Privy Council Appeal No. 93 of 2002

Kenneth Clarke *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 22nd January 2004

Present at the hearing:-

Lord Steyn
Lord Hoffmann
Lord Hobhouse of Woodborough
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe

*[Majority judgment delivered by **Lord Hoffmann**]*

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1. On Saturday 24 February 1996, at about 5 p.m., a team of technicians were installing cables to the front of a house in Roehampton Circle in the parish of St Andrew, Kingston. Two men came up and asked one of them who the boss was. He pointed to David Darby, who was up a ladder. Mr Darby came off the ladder and walked towards the men, who took out guns and fired at him. The men ran away and Mr Darby later died of four bullet wounds.

2. On Sunday 17 March 1996, Detective Sergeant Errol Williams arrested Kirk Rose at 19 Myrie Avenue, St Andrew. He came from Thatchwalk District, St Ann, out in the country, but on that Sunday he was in Kingston staying with his aunt Eloise Rose. Mr Williams took him to Constant Spring police station, where he made a statement under caution which was recorded between 3 p.m. and 4.15 p.m.

3. The statement as recorded said that on Saturday 24 February Donovan Starrad, whom Rose knew as "Danny", arrived at 19 Myrie Avenue in a white Corolla car and spoke to Rose's cousin Kenneth Clarke, whom he knew as "Paul" and who lived with his girl-friend in a house opposite. Danny asked Rose to come with him and Paul in the car and they drove to the Chinese Cemetery on Waltham Park Road. There Danny and Paul got out, leaving Rose on the back seat. He saw them speak to a "plaited hair man" wearing a black jacket and all three then returned to the car. Danny then drove off, the plaited hair man sitting with him in the front and Paul and Rose in the back. They stopped at a Mr Chin Bar in Hagley Park Road and had drinks. Then they drove up Waltham Park Road. Rose thought they were looking for a woman. They drove past a fridge repair shop and parked outside a pink house. There Danny took out a chrome 9 mm automatic and the plaited hair man took out a .38 with a long mouth. They all got out of the car but Danny told Rose to stay in the car. The others went around a corner while he sat in the driver's seat and listened to music. Soon afterwards he heard 6 shots and then the others came running back. The plaited hair man got into the front passenger seat and the others into the back. Danny said "drive the car country man". Although he had no licence, Rose said that he knew how to drive because he used to do "mechanic work". They drove off and stopped at the Esso Gas Station in Waltham Park Road and Hagley Park Road and there Danny took over the driving. At Myrie Avenue they stopped at the "Plowie" Bar and got out. There Paul told him that he must not "tek Danny and the plaited hair one simple because is a man them just shot and drop". The other three then drove off, leaving Rose to walk home. Paul returned at 11 that night and the next morning Danny came back with the car and he and Paul drove off.

4. After this statement had been recorded, Rose went in a police car and pointed out the street where the shooting took place. He also told them where to find Kenneth Clarke ("Paul") and Hopeton Robinson ("Flipper" or "Starchie" or "the plaited hair man") who, as Rose afterwards said at the trial, were hiding. After being arrested, Clarke took the police to find Danny. Between 6.30 and 8.30 the same night, Clarke answered 69 questions under caution. He said that Rose had been living at Myrie Avenue for two months. Hopeton Robinson was his girl-friend's brother. Danny was a taxi driver who drove a white Toyota Corolla. On 24 February Danny had come to Myrie Avenue, picked up Rose and himself and driven to the Chinese Cemetery to pick up Hopeton. Danny had said that the purpose of the expedition was to "go drop a man" – identified

only as a "cableman" - "fi somebody". Danny asked Hopeton for the guns and he produced a chrome 9 mm and .38 Special. They passed a fridge repair shop and drove to Roehampton where "Danny say the cableman we fi kill a do some work". Danny identified the cable technicians at work and they stopped the car and got out. Danny gave Clarke the 9 mm gun and told him to go with Hopeton, ask for Mr Darby and kill him. They did so and ran back to the car. Rose drove back to the Esso Gas Station where Danny took over. Asked why they killed Darby, Clarke said that "a Indian man who owns a bicycle shop on Waltham Park Road" and was also in the cable business paid them $90,000 to eliminate competition. The money was paid over to Hopeton, Clarke and Rose in the bicycle shop. Clarke took $40,000 (Hopeton and Rose were to "get money later") and Danny received the other $50,000.

