Slavery, Terrorism, Law, and Justice

By James Robertson

Three of my five published novels prominently feature court scenes. The first of these, in *The Fanatic*, is the trial of James Mitchel in 1678 at the High Court of Justiciary for the attempted assassination of James Sharp, Archbishop of St Andrews, ten years earlier. The second, in *Joseph Knight*, focuses on the case of Knight v. Wedderburn, heard before the Court of Session in 1778, and the question of whether a slave owed 'perpetual service' to his master. The third, in *The Professor of Truth*, is the trial of Khalil Khazar for allegedly planting a bomb which destroyed a plane flying from London to New York.

All three novels have their roots in real events; but unlike *The Fanatic* and *Joseph Knight*, *The Professor of Truth* shadows rather than explicitly reproduces the events which inspired the fiction. While the Lockerbie bombing of 1988 and the subsequent trial and conviction of Abdelbaset al-Megrahi in 2000-01 are unmistakably paralleled in *The Professor of Truth*, there is no mention of Lockerbie, Megrahi, Malta or Libya in its pages. Because Lockerbie is very much unfinished business, a story that is far from complete, I felt a need to distance my fictional exploration of the event and its aftermath from the reality which inspired it. *The Professor of Truth* is therefore more abstract in its approach to questions of law and justice than the other two novels. However there are interesting similarities, in terms of subject matter, between*The Fanatic* and *The Professor of Truth*: terrorism and its possible justification; the measures to which the state and its functionaries may resort in order to bring a suspect to trial and secure a conviction; the interaction of truth, justice and law.

Some of these issues are present in two classic novels, Sir Walter Scott's *The Heart of Midlothian* and Robert Louis Stevenson's *Weir of Hermiston*, in which Scots criminal law is a central theme. Key scenes and exchanges from both books have been lurking in my consciousness for years. These two great works (Stevenson's, of course, left unfinished) also informed *Joseph Knight*, which retells the story of a slave's fight for his freedom through the civil courts.

Slavery and Civil Law

Joseph Knight, transported from Africa to Jamaica as a boy, was brought by his plantation-owning master John Wedderburn from the Caribbean to Scotland in 1769. Knight was then about twenty. Four years later, in order to find paid employment to support his wife (a woman from Dundee whom he had married against his master's will) and child, he left Wedderburn's service. Wedderburn, through his friends the local Justices of the Peace, had him arrested, but Knight appealed to the Sheriff Depute of Perthshire against being held in 'perpetual service'. His appeal was upheld and Knight was released. Wedderburn in turn appealed to the Court of Session against the Sheriff Depute's finding that 'the state of slavery is not recognised by the laws of this kingdom, and is inconsistent with the principles thereof'. Four more years passed before the case was finally heard by the 'haill Fifteen' (actually fourteen, as one judge was indisposed) in Edinburgh in January 1778. The fact that the entire Bench heard the case is an indication of how important it was considered to be. Those intervening years, however, must have meant considerable hardship for Knight and his family even with the assistance of sympathetic lawyers who did not charge him for their services.

One reason for the long delay was that the Court of Session recognised the wider interest in and potential implications of whatever judgment they reached. In 1772, Lord Mansfield, the Lord Chief Justice of England, had ruled in the case of Somerset v. Steuart (in which the master, Steuart, had tried to send the slave, Somerset, to Jamaica under duress) that no person, regardless of their status, could be removed from England against their will. The effect of this ruling was to make slavery *within the bounds of England* incompatible with common law, but Lord Mansfield, well aware that slavery and the slave trade were practised and legally sanctioned in many parts of the British Empire, went out of his way to limit the judgment to the case in hand. In an earlier case Mansfield (himself a Scot) had commented, 'I don't know what the consequences may be if the masters were to lose their property by accidentally bringing their slaves to England. I hope it never will be finally discussed; for I would have all masters think them free, and all negroes think they were not, because then they would both behave better.' Mansfield applied the same reasoning in the Somerset case: he tried, in other words, to damp down expectations raised by his judgment.

