

AUDITOR OF THE COURT OF SESSION

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NOTE

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Fees for Mr Herbert Kerrigan, QC

H M ADVOCATE v [REDACTED] AND OTHERS

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EDINBURGH. 8th August 1995

The Auditor has been requested, in terms of paragraph 3 of Schedule 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, as amended, to increase the fees set out in the Table of Fees contained in the Schedule, payable to Mr Herbert Kerrigan, Leading Counsel for [REDACTED] to provide reasonable remuneration for Counsel in preparing for and conducting [REDACTED] defence to an Indictment against him and others in respect of their alleged participation in the murder of [REDACTED] and towards whom it was also alleged that he had previously evinced malice and ill-will.

The Scottish Legal Aid Board ('the Board') was represented at the diet of taxation by [REDACTED] and Counsel, Mr Kerrigan appeared personally.

The diet of taxation had been necessary because Counsel had not been prepared to accept the Board's offer of increased fees from the prescribed fees to include all work of preparation, which various increased fees the Board considered to be reasonable.

The Auditor has annexed a Schedule to this Note showing the various items of work performed by Counsel, the prescribed fee, the fee claimed, and the Board's offer.

As Counsel had rejected the offers where less than the fees claimed it consequently fell to him to justify the increased fees claimed.

The Auditor J. Haldane Tait, S.S.C.  
Principal Clerk Mrs Janet P. Buck



Before increasing a prescribed fee, the Auditor requires to be satisfied that because of the particular complexity or difficulty of the work or any other particular circumstances of the case, such an increase is necessary to provide reasonable remuneration for the work done.

Counsel in support of his submissions that these various factors were present in this case requested the Auditor to take into account inter alia the following:-

- a. That the trial involved the identification of a decomposed body from which direct identification could not be made. That D.N.A. tests had not assisted in the making of a positive identification. That the Crown had to rely on circumstantial evidence for the purposes of identification. The dental records had been alleged to have been lost after the dentist prepared a hand written report which had been lodged. The body found apparently had one tooth extra to that which [REDACTED] would have had.
- b. That the Indictment listed 159 Crown witnesses, whose evidence had to be considered with great care.
- c. That the case was of very considerable difficulty because of the need to consider to what extent the evidence of the co-accused in the same charge impinged on [REDACTED] defence, and
- d. That preparation of the case and its conduct had been made much more difficult because of [REDACTED] having formed a relationship with [REDACTED], wife of the deceased [REDACTED].

### Introduction

In order that a proper understanding of the difficulties and complexity of the case may be achieved it is necessary to set out, as succinctly as possible, the circumstances which gave rise to it.

It appears that the first the Police knew that [REDACTED], the husband of [REDACTED] (one of the accused) was a missing person was when his



brother, [REDACTED], made a report to that effect on 29th October 1992 at Milngavie Police Station. The Police had no record of [REDACTED] having made any such report.

The marriage of [REDACTED] had apparently been a stormy one with a history of incidents of violence by [REDACTED] towards her over a period of years. There was one child of the marriage, [REDACTED], whose presence seemed to annoy [REDACTED] as his wife's attention was diverted from him to the care of their daughter.

As a result of [REDACTED] treatment of his wife, she formed a friendship with [REDACTED] with whom she went to live for periods of time.

### The Event

An incident giving rise to the murder charge took place in Cobblers Bar, Blantyre, on the night of 9th October 1992. An eye witness, [REDACTED], gave the following account of it:-

[REDACTED] and her boyfriend, [REDACTED], entered the bar at about 6.00 p.m. and sat at a table next to the entrance door. Some six to eight feet away at another table sat a man and a woman who were drinking. Both were well-dressed, which she particularly noted as this was unusual for the clientele of that bar. The couple were in sight of [REDACTED] when she turned to speak to [REDACTED]. Some five minutes after sitting down, [REDACTED] saw the man at the adjoining table fall over. He fell straight forward, hit his head on the table, toppled over to his right side and fell to the floor. Immediately prior to that happening, she had heard two faint sounds like jets of air but then thought nothing of it since [REDACTED] had apparently not noticed anything unusual. After the man fell to the floor two other men, again noticed to be smartly dressed, moved over from a fruit machine, bent down, picked up the fallen man and carried him out of the bar through the fire exit, which was not the nearest way out. The man in falling had apparently broken his beer glass and pieces of it fell to the floor. After he was taken out, a man, afterwards known to be [REDACTED] (another of the co-accused), came from behind the bar with a brush and

shovel and swept up the broken glass. [REDACTED] did not notice any blood on the carpet. As she felt uncomfortable when people had had too much to drink, she decided there and then to leave the bar and went to [REDACTED] home, which was nearby, and waited for him there until he had had another drink.