5. Danny made a statement in which he admitted going with Clarke and Rose to the Chinese Cemetery but no more.

6. The police decided not to charge Rose and he agreed to be a Crown witness. On Wednesday 20 March he made a second statement which covered the ground in much greater detail and added some important material. It appeared that Hopeton, who featured anonymously as the "plaited hair man" in the first statement, was actually quite well known to Rose as Paul's girl-friend's brother. Danny was a good friend of Paul who visited often. Before Danny turned up on 24 February, Paul had told Rose that they would be going "on a mission". When Danny arrived, he pointed to Rose and said "Who is that person?". Paul replied "Is my cousin from [the] country" and Danny said "Let him come too". So Rose took a music tape and got in the car. The account of the drive followed that of the earlier statement until they arrived at Roehampton Circle, where, instead of identifying the cablers from the car, Danny parked the car and said "come mek wi walk go look fi di man because them suppose fi a work in this area". They took their guns and went off. After the shots, they returned and Danny said "Drive the car country man because all the while yu say yu can drive". He could drive because he had been an apprentice mechanic at a garage while living in St Ann and learned to drive different types of vehicles.

7. When the four of them stopped outside the bar on Spanish Town Road, Rose asked Paul whom they had shot and he said a cable man and that Danny had got $90,000 for "hit man work" from "a Indian man who fix bicycle on Waltham Park Road". Paul said

31. By contrast, *R v McTaggart* (6 March 2000) resembled the present case in that the witness whose evidence was tendered claimed to have been paid by the police to point out the accused at an identification parade and then (after suitable coaching) to give evidence against him at the trial and again at a retrial. Forte P said:

> "The evidence that he gave at both trials was long and in detail and his withstanding the thorough and exacting cross-examination of counsel at both trials in our judgment is demonstrative of a witness who was very knowledgeable of the incident of which he was testifying. A young boy, of limited intelligence and education such as the witness, speaking to a script which he was given and without knowledge of the incident of which he was speaking, would be in our judgment destroyed by the long and detailed cross-examination of five experienced attorneys ... [We] came to the conclusion that the evidence of David Morris is incapable of belief and for that reason refused the motion to adduce fresh evidence."

32. Since *R v Parks* the principles have been considered in *Clifton Shaw v The Queen* (2002) (unreported, 15 October 2002), an appeal from Jamaica to their Lordships' Board. The appellant and four others were convicted of murdering a man and his two children with guns and knives after bursting into their house in Spanish Town Road, Kingston. The main witness for the prosecution was another child, aged 16, who had survived the massacre by hiding under the bed. She identified the accused. Another man, Neville Johnson, who was present in the house and wounded in the shooting, made a statement to the police but did not give evidence. Two years after the trial, Neville Johnson, who had emigrated to England, swore an affidavit in which he said that the men who burst into the house had worn balaclavas and could not be identified. The Governor-General referred the case back to the Court of Appeal, which refused to admit the evidence. Rattray P said that if one compared the new affidavit to the statement he had given the police, "it would not be possible to conclude that the [new affidavit] was credible".

33. The Board adopted the guidance given by Rose LJ in *R v Sales* [2000] 2 Cr App R 431, 438:

> "Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief; and possibly capable of belief. Without hearing the witness, evidence in the first category will usually

be received and evidence in the second category will usually not be received. In relation to evidence in the third category, it may be necessary for this Court to hear the witness *de bene esse* in order to determine whether the evidence is capable of belief. That course is frequently followed in this court."

34. The Board considered that on the facts of *Clifton Shaw's* case, the evidence tendered from Neville Johnson fell into the third category and should not have been rejected without an oral hearing.

35. In her submissions to the Board on behalf of Clarke, Miss Montgomery QC said that the Court of Appeal should have taken a similar view of the new evidence from Rose. It should have been heard *de bene esse*, together with oral evidence from the policemen who had sworn affidavits in answer. Only then would the Court of Appeal have been in a position to conclude that it was not capable of belief. She drew attention to the inconsistencies between Rose's evidence and earlier statements which, she submitted, made his evidence at the trial less credible and therefore made it more credible that he was now being truthful in saying that it had all been lies.

36. Miss Montgomery said that the Court of Appeal erred in law because they did not consider the possibility of hearing the evidence *de bene esse* as recommended in *R v Sales* and followed in *Clifton Shaw's* case. The judgment suggested that they thought themselves obliged to decide the question of whether the evidence was capable of belief or not on the affidavits alone.