The Scottish judges by contrast (some of whom were leading intellectual and literary figures in Enlightenment Edinburgh) were keen to look not just at an individual case but at the entire philosophical and moral question of slavery: two recent slave-master disputes had failed to reach the Court of Session because on each occasion one of the contesting parties had died. Knight v. Wedderburn was therefore an opportunity to explore the matter in great depth, and the legal teams on both sides were invited to provide extensive 'memorials' not just putting the arguments of their respective clients but analysing the whole history of slavery, with supporting evidence for and against from classical, Biblical and modern sources.

The case provoked much popular interest in Edinburgh and further afield. Samuel Johnson, a fierce critic of slavery, was among those who supported Knight in his cause. On 15th January 1778, a decision was reached. Four of the law lords voted against Knight, ten for him. Wedderburn's counsel, perhaps recognising that the moral ground was going to be difficult to hold, opted for arguments based on precedent, history and the undoubted reality that slavery was established and maintained in Jamaica by its laws and in the slave trade by English law. They argued that Mr Wedderburn could not be held responsible for the rights and wrongs of slavery itself, and that therefore the issue turned on the facts — did he have the right to Knight's perpetual service? By Jamaican law, this seemed indisputably to be the case. Scottish law could not overturn Jamaican law just because of the physical movement of master and slave from one country to another. At the very least, though, if it was held that a man could not be a slave in Scotland, Wedderburn should have the right to take or send Knight back to Jamaica as a slave. This would have been disastrous for Knight, his wife and their child. Lord Hailes called it 'an inconveniency, but a very great inconveniency' since neither Knight nor Ann Thomson (his wife) had done anything wrong in marrying, nor had committed any offence which could excuse their being separated or their being prevented from cohabitation if she accompanied him to Jamaica.

We know from Lord Hailes's notes on the decision who voted which way. Hailes himself came down firmly for Knight. Other judges similarly had no hesitation. Lord Kennet said: 'The pursuer [Knight] is a slave in Jamaica, but not here.' Lord Auchinleck (father of James Boswell) thought slavery was thoroughly disagreeable to humanity and to Christianity and that the colour of your skin was irrelevant: 'Is

a man a slave because he is black? No. He is our brother; and he is a man, although not our colour; he is in a land of liberty, with his wife and his child; let him remain there.' And Lord Kames, then a man in his eighties, remarked: 'Let the laws of Jamaica govern the inhabitants of Jamaica. We cannot enforce them; for we sit here to enforce right, not to enforce wrong.'

On the opposite side was the Lord President (Lord Arniston), who upheld the notion that a person could be somebody else's property or 'bonded servant', and that coming to Britain did not alter that fact; but even he admitted that the Court could not send Knight to Jamaica, for that would encroach on his civil liberty. Lord Covington, Lord Elliock and Lord Monboddo also took the view that slavery was legally, morally and religiously sanctioned and that therefore Wedderburn was in the right. Monboddo based his argument partly on his admiration for the 'ancients'. The fact was that the Romans and Greeks had slavery, and as theirs were the finest civilisations the world had ever seen, so slavery must be acceptable.

The direct and immediate effect of the majority ruling upholding the original decision of the Sheriff Depute of Perthshire was that slavery became illegal in Scotland: this was twenty-nine years before Parliament passed the Act for the Abolition of the Slave Trade, and fifty-five years before it abolished slavery in the colonies. The decision, according to a contemporary Edinburgh newssheet, was greeted with enthusiastic approval among the populace.

In reconstructing this story, I was able to draw on papers held in the National Archives and in the Library of the Faculty of Advocates. These are quite detailed and demonstrate the seriousness which all parties concerned applied to the dispute. A trickier aspect of fictionalising the case lay in building a picture of how the Court of Session actually operated in the 1770s, and how the various written arguments might have been represented by counsel. A major difficulty — and perhaps an indication of the great self-confidence of the Scottish legal establishment — was that nobody at the time considered that the procedures of court needed to be formally recorded for posterity. Even the physical environment of the Court of Session was only lightly described. I depended to a large extent on anecdote, and the memoirs of men like James Boswell and, from the next generation, Lord Cockburn.