[REDACTED] was unable to identify any of the dramatis personae at subsequent identification parades, nor was her boyfriend [REDACTED], apart from identifying [REDACTED], already known to him.

On the morning of Tuesday, 9th January 1993, the police received a report of a leg of a human body having been found entangled in the machinery, at the Bothwell Bank Sewage Works, Bothwell. On further investigation a headless body in an advanced stage of decomposition was recovered. It had been mutilated by burning and removal of the arms from the elbow joints down.

On the morning of 10th January sewage workers found trapped in a screen a piece of human skull and a search revealed a further piece of skull. The pieces of skull were subsequently examined at the Dental Hospital, Glasgow. Dental charts of [REDACTED] were obtained but did not assist in making a positive identification of the body as that of the missing person [REDACTED]  
[REDACTED]

X-Ray examinations of the pieces of skull showed a metal fragment which was later identified as a bullet.

D.N.A. tests were carried out on various parts of the recovered body but none of these tests positively identified the deceased as [REDACTED]. D.N.A. tests were carried out on his parents and relatives and the results of these suggested that a D.N.A. test of a blood sample obtained from a bucket subsequently found in the bar was the blood of [REDACTED].

Certain firearms were retrieved from the River Clyde, as was a bullet and forensic evidence in respect of these was also introduced into the case.

In the weeks before [REDACTED] birthday on 9th October 1992 her husband's brother, [REDACTED], had moved into the house in Milngavie, then

occupied by [REDACTED] and his wife. According to [REDACTED] was of an erratic disposition, usually sleeping all day and going out all night. On the evening of [REDACTED] birthday when she returned home her husband and his brother, [REDACTED], were in the house. She and her husband went into Glasgow and he apparently wanted to go to a bar but Mrs Hall did not wish that but instead wanted to collect their child from her sister's home. That however displeased her husband and the result was that he left the car in which they were travelling and [REDACTED] never saw him thereafter. She apparently, for one reason or another, cruised around all night in the car and when she returned home about 10.00am [REDACTED] car was parked outside. After a chat with [REDACTED] he said that he wanted to find somewhere else to live as he found the atmosphere in the house unpleasant. She left [REDACTED] in the house, went to her sister's to collect her daughter, but by the time she returned to the house [REDACTED] had left it and then she went to join [REDACTED] with whom she stayed for a time. Some time thereafter the police contacted [REDACTED] to say that her husband was a missing persons and they pressed her for information as to his whereabouts but she was unable to assist them.

There were several reports of neighbours of [REDACTED] having seen him on various dates subsequent to 9th October 1992, the date when he was alleged to have been murdered.

[REDACTED] [REDACTED] and [REDACTED] were, along with [REDACTED] [REDACTED], all charged with the murder of [REDACTED].

The Precognition of [REDACTED] shows that her marriage to [REDACTED] was a very turbulent one and for varying periods of times they separated and went their own ways and [REDACTED] formed a close association with [REDACTED], one of the co-accused. [REDACTED] vehemently denied that she was in any way associated with the murder of her husband.

[REDACTED] defence was conducted by Mr Herbert Kerrigan, QC.

Mr Kerrigan in his submission to the Auditor in support of his claimed fees, pointed out that the case involved the identification of a headless body and that it was a live issue in the case as to whose body it was that had been



found. DNA tests had not confirmed the matter one way or another, nor had the dental tests, and there had been no other satisfactory evidence of identification. Identification, therefore, crucially depended on the interpretation of circumstantial evidence which necessitated every witness' evidence being considered very carefully. The Crown had listed 159 witnesses.

The evidence had to be reviewed meticulously after each day's proceedings.

Having regard to the fact that the evidence against the various accused was wholly circumstantial, [REDACTED] Counsel had to devote a considerable amount of time prior to the trial considering all the statements and reports with very great care. His preparation was made all the more difficult by the fact that witnesses were changing their version of the evidence and some of them acknowledged that they over-indulged in alcohol and abused drugs, which made it all the more difficult to discern what was reliable evidence.

In Counsel's submission, the case was unique and had many complex and difficult aspects and the fees claimed for the conduct of [REDACTED] defence were reasonable.

It was submitted on behalf of the Board that as the prescribed daily trial fee for a Senior Counsel was at the relevant time £315.00 (to include preparation) and having regard to the case, which the Board after consideration of the case papers recognised as complex, would merit a daily fee of £475.00, to include all pre-trial preparation, and on-going preparation during the trial. The offers of increased fees in respect of other items of work were considered to be reasonable.