37. In addition, Miss Montgomery said that the terms in which Harrison JA described Rose's new evidence indicated that he had misdirected himself on the correct test to be applied. He said that it was "quite unlikely" that Rose would have been able to sustain a false story under cross-examination, that his evidence was "less than credible", that it was "quite likely" that he made the statements which he now claimed to have been fabricated by the police and that this made his new evidence "less than credible". None of this amounts to saying that the evidence was plainly incapable of belief. Furthermore, in relation to the evidence of Tencie Rose, Harrison JA said he was not satisfied that if he evidence had been led at the trial "it would have affected the decision of the jury". The correct test was whether it could possibly have given rise to a reasonable doubt.

38. Their Lordships do not think that the Court of Appeal misdirected themselves on their power to hear the witness in order to decide whether his evidence was or was not capable of belief. They may not have used the words "*de bene esse*" but it is plainly what Mr Daly was urging them to do and the procedure which had been followed in *R v Lindsay*, to which Harrison JA referred. There is no suggestion that they thought they lacked the power to hear the witness before deciding whether the evidence should be admitted. They simply decided that, as in *R v McTaggart*, they were not going to do so.

39. On the other hand, their Lordships are bound to say that there is some force in Miss Montgomery's criticisms of the language of the judgment. The use of the terms "quite unlikely" and "less than credible" may have been intended as meiosis, but their Lordships respectfully suggest that such tropes are better avoided. The court's conclusion, however, was that Rose's new evidence was "not capable of belief" and the question is whether the Court of Appeal was entitled to form this view on the basis of the written material alone.

40. In answering this question, their Lordships bear in mind that, as has been frequently said, they do not sit as a second court of appeal. The degree to which evidence is credible is very much a matter for the Court of Appeal and their Lordships will not lightly interfere with its assessment.

41. The Court of Appeal was being asked to entertain the possibility that a number of policemen had conspired to capture a not particularly intelligent rural petty criminal who happened to be in Kingston, beat him into agreeing to sign two written statements which contained certain inconsistencies of their own, and then put him forward as the principal prosecution witness, following which he was not only able to narrate in the most circumstantial detail a wholly fictitious tale, set in a town with which he had a very limited acquaintance, but to carry off the deception over a day and a half of cross-examination so as to convince the jury that he had been telling the truth.

42. Their Lordships share the view of the Court of Appeal that this story was not capable of belief. The various inconsistencies between the two statements and between the statements and the oral evidence do not in their Lordships' view support the view that Rose was speaking from a script which he had learned by heart. On the

March 2000 and 23 November 2000, as well as an affidavit of Tencie Rose, the appellant's aunt. There were also affidavits by police officers. It is only necessary to describe the substance of Kirk Rose's new evidence. It amounted to a complete retraction of his evidence at trial. In short Kirk Rose alleged that he had been coerced by violence by the police to testify at trial. He said:

> "Superintendent Tony Hewitt told me he knew I had nothing to do with it but he wanted me to give him some information. Again I insisted that I knew nothing. Along with Superintendent Hewitt were Inspector Chipper Grant and Detective Sgt. Williams. They told me that they wanted me to sign a statement and go to Court and say I was with the men in the car when they killed Mr Darby. Inspector Grant did most of the talking. Superintendent Hewitt did not say much but appeared to be in charge. They promised to send me abroad and give me a start in life, but I refused to do as they asked.
>
> I was kept at the Constant Spring Station for several months in total until the trial. On the first two days I was repeatedly beaten by them as well as by other policemen including one called Mr O'Connor who almost broke my jaw. Mr Hewitt slapped me around, Detective Williams beat me repeatedly with a strip of old tyre rubber and Chipper Grant kept hitting me in the head with a baton, though not very hard. This continued into the second day until I agreed to do as they asked."

The Court of Appeal declined to hear the evidence on the basis *that it was not satisfied that the new evidence was credible, that is, capable of belief.* It is, of course, one thing to say that, if the court is satisfied that the new evidence is incapable of belief, it may refuse to admit it, and an altogether different thing, in the context of a criminal appeal, to say that if the court is not satisfied that the evidence is capable of belief, it may refuse to hear it *de bene esse.* That the latter was the approach of the Court of Appeal is made crystal clear in several passages. First, in regard to the approach to be adopted the Court of Appeal observed:

> "The governing principles which guide this Court on the admissibility of fresh evidence, in the exercise of its discretion, were formulated by Lord Parker, CJ in *R v Parks* (1961) 46 Cr App R 29. That approach was followed by this Court in *Samuel Lindsay and Henry McKoy* SCCA 7 and

contrary, it seems to their Lordships more likely that if he had learned his lines he would have told the same story throughout. The inconsistencies suggest to their Lordships that Rose may have been more heavily implicated in the crime that he cared to admit and that he was trying to distance himself from the other three. But that casts no doubt upon the reliability of the essential elements in his evidence.