One characteristic I was determined to reproduce was that at this period the law

was conducted, orally at least, largely in Scots. Lord Hailes was often ribbed by his contemporaries because of his anglicised speech: he was a then rare example of a Scottish judge who had been educated at Eton. Lord Braxfield, in 1794, said of the young Francis Jeffrey, fresh at the Bar after attending Oxford, 'The laddie has clear tint his Scotch and fund nae English.' Interestingly, despite the now overwhelming dominance of English in public life, the Scots-speaking tradition persists in the law. A *Herald* obituary of the late Jock Thomson QC (1942-2013), one of the finest criminal lawyers of recent times, mentioned that 'his guid Scots tongue, confident courtroom manner and vast experience ensured that he always enjoyed a busy and successful career.'

Terrorism and Criminal Law

In 1668 James Mitchel tried to assassinate the Archbishop of St Andrews, James Sharp, as he left his lodgings in Blackfriars Wynd, Edinburgh. Mitchel, a Covenanter, believed that Sharp had betrayed Scotland's contract with God by becoming head of the established (Episcopal) Church, which Mitchel refused to recognise. Mitchel believed it was not only his right but his duty in Christ to strike down the enemies of Presbyterianism and the Covenant. But his bullets missed Sharp, injuring the Bishop of Orkney instead. After years on the run, Mitchel was apprehended and imprisoned without trial in the Edinburgh Tolbooth.

In 1676, two years after his arrest, the Privy Council which governed Scotland on behalf of Charles II interrogated Mitchel, extracting a confession from him in exchange for a promise of his life. When Mitchel, suspicious of their real intentions, denied in court that he had freely signed the confession, he was subject to judicial torture in the Laich Hall of Parliament House, having one leg crushed by the notorious 'boot'. He was then sent to the prison on the Bass Rock, 17th-century Scotland's equivalent of Guantanamo Bay. Two years later, still desperate to make a public example of Mitchel, the Council had him brought before the High Court to be prosecuted by the Lord Advocate Sir George Mackenzie on charges of assassination and invading the persons of His Majesty's counsellors, the penalty for either being death. Effectively, all Mackenzie had to do was prove that Mitchel had indeed made confession of his attempt to kill the Archbishop.

Mitchel's lawyers, however, argued that the confession was invalid since extracted under duress. Failing that, they said it had only been given on condition

that his life would be spared. With breathtaking boldness they summoned as witnesses four of the most powerful men in the land, all of whom detested Mitchel and his fellow 'fanatics' but who also mistrusted one another: they were the Duke of Lauderdale (Lord President of the Privy Council), James Sharp, Lord Rothes (the Lord Chancellor) and Lord Haltoun (brother of the Duke of Lauderdale): the last two had been present when the promise of life was given to Mitchel, while Lauderdale and Sharp, though not present, had authorised the terms of the confession.

What followed, before an intimidated Bench and a jury packed with pro-government men, was a show trial. One after another, these noble witnesses denied that Mitchel had ever been promised his life, either verbally or in writing. What they did not know was that the defence had secretly obtained a copy of the Act of the Privy Council in which the promise was expressed. After they had given their evidence, Sir George Lockhart (Mitchel's advocate) read out the entire document, effectively demonstrating that they had all perjured themselves. The Lord Advocate argued that Lockhart's document was a fabrication, but it was obvious to all present that it was not. Lockhart then requested that the register of Council be brought to the court to prove that what he had read out was genuine. At this point the full weight of Lauderdale's authority intervened: to save their reputations and their authority, the Privy Council refused to allow the register to be produced. The Council's Acts were the King's secrets and could not be made public, and the word of the King's most senior counsellors could not be doubted in this way. The Bench dared not assert its judicial independence. The register was not produced, and Mitchel was found guilty and hanged the following week.

In the narrative surrounding the trial of James Mitchel the law is a weapon in a battle between different political interests with different interpretations of the meaning of justice. For the Covenanters, the rule of Christ and the preservation of the Reformed religion trumped the rule of law of the secular state. For the government, adherence to the established Church's theological authority went hand in hand with obedience to the King's law. On both sides toleration of diversity was highly suspect. Add into the mix political corruption and social and economic instability and it is no surprise that 17th-century Scotland was a turbulent place. Furthermore the Mitchel trial took place in a society which regularly dispensed another kind of justice: the investigation, prosecution and punishment of people accused of witchcraft. In the year preceding Mitchel's

execution numerous witches were identified and brought to trial across the country, from Paisley to Fife and from Stirling to Haddington, and several were executed. The separation of temporal and spiritual jurisdictions was a long way off and the idea of such a separation was violently opposed by many: the last person executed for blasphemy in Britain, the Edinburgh student Thomas Aikenhead, was hanged in 1697.