As there was a considerable divergence between the views of Counsel and the Board as to what are reasonable fees for Counsel in this case, the Auditor considered it necessary to peruse and consider the relative precognitions and reports as had been done by the Board when considering the fees claimed. That work took a substantially longer period of time to accomplish than had been envisaged by the Auditor when requesting sight of the documentation.



In considering reasonable fees to be paid to Counsel in any Legal Aided defence in a criminal cause the Auditor has initially to have regard to the relevant prescribed fees, but if having regard to any factor which in his opinion makes such a prescribed fee inadequate then he has to exercise his own judgement as to what is a reasonable fee. See Geddes v. Lothian Health Board 1993 GWD 11-767.

Lord President Cooper in Macnaughton v. Macnaughton 1949 S.C. 42 when considering what is a "proper fee" of "competent Counsel" for the conduct of a case of known magnitude and difficulty involving a stake of known importance said at page 46:

"The answer cannot be found by applying arbitrary standards or rules of thumb, but requires an appraisal of the nature of the amount of the services given. The first approximation can be found by reference to the current practice of solicitors in instructing Counsel in an average case of the type in question presenting no specialties. But, if the case is abnormal in magnitude or difficulty, or in any other respect, a second approximation must be made to reflect these specialities, and this approximation may yield a substantially higher figure."

The Auditor, having considered all the information made available to him, is satisfied that the case was of unusual complexity requiring substantial preparation, and is of opinion that the fees allowed by him in the annexed Schedule are reasonable for the various items of work done.



AUDITOR OF THE COURT OF SESSION





## SCHEDULE

(NFP = No fee prescribed)

### WORK UNDERTAKEN

	<u>Scale Fee</u>	<u>Claimed</u>	<u>Offered</u>	<u>Allowed</u>
<b>Wednesday 14th July 1993</b> Consultation with accused in Barlinnie Prison 7-8.40pm	£196.50	£250.00	£250.00	£250.00
<b>Friday 16th July 1993</b> Consultation with accused in Barlinnie Prison Noon-3.45pm	£196.50	£350.00	£250.00	£250.00
<b>Monday 19th July 1993</b> Consultation with accused in Barlinnie Prison 2-4.30pm	£196.50	£275.00	£250.00	£250.00
<b>Wednesday 21st July 1993</b> Consultation with accused Barlinnie 10.45-3.35pm	£196.50	£360.00	£300.00	£350.00
The Auditor considers that a fee of £350.00 is reasonable having regard to the length of the consultation.				
<b>Monday 26th July 1993</b> Note on case	£70.50	£100.00	£100.00	£100.00
<b>Thursday 5th August 1993</b> Consultation with accused 10.15-12.15	£196.50	£250.00	£250.00	£250.00





	<u>Scale Fee</u>	<u>Claimed</u>	<u>Offered</u>	<u>Allowed</u>
<b>Friday 6th August 1993</b>				
Preliminary Diet Edinburgh High Court	£315.00	£700.00	£475.00	£475.00

The Auditor considers that the fee offered is reasonable there being no examination of witnesses involved.

**Saturday 7th August**

Locus inspection at Cobblers  
Bar, Sewage Manhole Cover,  
Blantyre and at Bothwell  
Sewage Works

NFP	£300.00	£250.00	£300.00
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The Auditor considers that the fee claimed is reasonable having regard to the significant importance of the work and when it was carried out.

Note on Forensic Evidence -  
pathologist & D.N.A.

NFP	£150.00	£150.00	£150.00
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**Sunday 8th August**

Preparation 10.30-1pm; 2-6pm;  
7-12.30pm

Includes conversation with  
Dr Fedor and Supplementary  
Note; also discussions with  
Advocate Depute

NFP	£500.00	£Nil	£Nil
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As Counsel has not, apart from this fee, charged separately for pre-trial preparation work the Auditor has taxed off this fee but has taken that work into account when considering the reasonable daily trial fee to be allowed, to include all pre-trial preparation and on-going preparation during the trial.

**Monday 9th August**

Attendance at High Court  
Edinburgh. Case could not  
proceed as Crown had problems  
with two witnesses. Matter  
explained to potential jurors  
about 11.20am.

£315.00	£500.00	£475.00	£315.00
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The Auditor has allowed this fee to recognise pre-trial preparation work.

Consultation with  
Professor Bassutl.

