

(1) Clifton Shaw /
(2) Titus Henry
(3) Morris Boreland
(4) Donovan Mullings and
(5) Junior Wright

Appellants

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 15th October 2002

Present at the hearing:-

Lord Steyn
Lord Hoffmann
Lord Hutton
Lord Millett
Lord Scott of Foscote

[Delivered by Lord Hutton]

1. On 15 May 1993 Winston Bowers and two children, Nikeisha Samuels and Christopher Grey, were murdered in a house in Spanish Town Road, Kingston, by a number of men. The circumstances of the murders were extremely brutal. Winston Bowers was shot in the back, Nikeisha Samuels was shot in the back of the head and Christopher Grey was shot twice and was stabbed four times.

2. In addition to the three persons who were murdered a number of other people were present in the house when the murders took place. They were Nicola Bowers, who was the daughter of Winston Bowers and was then aged 13 and the sister of Nikeisha

Samuels and Christopher Grey, a man named Neville Johnson, a friend of Winston Bowers, and two other children.

3. The five appellants were arrested for the murders and, with the exception of Clifton Shaw, they all denied being present in Winston Bowers' house or any participation in the murders. Clifton Shaw made a statement to the police in which he said that he was there but he did not shoot anyone, and this statement was admitted in evidence at the trial.

4. At the trial in June 1996 of the five appellants for capital murders in the course of and in furtherance of a burglary the case for the Crown was primarily based on the evidence of Nicola Bowers, who was then aged 16. In her evidence she said that at about 8.30 pm on 15 May 1993 she was at home having dinner and watching television with the three deceased, together with Neville Johnson and two other children, when she saw a group of men come into the yard. She heard shots fired and the men knocked down part of the door and came into the house. She, Nikeisha Samuels and Christopher Grey and the other children hid under a bed and her father, Winston Bowers, and Neville Johnson stayed sitting on a hassock. Her father then ran out of the door. She said that she knew the men who came into the house, they were the five appellants. She knew them by nicknames and she used to see them all regularly in the local area. She said that the appellant, Clifton Shaw, had a knife and that the others had guns. The men turned over the bed under which she was hiding and began to fire and Clifton Shaw then cut her brother's throat with his knife and another man shot her sister. The men then stole a video and left the house. She said in her evidence that she had seen the faces of the five appellants clearly and had had no difficulty in recognising them as being the men who had murdered her father, brother and sister. She denied the suggestions of defence counsel that she had not seen the faces of the persons involved in the killings.

5. Nicola Bowers was the only witness at the trial who described what happened in the house at the time of the killings and who identified the five appellants as the murderers. Neville Johnson was not called as a witness by the prosecution or by the defence.

6. In the attack on the persons in the house Neville Johnson was himself shot a number of times in the buttocks and was also shot in the hand. He was taken for treatment to the Kingston Public Hospital. Inspector Ivanhoe Thompson was the police officer in

charge of the investigation into the murders and in an affidavit sworn on 26 April 1999 he states:

“5. Later, on the same day I went to the Kingston Public Hospital where I saw and spoke with one Neville Johnson, a victim of the crime at 821/2 Spanish Town Road.

6. I asked Mr Johnson about the incident. He told me that he was inside the house when a number of men entered the premises, about four (4) men and started shooting.

7. I told him that we had recovered a video near the crime scene and if he could identify it he said no. He did not indicate whether he knew any of the men but he gave a description of the men who shot him. Mr Johnson said nothing about any of the men wearing mask and I did not ask him about any man in a wheel chair.

8. I gave Johnson instructions to attend the Hunts Bay Police Station in order to give a statement and then I left the hospital.

9. Mr. Johnson subsequently came to the station on the 3rd day of June 1993 and I instructed Detective Corporal Walters to record his statement. To my knowledge this was done. Corporal Walters has since migrated. I did not force him to identify anyone and he did not inform me that any of his assailants had on masks. His statement dated 3rd day of June 1993 which I exhibit hereto and mark it ‘IT 1’ for identification was subsequently handed over to me and I placed it on the file.

10. Mr. Johnson told me he was afraid that the men would come back and kill him.

11. I asked him if he has nowhere else to go, he said yes. I then made arrangements for him to be taken out of the area for his own protection.

12. I did not place him on the witness protection programme. ...

17. I have not seen Mr Johnson since he was taken to premises in Caymanas Park Estate by the police on my instructions.

18. I have never asked him to identify the suspect in custody because he was not available.

19. I had subsequently received information and I verily believed that Mr Johnson had migrated to England. I communicated this fact to Ms Paula Llewellyn Deputy Director of Public Prosecutions, before the commencement of the trial. She elicited evidence about Mr Johnson from me on oath during the course of the trial.”

7. In the statement which Inspector Thompson says Neville Johnson made to Corporal Walters and which is signed “Neville Johnson” and dated 3 June 1993, Neville Johnson states that on the evening of 15 May 1993 he went to Winston Bowers’ house. Four men came into the kitchen where he was and one of them put a knife to his neck. Another man shot him in the buttocks and pushed him down. The man then shot him again in the buttocks and also shot his hand. He was feeling pain and he lay down as if he were dead. He heard a voice saying “kill, kill” and other voices saying “cold-blooded murderer”. He heard two shots and then he heard a sound like that of killing a goat and the goat frothing. A lot of blood began to spew on him because they were near him in the room. The last thing he heard was the men saying “take up the video”. After the men had left he took the surviving children to his own home and he then went to the hospital. The statement concludes as follows:

“The man who shot me is of a clear complexion, slimly built and is about 5 ft tall. The gun he had looks like a .22.