Elusive Justice

Even at a distance of more than 300 years, there is little doubt that, however unsavoury the methods used to bring him to the scaffold, James Mitchel was guilty of attempting to kill the Archbishop of St Andrews. Much greater uncertainty surrounds the conviction of Abedlbaset al-Megrahi for the Lockerbie bombing in December 1988. What drew me to write about the Lockerbie affair was a concern — which began during the trial of Megrahi and his co-accused Lamin Khalifah Fhimah and was reinforced by revelations and developments subsequent to the trial — that a miscarriage of justice might have taken place.

Two factors made me decide to write a novel based on this huge and unfinished story. First, an enormous amount of non-fiction material already existed on Lockerbie, in the form of journalism, legal and other expert opinion, documentary film and official records both on paper and on-line. Second, fiction is my craft, and I felt that through a novel I could explore some of the key questions that always attach themselves to such big events. What is truth? What is justice? Where do these ideals coincide with the application of the law? And what happens to a human being who not only loses his loved ones in an act of terrorism, but also has to contend with the belief that an innocent man has been found guilty of their murder?

As a novelist, I am of course interested in the idea of narrative. When I set out to write a novel, I know the intended narrative direction but not the precise route, and usually not the destination either. Over several drafts, the route is explored and mapped, but this always involves deconstructing, rewriting, discarding or adding material. Sometimes dead-ends open up, sometimes through-roads turn into dead-ends. Eventually a destination is reached which, one hopes, is a fitting one for the constructed narrative. But the narrative can also be trimmed and adjusted to fit the destination and if this is done with enough skill the reader may be persuaded that the narrative always led naturally to that destination.

This is not so very different from what happens when investigators or prosecutors construct a narrative of events that will result in someone being found guilty of a particular crime. In my view what went wrong with the Lockerbie case was that error, incompetence and complacency on the part of the police, the Crown Office and others, were compounded by competing political agendas (including international ones) and immense pressure to secure a conviction. Instead of evidence being continuously tested to form a coherent and robust narrative of events, the supremacy of a particular narrative meant that evidence was advanced, ignored or even suppressed, in order to support and enhance it.

Here are two examples of how this could happen. The Crown's case was that the bomb which destroyed Pan Am Flight 103 over Lockerbie was loaded, in an unaccompanied suitcase, onto a plane at Luqa airport in Malta, transferred onto another plane at Frankfurt, and transferred again onto the target plane at Heathrow. This narrative was maintained by the prosecution and accepted by the court despite the *complete absence* of any evidence as to how the bomb was loaded at Luqa, an absence which the judges themselves described as 'a major difficulty for the Crown case'. Megrahi and Fhimah were jointly accused because between them they were supposed to have somehow smuggled the bomb suitcase onto Air Malta flight KM180 to Frankfurt. This was despite the fact that the Maltese airline had unusually strict baggage procedures, that it was proved that the number of bags in the hold exactly tallied with the number of bags checked in, that no suspicious activity was reported around the plane and that no evidence was produced of any Air Malta staff having been corrupted. The Crown case was that Megrahi must have had assistance from Fhimah, a station manager for Libyan Arab Airlines at Luqa, to get the bomb suitcase airside, but Fhimah was acquitted. No explanation was ever advanced as to how Megrahi, without Fhimah's help, managed to get the bomb onto Flight KM180.

By contrast, a suitcase answering to the description of the bomb suitcase was witnessed by a luggage handler at Heathrow airport, where airside security in 1988 was extremely poor compared with security at Luqa. This suitcase (brown, with a hard shell, 'the type Samsonite make' according to the witness) was seen waiting to be loaded onto Pan Am Flight 103, in the luggage container in which the bomb later exploded, and very close to the position where the explosion took place. The witness was, the judges said, 'a clear and impressive witness' who, moreover, volunteered this information without any prompting and before the

information that the bomb was contained in a brown, hard-shelled Samsonite case was in the public domain. Yet, astonishingly — and despite a great deal more information suggesting that London was a far likelier point of ingestion for the bomb than Malta — the prosecution rejected this evidence. It is hard not to conclude that this was because it completely undermined the preferred narrative that the bomb originated in Malta and that the two Libyans were responsible for loading it there.