43. The case of *Clifton Shaw* was very different. The question there was whether an eyewitness who had not given evidence at the trial might be telling the truth on the single point of whether the murderers had worn balaclavas over their faces. The fact that he had made no mention of this fact in a statement to the police was not considered by the Board to be enough to justify it being rejected out of hand.

44. The Court of Appeal was also entitled to reject the evidence of Tencie Rose as incapable of belief. It was contradicted not only by Rose's evidence at the trial but also by his new story.

45. In addition to the application to adduce new evidence, the appellant complained of the prosecution's failure to disclose material which might have assisted the defence. One was the fact that he had been wanted by the St Ann police for a wounding or a shopbreaking (as the case might be) at the time of the murder. The other was the circumstances surrounding another prosecution for murder against a couple called Livingstone, which (it was suggested) would show that two other men had been hired to kill Mr Darby. But inquiry has revealed nothing to show that the appellant was wanted by the St Ann police or any connection with the Livingstone proceedings. These grounds of appeal must therefore fail.

46. Their Lordships will therefore humbly advise Her Majesty that the appeal against conviction should be dismissed. There is also an appeal against sentence which has by consent been adjourned to a date to be fixed.

Dissenting judgment delivered by ***Lord Steyn***

47. The question is whether, upon a statutory reference by the Governor-General to the Court of Appeal to consider the case of a convicted person in the light of new evidence, the Court of Appeal

was entitled to decline to hear the new evidence *de bene esse* before deciding on its admissibility. After a hearing on 27 and 28 November 2000 the Court of Appeal dismissed the motion to admit the new evidence. On 25 October 2001, that is 11 months later, it produced the reasons for that decision.

48. On 8 May 1997 the appellant was convicted of the capital murder of David Darby. The offence charged was capital murder because it involved a contract killing for reward. He was sentenced to death. At the same time his two co-accused were each convicted of Darby's non-capital murder. At trial Kirk Rose was the principal witness for the prosecution. The Court of Appeal summarised the substance of Kirk Rose's evidence as follows:

> "... He gave detailed evidence of being in the company of the applicant and two other men, in a car which was driven to the vicinity of Roehampton Drive in Kingston, where the men on seeing some other men, left him in the car, after which he heard some gun shots. The men, including the applicant, returned running to the car, which he the witness drove away as directed. Minutes later, the applicant told the witness Kirk Rose, that he the applicant had 'just killed the cableman' and the following day told him that he was going to collect money for the said killing."

In addition the prosecution relied on alleged admissions by the appellant in interviews with the police.

49. On 30 July 1999 the Court of Appeal dismissed the appeal of the appellant against his conviction as well as the appeals of the two co-accused. On 6 March 2000 the Privy Council dismissed the appellant's application for special leave to appeal to the Privy Council.

50. On 12 May 2000 the appellant petitioned the Governor-General under the provisions of section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act for a further reference to the Court of Appeal. The grounds for the petition were said to be contained in the fresh affidavit evidence of Kirk Rose and Tencie Rose. On 8 June 2000 the Governor-General advised the Court of Appeal that the petition had been granted.

51. When the matter came before the Court of Appeal on 27 and 28 November 2000 there were two affidavits by Kirk Rose, dated 4

In other words, where the evidence might have been regarded as possibly credible the application could not be rejected outright. In such a case, the Court of Appeal must hear the evidence *de bene esse,* as happened in *Parks,* before ruling on the outcome.

52. Secondly, the Court of Appeal repeatedly made clear that it was addressing the question whether the new evidence was "likely to be credible". The following passage illustrates the point:

> "... We regard it as quite unlikely, that a witness such as Kirk Rose, a woodworker by trade, who agrees that he can write but asked if he could read, answered 'Not so good, sir', could have given evidence at the trial and maintained his story consistent with his earlier statements, unless he was speaking the truth and from his own knowledge. It is unlikely that he was diligently reciting what the police had told him to say. Accordingly, the evidence which was sought to be led as fresh evidence is less than credible.
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> Detective Inspector Errol Grant gave evidence at the trial that Kirk Rose took him on 17th March, 1996 to various places, ... This conduct of the witness Kirk Rose displays an intimate knowledge of the events of the 24th February, 1996 and coincides with his detailed statements of 17th March, 1996 and 20 March, 1996. It is therefore quite likely that he himself did give the latter statements to the police and that makes the 'fresh evidence' sought to be tendered less than credible."