£118.00	£250.00	£250.00	£250.00
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	<u>Scale Fee</u>	<u>Claimed</u>	<u>Offered</u>	<u>Allowed</u>
Third Note re Legal Aid for Expert <u>re</u> D.N.A.	NFP	£150.00	£250.00(?)	Nil

**Note:** Taken into account as preparation work.

Draft List of Witnesses  
Draft List of witnesses whose characters are to be attacked.

Section 27(6) Notice  
[Undertaken because of the urgency involved.]

NFP	£75.00	£75.00	Nil
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The Auditor has allowed this fee to recognise pre-trial preparation work and consultation held.

**Tuesday 10th August**

Trial - Counsel unwell unable to continue that day	£315.00	£500.00	£475.00	£475.00
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Consultation with Dr Moody Dental Expert	£250.00	£250.00	£250.00	£250.00
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**Wednesday 11th August**

Trial Diet Edinburgh High Court	£315.00	£700.00	£475.00	£700.00
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**Thursday 12th August**

Trial	£315.00	£700.00	£475.00	£700.00
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**Friday 13th August**

Trial	£315.00	£700.00	£475.00	£700.00
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4.00pm-5.30pm

Consultation with Mr Thorpe,  
Ballistics Expert

5.30-7pm

Consultation with Mr Fedor,  
D.N.A. Expert

£118.00	£300.00	£250.00	£300.00
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The Auditor considers that the fee claimed is reasonable having regard to the importance of the complex matters discussed with the expert witnesses and as confirmed by Counsel in a subsequent Note.

**Saturday 14th August**

10.11.30am

Consultation with accused in  
Saughton Prison

£126.50	£200.00	£200.00	£200.00
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	<u>Scale Fee</u>	<u>Claimed</u>	<u>Offered</u>	<u>Allowed</u>
<b>Sunday 15th August 1993</b>				
Fourth Note by Senior Counsel	£ 70.50	£100.00	£100.00	£100.00
<b>Monday 16th August</b>				
Trial Diet Edinburgh High Court	£315.00	£700.00	£475.00	£700.00
<b>Tuesday 17th August</b>				
Trial Diet Edinburgh High Court	£315.00	£700.00	£475.00	£700.00
<b>Wednesday 18th August</b>				
Trial Diet Edinburgh High Court	£315.00	£700.00	£475.00	£700.00
<b>Thursday 19th August</b>				
Trial Diet Edinburgh High Court				
Juror absent and ill - case could not proceed	£315.00	£700.00	£475.00	£350.00
<b>Friday 20th August</b>	£315.00	£700.00	£475.00	£350.00

Juror still absent, case could not proceed.

**Note:** The Auditor has abated the fees for 19th and 20th August to allow for preparation work and having regard to the fees otherwise allowed.

<b>Monday 23rd August</b>				
Trial Diet Edinburgh High Court	£315.00	£700.00	£475.00	£700.00
<b>Tuesday 24th August</b>				
Trial Diet Edinburgh High Court	£315.00	£700.00	£475.00	£700.00
<b>Wednesday 25th August</b>				
Trial Diet Edinburgh High Court	£315.00	£700.00	£475.00	£700.00
<b>Thursday 26th August</b>				
Trial Diet Edinburgh High Court	£315.00	£700.00	£475.00	£700.00

██████████ after detailed consultations gave instructions to tender a plea of guilty to murder but not guilty to all other charges. ██████████ plea of not guilty was accepted. ██████████ pled guilty to the disposal of the body. The trial against ██████████ proceeded but was adjourned until Monday 30th to enable Crown and defence to re-assess the position.



	<u>Scale Fee</u>	<u>Claimed</u>	<u>Offered</u>	<u>Allowed</u>
<b>27th August</b>				
No sitting	£N/A	£300.00	£Nil	£Nil
No attendance at court				
The Auditor considers that as there was no attendance at Court, the case having been adjourned from Thursday 26th August to Monday 30th August, no trial fee is payable for that day.				
Joint Note	£70.50	£100.00	£100.00	£100.00
<b>Monday 30th August</b>				
Attendance at Court	£315.00	£400.00	£315.00	£315.00
<b>Tuesday 31st August</b>				
Attendance at Court	£315.00	£400.00	£315.00	£315.00
<b>Wednesday 1st September</b>				
Attendance at Court	£315.00	£400.00	£315.00	£315.00
<b>Thursday 2nd September</b>				
Attendance at Court	£315.00	£400.00	£315.00	£315.00
<b>Friday 3rd September</b>				
Attendance at Court	£315.00	£300.00	£300.00	£300.00

