had this information been acted on the trauma of the past 6 years could have been avoided.

- On 14, May, 1999, Shirley was unanimously cleared of charges of Perjury by her peers. The only evidence against her was a mark identified by SCRO as Shirley's.
- Prosecution forensic evidence presented by a scenes of crime officer at Shirley's trial proved that the mark could not have been left by Shirley over the period stated.
- Not one of the 54 Police officers on 24 hours security watch at the murder house or the dozens of experts and detectives examining inside saw Shirley in the house.
- In January 2000 14 Lothian and Borders Experts wrote to the Minister for Justice:

'At best the apparent 'misidentification' is a display of gross incompetence by not one but several experts within the bureau. At worst it bears all the hallmarks of a conspiracy of a nature unparalleled in the history of fingerprints.' [9]

- The Report on Independent Enquiry conducted by the HMCI concluded in August 2000:

'That the mark was not made by Shirley McKie. It is (the independent experts) view that decision could have been reached at an early point in the comparison process.' [10]

[9] 14 experts Lothian and Borders Police: Letter dated 26 January 2000 to the Minister for Justice.

[10] Scottish Criminal Record Office: The Fingerprint Bureau Primary Inspection 2000 A Report by Her Majesty's Inspectorate of Constabulary – August 2000 para. 1.2.6

- Hundreds of experts from across the world challenged SCRO's conclusions and in May 2002 171 experts from 18 countries and 26 USA states signed a statement to the Scottish Minister for Justice calling for further enquiry.

Some of the experts were scathing in their attack. Wes Sossamon an American expert stated:

'I know of not a single latent print examiner who has viewed the images of the "identifications" that concurs with the "opinions" offered by the SCRO "experts" in these infamous cases. Indeed, our colleagues who are recognized as some of the world's foremost authorities in friction ridge skin identification have gone on record and clearly exposed these shameful fabrications for what they really are. Moreover, there are many, many more of us who have conducted our own examination of the marks in question and we can only stand with our mouths agape at this most recent turn of events.' [11]

Another commented:

'Let SCRO enjoy the fame and celebrity currently enjoyed by all members of the Flat Earth Society and the various apostles of crop circles, alien autopsies in New Mexico and those who profess to communicate with the dead.' [12]

- Independent experts found that SCRO had made another mistake in identifying murder victim Marion Ross's print on a tin found in David Asbury's bedroom. On 15 August 2002 his murder conviction was quashed by appeal court judges after they accepted that the fingerprint evidence against him was unreliable.

[11] 'Statement by World Experts' to Minister for Justice dated May 2002

[12] 'Statement by World Experts' to Minister for Justice dated May 2002

- In September 2002 a Petition was delivered to the Scottish Parliament signed by four world renowned experts calling for an independent examination into openness and accountability at the SC RO. [13]
- In February last year the Lord Advocate Colin Boyd stated in a speech to the Howard League for Penal Reform:
‘The BBC Frontline Scotland programme on the case of Shirley McKie.....changed public perceptions of her case. More importantly it helped uncover what were at best serious defects in the analysis of fingerprinting at the Scottish Criminal Records Office and forced the authorities, including myself, to act to ensure that such a case would not happen again.’ [14]

How much more evidence is required before admissions are made, the guilty are punished, healing is started and this whole sordid mess can be laid to rest?

Fingerprinting in Crisis

The truth is unless SCRO's 'opinions' are challenged and challenged now the the fingerprint profession will tear itself apart and sadly it is you the experts who will reap the whirlwind.

Openness, Accountability and Ethics are issues for all Forensic Scientists because arrogance and complacency and a blind belief in the infallibility of the British Expert is not confined to fingerprinting or the UK.

For SCRO to admit a mistake had become culturally impossible - a greater sin than closing ranks and hiding the truth. Sadly we soon found out that other UK fingerprint organisations shared this culture as they closed ranks.

[13] ‘Petition to the Scottish Parliament: 18 September 2002.

[14] Boyd C The Lord Advocate: Address to the Howard League for Penal Reform , Edinburgh - Tuesday, February 19, 2002 – see www.scotland.gov.uk/pages/news/extras/00004800.aspx

There is little doubt that our campaign opened up the British Fingerprint service to unprecedented analysis and examination and it was found sadly lacking.

I believe that there is a crisis facing fingerprinting in particular and experts in general in the UK. I believe that the whole of the forensic sciences must sit up and take notice.

Over 100years ago the English commentator Walter Bagehot speaking about our Royal Family said,

‘If you begin to poke about it, you cannot reverence it. Its mystery is its life. We must not let in daylight upon magic.’ [15]

Well now light has been let in on the magic. Fingerprinting and to some extent the forensic sciences have existed in a culture and philosophy in which legitimate challenge and debate has been stifled in some areas and ‘absolute certainty’ is assumed.

This mantle of infallibility has allowed arrogance, complacency and bad practice to develop in some areas.

Now however this aura of magic, this myth of infallibility, that had been bestowed on all of our main institutions like medicine the law is being challenged.

In 2001 the long awaited Government report into the unusually high death rates in certain types of paediatric heart surgery at Bristol. Royal Infirmary stated:

‘There was enough information from the late 1980s onwards to cause questions about mortality rates to be raised both in Bristol and elsewhere had the mindset to do so existed.’ [16]

[15] Bagehot W (1826 - 1877) *English economist & journalist* - The English Constitution (Oxford World's Classics)

[16] ‘Learning from Bristol’: the report of the public inquiry into children's heart surgery at the Bristol Royal Infirmary 1984 -1995 Command Paper: CM 5207

More than enough evidence has existed for over 6 years to prove the culpability of the SCRO experts and their supervisors. I must assume that as in Bristol the mindset does not exist to allow openness and accountability.