Instead of asking whether the new evidence, if explored *viva voce,* might be capable of belief the Court of Appeal applied the higher threshold requirement of examining whether in its view of the affidavit evidence, it is "likely to be credible".

53. Thirdly, the Court of Appeal came to the following conclusion:

> "for the reasons stated, we do not find the evidence to be capable of belief, nor that if the evidence had been led at the trial it would have affected the decision of the jury. It cannot be categorised as fresh evidence."

The Court of Appeal expressed the view that "we do not find" that "if the evidence had been led at trial it would have affected the decision of the jury". This is a remarkable conclusion: without the critical account of Kirk Rose at trial the jury might very well have

8/99, delivered 18 December, 1999, (unreported) and recently in *R v Deon McTaggart* SCCA 57/95 delivered 6 March, 2000, (unreported). In the exercise of its discretion, the Court must consider and be satisfied that, the said evidence:

(1) was not available at the trial;

(2) is relevant to the issues;

(3) is credible, that is, capable of belief, and

(4) if it had been given at the trial might have created a reasonable doubt in the minds of the jury as to the guilt of the applicant."

The opening words of the passage, together with the third requirement, reflects the view of the Court of Appeal that unless it is "satisfied" that the evidence "is credible, that is capable of belief" it must decline to admit the evidence. That is not an accurate rendering of the observation of the Lord Chief Justice in *Parks.* He said [1961] 1 WLR 1484, 1486:

> "... it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but evidence which is capable of belief."

Applying this test to new evidence the Chief Justice observed, at p 1488:

> "Having seen the young man give his evidence before us, the court feels unable to say that it is not credible evidence in the sense of being evidence open to a jury to believe. The only question is whether if that evidence had been given together with the other evidence at the trial, and in the light of the character of the complainant, the jury might have had a reasonable doubt in the matter.
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> It is well known that these questions of identification are difficult. They can lead to a miscarriage of justice, and the court, though with great hesitation, has come to the conclusion that it would be unsafe to allow this conviction to stand. If the evidence to which I have referred had been given at the trial it is impossible to say that the jury might not have had a reasonable doubt in the matter."

acquitted. In any event, in considering the potential impact of the new evidence of Kirk Rose the Court of Appeal should not have asked whether it *would* have affected the outcome of the trial. Instead it should have considered whether the evidence *might* possibly have affected the decision of the jury.

54. One can sometimes overlook language at appellate level, which literally read, demonstrates a fundamental error in approach on the basis that it could not have been so intended. Here the content and cumulative effect of the passages make that approach impossible. In any event, in the present case, bending over backwards to explain away fundamental errors in approach of the Court of Appeal is not appropriate. It is not a commercial or chancery case. On the result of the decision of the Privy Council depends the question whether a man should be hanged.

55. I accept, of course, that where a witness wishes to retract the evidence which he gave at trial the Court of Appeal is entitled to look at the new evidence with some scepticism. Common sense so dictates. But this is no warrant for an excessively robust approach of condemning new exculpatory evidence contained in an affidavit as incapable of belief without allowing it to be explored *de bene esse*. Nowhere in the judgment of the Court of Appeal is there any recognition of the difficulty of assessing on paper the credibility of affidavit evidence. The dangers of making a judgment on the credibility of affidavit evidence have often been emphasised. In *John v Rees* [1970] Ch 345, Megarry J addressed an argument that "the result is obvious from the start". He stated at p 402:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

That was said in a civil case. In a criminal case the dangers are even greater: the standard of proof required is higher and, usually, the stakes are higher, notably so in a death sentence case.

56. The procedure to be adopted by the Court of Appeal faced with an application to lead new evidence was authoratively explained in *R v Sales* [2000] 2 Cr App R 431. Lord Justice Rose, Vice President, explained [at 438].

> "Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief, and possibly capable of belief. Without hearing the witness, evidence in the first category will usually be received and evidence in the second category will usually not be received. In relation to evidence in the third category, it may be necessary for this Court to hear the witness *de bene esse* in order to determine whether the evidence is capable of belief. That course is frequently followed in this Court. It was a course which we followed in this appeal, in relation to the evidence of the appellant himself and the three witnesses called in support of his appeal to whom we have referred."