The second example shows how a preferred narrative can be enhanced by suppression of inconvenient information. It concerns a key witness, Abdul Majid Giaka, who worked for the Libyan security service (the JSO) but was also an informant to the CIA. It was Giaka who identified Megrahi as an officer of the JSO although this was never substantiated and the designation always denied by Megrahi. Giaka's evidence at the trial was crucial — indeed, without him it is unlikely that Megrahi and Fhimah could have been indicted at all. The defence lawyers wanted to see — and argued that to ensure a fair trial they were entitled to see — unredacted copies of twenty-five CIA cables detailing the CIA handlers' meetings with Giaka. They had got word that the Crown had secretly viewed these unredacted copies at the US embassy in The Hague, and believed that these documents might have a bearing on the reliability of Giaka's evidence. When asked about this by one of the trial judges, Colin Boyd, the Lord Advocate, who was leading the prosecution, replied that 'there is nothing within these documents which relate to Lockerbie or the bombing of Pan Am Flight 103 which could in any way impinge on the credibility of Mr Majid on these matters.' He appeared to be relying, in making this statement, on assurances from the CIA that it had disclosed to the Crown all necessary and relevant information. Counsel for the defence maintained that they should still have sight of the cables, and the judges concurred. Under pressure, much less redacted versions of the cables, and a further thirty-six cables, knowledge of which had been denied to the defence, were released. They conclusively showed not only that Lockerbie and related matters were specifically discussed by the CIA and Giaka, but that Giaka was a completely unreliable witness prepared to say almost anything in exchange for money and in expectation of a new life under a witness protection scheme. 'Some of the material which is now disclosed goes to the very heart of material aspects of this case, not just to issues of credibility and reliability, but beyond,' Richard Keen, defence counsel for Fhimah, commented. 'I frankly find it inconceivable that it could have been thought otherwise.' The clear implication was that the

Lord Advocate had seriously, if unwittingly, misled the court.

There are many reasons, and more significant ones than these, for doubting the safety of the conviction of Abdelbaset al-Megrahi for the Lockerbie bombing. My purpose here is simply to illustrate similarities between narratives pertaining to crimes and the legal process around them, and narratives of novels. Here is what an entirely imaginary American intelligence officer says as he recalls trying to piece together the case against Khalil Khazar in *The Professor of Truth*:

> 'It wasn't just that we dropped irrelevant evidence, we suppressed things that were relevant but disruptive. Maybe the first time you do that it's some tiny, insignificant detail. Everything else fits but this one piece won't click home. You try it every which way. It just won't go, but if you trim it a little it will. Or maybe you don't trim it, you find something else that doesn't belong but fits better in the space. You put it in and it looks perfect and after a while you don't want to take it out. Then you have to get rid of the awkward non-fitting piece. You go through that process once, and the second time it doesn't seem such a big deal, and then you remind yourself that what you're trying to do is reach a destination and it doesn't matter so much how you get there, just get there. And there is urgency, pressure from above. So you keep going.' (66-67)

In another part of the novel, a lecturer in jurisprudence discourses on what really goes on in a courtroom. People confuse the law with justice, he says, evidence with the truth. In reality,

> '[…] a courtroom is a venue for a fight between two sides, each trying to persuade a jury, or in this case the Bench, that an accused person did or did not do something. That's all it is, a fight. As in a boxing match, points are scored by delivering punches on target. It may even be that a knockout punch is landed. And when it is all over, one side wins. But the outcome of any trial is not that justice has been done, or that the truth has come out, anymore than the outcome of a boxing match is that the better, nobler, finer man has triumphed. Justice *may* have been done. The truth *may* have come out. But neither of these things is necessary in the application of the law. They are actually irrelevant.' (103)

That is one view. Perhaps one of the most valuable functions of fiction is that it can offer a variety of perspectives. Scott, who knew a thing or two about the law, articulated a less cynical view than the above through the character of Mr Paulus

Pleydell in *Guy Mannering*:

> ‘In civilised society, law is the chimney through which all that smoke discharges itself that used to circulate through the whole house, and put every one’s eyes out — no wonder, therefore, that the vent itself should sometimes get a little sooty.’ (chapter 39)

(c) The Bottle Imp