After Bristol the floodgates opened. Light had been let in on the magic and things would never be the same again. It was becoming clearer and clearer that the expertise we had taken for granted for years was open to challenge.

If ever a case brought home the problems and difficulties with expert evidence it was that of Sally Clark a solicitor who was jailed for life in 1999 for killing her two sons when they were only weeks old.

Despite the many eminent paediatricians and pathologists gathered for the trial it was clear that they cancelled each other out as they presented a mass of complex and at times contradictory evidence to a confused judge and jury. As the jury sat down to deliberate, Sir Roy Meadow's notorious statistic that the probability of two natural cot deaths occurring in a family like the Clarks was '*one in 73 million*' must have been ringing in their ears. [17]

Thankfully Mrs Clark has now returned to her family but there appears little doubt that as more and more cases are reviewed further flaws in forensic testimony will be revealed.

The reality is clear. With expert evidence you are guilty until you can prove yourself innocent.

Given such a situation logic would demand that where the experts disagree then the accused must be given the benefit of the doubt – proved beyond reasonable doubt - innocent until proven guilty.

[17] Internet: www.sallyclark.org.uk/

It is all too easy to understand how a judge and jury struggling to come to terms with previously conflicting ‘expert’ evidence can fall prey to a ‘soundbite’ offered by an expert who wears the mantle of infallibility with ease and arrogance.

Solutions

There are three major areas I have identified for change.

- 1. End police control of fingerprint experts by centralising the service under the Forensic Science Service*
- 2. Reject the Adversarial system in respect of expert testimony in criminal as well as civil cases.*
- 3. Consider adopting an inquisitorial system of law in our criminal courts.*

Police Control

For over 100 years the police has controlled fingerprinting and protected it. Fingerprint experts have grown up within the police culture and have rightly or wrongly been seen to have adopted the aims of the service in the ‘fight against crime’. TV programmes like ‘Waking the Dead’ and the American import ‘CSI’ encourage us to believe that forensic scientists are in fact leading that fight.

The problem is however that the culture and role of the police and experts should not be the same. As long as their close association is maintained the doubt will linger that the temptation remains for scientific objectivity to take second place to police and public pressure for a conviction

Professor Pounder Professor of Forensic Pathology at Dundee University is reported as saying:

“In an adversarial system, because the pathologist is working with one side or the other, there is obviously an influence that is brought to bear . [18]

[18] Pounder D Professor, Department of Forensic Medicine, University of Dundee:

Rebecca McQuillan, ‘The Herald’ 1.02.03

Shirley perhaps more than most has reason to value the integrity and independence of the hundreds of experts from across the world who came to her rescue but while experts remain under Police control scientific objectivity and impartiality continue to be extremely difficult to prove and sustain.

The mission statement of the Forensic Science Service is:

“To provide impartial forensic science services in support of the investigation and detection of crimes, the prosecution of offenders and the prevention, deterrence and reduction of crime.” [19]

The sooner the Police release their grip on their experts and allow them to join their colleagues within the Service the sooner this goal will be achieved.

The Adversarial System

The Sally Clark case highlights what is so seriously wrong in an adversarial system where vital test results are withheld, mistakes are made and expert evidence can be confusing and contradictory.

In 1999 the New Scientist commenting on new procedural rules allowing judges to appoint court experts in civil cases noted that:

‘English judges may also be rejecting the adversarial system when it comes to scientific testimony..... Now all expert witnesses will be obliged to explain the reasoning behind their opinions and highlight prominent issues where scientists disagree. Judges can restrict the number of experts who are called, or insist that both parties agree on one shared expert.’ [20]

This is a philosophy ripe for transfer to the criminal justice system

[19] Forensic Science Service Website @ www.forensic.gov.uk/forensic/

[20] New Scientist vol. 163 issue 2193: 03 July 1999, page 18

Indeed I would go further in my challenge to the adversarial system and recommend that a long hard look be given to a total system of criminal law that over the past decades has thrown up a remarkable number of injustices.

They shed an appalling light on our adversarial system where often juries are uncomprehending witnesses to a confusing game of chance being played out by the legal profession.

I do not believe that the adversarial system has served the truth or justice well. It is time to drop the adversarial pantomime and develop a system that serves justice rather than the egos and pockets of many of the contestants

Some Closing Thoughts

So there you have it - the plot is clear but what about the motive? In this respect some interesting questions remain to be answered:

- Why did the FBI suggest to some of the American experts that they might not wish to testify for Shirley.
- Why do files on Shirley and our family exist in Edinburgh, London and the USA.
- Why was an apology in the Scottish Parliament followed by denial and obstruction?
- Why did a secret internal SCRO enquiry clear the experts of any wrongdoing?
- Why have 'doctored' prints been circulated?

Perhaps the biggest mystery of all is:

- What drives the six year cover up - is it incompetence, something worse or is some other sinister motive still to be revealed?

When my daughter left the dock in the High Court in Glasgow on the 14 May 1999

Lord Johnston took the unusual, step of saying:

"Shirley McKie.....personally I would like to extend to you my respect for the obvious courage and dignity which you have shown throughout this nightmareI very much hope you can put it behind you. I wish you all the best." [21]

Despite Shirley's courage and that of her supporters her nightmare is still not at an end. It is the experts – your responsibility - to ensure that the injustices inflicted on innocent victims like Shirley McKie and Sally Clark are never ever repeated.

Abraham Lincoln famously said,

" To sin by silence when they should protest makes cowards of men". [22]

To those experts who did not 'sin by silence' my sincere and undying thanks.

[21] Johnston A C M Hon. Lord: High Court of Justiciary at Glasgow, Charge to the Jury – Friday 14 May 1999.

[22] Bullivant A Ed: 'The Little Book of Humorous Quotations' - Page 165