In *R v Pendleton* [2002] 1 WLR 72 the House of Lords considered new evidence in the third category. Lord Bingham of Cornhill observed at p 79, para 11:

> "But in practice, and often with the consent of the Crown, the court will hear *de bene esse* the evidence of the witness whose evidence it is sought to adduce, without preliminary argument whether the requirements of section 23(1) and (2) have been met or not, as was done (for example) in *R v Parks:* see [1961] 1 WLR 1484, 1488. There is no objection to this practice. But if the court receives the evidence, or hears it *de bene esse,* it must then undertake its second task, of deciding whether or not to allow the appeal."

This approach was followed by the Privy Council in *Shaw v The Queen,* [2002] UKPC 53. Relying on my experience of Court of Appeal practice I am relatively sure that this practical and just procedure would have been adopted in England if a case similar to the present one had come before it. The comparison is, of course, to some extent inexact: in England the death sentence would not have been involved.

57. *Sales* had been decided and reported before the Court of Appeal gave its decision but it was apparently not cited. In *Parks* the Court of Appeal did hear new evidence *de bene esse.* In the present case the Court of Appeal referred to the principles stated in *Parks.* But nowhere in its judgment is there any indication that it specifically considered whether the case might be in the grey area and whether it might be just to hear the evidence *de bene esse.* Instead the Court of Appeal simply addressed the issue whether the new evidence was capable of belief and therefore admissible or

incapable of belief and therefore inadmissible. This analysis was not only simplistic but fundamentally unfair.

58. It is useful to consider the legitimacy of the approach of the Court of Appeal from another perspective. Let it be assumed hypothetically that Kirk Rose gave evidence as he did at trial but subsequently, perhaps under cross-examination or upon being recalled, retracted his account as he did in his affidavit evidence. In such an event, the issue would have been a matter for the decision of the jury. It would have been totally improper for the judge to direct the jury that the later evidence was incapable of belief. This is, of course, something which happens from time to time in the real life of criminal courts. It is true that on the actual facts of the present case the retraction came after verdict and after a considerable lapse of time. That would be a matter to be explored in hearing the evidence *de bene esse.* Nevertheless, this point illustrates how over bold the approach of the Court of Appeal was.

59. In an impressive speech Miss Montgomery QC submitted that there had been a failure of due process. I would uphold this submission. If a man is to be hanged it must be in accordance with the law. The entire legal process (including all avenues of appeal) must demonstrably comply with the requirements of due process. In my opinion the Court of Appeal's treatment of the issue falls woefully short of this universal minimum standard of criminal jurisprudence.

60. When supporting the judgment of the Court of Appeal Mr Guthrie QC repeatedly emphasised the importance of the statement by Lord Griffiths in *Gayle v The Queen,* Times, July 2, 1996, that it is not a function of the Judicial Committee to act as a second Court of Appeal. This proposition must not be driven too far. It frequently is. First, it obviously cannot mean that the Judicial Committee need not consider every petition for special leave and every substantive appeal with the greatest care in order to ensure that potential injustices are properly examined: compare the empirical evidence showing a significant rate of demonstrated judicial error in refusing leave to apply for judicial review: *Craig, Administrative Law,* 4th ed., 1999, 786-789. While this applies to all cases before the Privy Council one must never lose sight of the fact that in death sentence cases the responsibility of the Board is an awesome one. Common humanity demands of the Board the greatest vigilance to identify possible injustices and failures of due process. Secondly, the proposition in *Gayle* cannot mean that the

Privy Council must defer to the decision of a Court of Appeal where its decision is materially defective as a matter of law (as in the present case) or otherwise unsatisfactory (as in the present case). Lord Griffiths would have had these qualifications well in mind but I emphasise them because they are sometimes overlooked. In any event, against the background of the flawed approach of the Court of Appeal, it would be absurd to apply to their decision what is in effect a principle of deference.

61. Finally, I pose the question whether, unassisted by the flawed judgment of the Court of Appeal, objectively the new affidavit evidence was so incontrovertibly incapable of belief that it would be right for the Board to dismiss the appeal. In my view the new evidence, although on the face of the affidavits somewhat implausible, should have been carefully tested by hearing it *de bene esse.* It could readily have been done in the two days set aside for the hearing and Kirk Rose was available to be examined and cross-examined. The short cut adopted by the Court of Appeal was ill-advised. It was also unjust. Due process required the Court of Appeal to hear the evidence *de bene esse.*

62. In these circumstances I would allow the appeal, quash the decision of the Court of Appeal and remit the matter for hearing by a differently constituted Court of Appeal.