At the KPH I was treated and then sent home.

On Thursday June 3 1993 I gave this statement to the police at Hunts Bay. It was read over to me and I signed it as being true and correct.”

Below the signature “Neville Johnson” there is the certificate:

“Taken down by me this day Thursday June 3 1993 at Hunts Bay Police Station. It was read over to the maker who signed it as being true and correct.”

The certificate is signed: “Walters Cpl H4521” and dated “3.6.93”.

8. At the conclusion of the trial the jury found each of the five appellants guilty of three capital murders and they were each sentenced to death. On 31 July 1997 the appellants' appeals against their convictions were dismissed by the Court of Appeal.

9. On 25 June 1998 the appellants' petitions for special leave to appeal against the decision of the Court of Appeal were heard by the Judicial Committee of the Privy Council and by order of Her Majesty in Council dated 21 July 1998 (i) special leave was granted to appeal; (ii) the hearing of the petitions was treated as the hearing of the appeals; (iii) the appeals were allowed to the extent of quashing the convictions for capital murder and substituting convictions for non-capital murder; and (iv) the appellants' sentences of death were confirmed. The reason for the decision in respect of the convictions was that the appellants ought not to have been charged with capital murders in the course of and in furtherance of a burglary. Their arguments against conviction were otherwise rejected, and because they were each convicted of more than one murder committed on the same occasion, they remained subject to sentence of death.

10. The case was subsequently referred to the Court of Appeal by the Governor General under section 29(1)(a) of the Judicature (Appellate Jurisdiction) Act.

11. On the hearing before the Court of Appeal pursuant to the reference two matters were relied on by the appellants. One matter was that there had been a material irregularity at the trial because the prosecution should have disclosed to the defence that Neville Johnson had made the statement of 3rd June 1993 and that the failure to disclose constituted a material irregularity. The second matter was that Neville Johnson had sworn an affidavit in England on 24 June 1998 in which he stated that the four men who entered Winston Bowers' house on 15 May 1993 were wearing balaclavas and that later on that evening when he was in Kingston Public Hospital Inspector Thompson asked him if he could identify any of the men who were at Winston Bowers' house and he said he could not; they were all wearing masks. He further said that he told Inspector Thompson two days later that he could not identify the men as each man had a mask on. The appellants applied for leave to adduce the fresh evidence contained in Neville Johnson's affidavit pursuant to section 28 of the Judicature (Appellate Jurisdiction) Act which provides:

“For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice

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...

- (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; ...”

The Board is informed by counsel that Neville Johnson was present in the Court of Appeal when this application was made. By a judgment delivered on 20 September 1999 the Court of Appeal dismissed the application to adduce fresh evidence and dismissed the appeals. The appellants now appeal by special leave to the Board against the decision of the Court of Appeal.

The first ground of appeal before the Board

There was a material irregularity because of the failure by the prosecution to disclose Neville Johnson’s statement of 3 June 1993.

12. On 17 August 1998 counsel for the appellant, Wright, Mr Roger Davis, swore a very brief affidavit in which he stated:

“I was not aware of the witness Neville Johnson the adult eye witness in the case.”

On 19 February 1999 counsel for the appellant, Boreland, Mr Linton Walters swore a very brief affidavit in which he stated:

“I was not aware of the witness Neville Johnson the adult eye witness in the case.”

On 22 February 1999 counsel for the appellant, Shaw, Mr Errol Gentles, swore a very brief affidavit in which he stated:

“I was not aware of the witness, Neville Johnson, the adult eyewitness in the case. I never became aware during the trial of an eye witness by the name of Neville Johnson and I was

never informed that a statement had been given to the police by him.”

On 22 February 1999 counsel for the appellant, Henry, Mr Lynden Wellesley, swore a very brief affidavit in which he stated:

“I was not aware of the witness Neville Johnson the adult eye witness in the case.”

On 13 August 1998 counsel for the appellant, Mullings, Mr Ravil Golding swore a more detailed affidavit than those sworn by the other defence counsel in which he stated:

“4. That the trial of the said accused men took place in the Home Circuit Court in June of 1996.

5. That the infant Nicole Bowers gave evidence on behalf of the Prosecution as being the sole eye-witness.

6. That in her evidence she mentioned that Mr Neville Johnson, a friend of her deceased father was present on the night her family was killed.

7. That she further stated that she knew the accused men and that on the night in question she had seen their faces as there was light inside the house.

8. That Detective Inspector Ivanhoe Thompson gave evidence at the trial; that he stated that he saw and spoke with Neville Johnson after the said killings; that he did not state whether he had collected a statement from Neville Johnson.

9. That the facts sworn to in the Affidavit of Neville Johnson were not made available to me by the Prosecution before or at the trial of Donovan Mullings, and that at no time did the Prosecution inform me that the said Neville Johnson had informed Detective Inspector Ivanhoe Thompson that the men who broke and entered the house of Winston Bowers were wearing balaclavas.

10. That a copy of the Statement of Ivanhoe Thompson which I perused did not indicate that Thompson was informed by Neville Johnson that the alleged offenders were wearing balaclavas.”

13. On 26 April 1999 Ms Paula Llewellyn swore an affidavit in which she stated that she was the counsel who prosecuted the case against the appellants at their trial. She further stated:

- “3. That just before the prosecution of the case having only received the file less than one weeks before, I enquired from Inspector I. Thompson the investigating officer about the whereabouts of the witness Neville Johnson, with a view to eliciting the fact that though he had given a statement, he was, from information received, off the island.
4. That in preparing the matter I saw on the file, the police statements, including that of Neville Johnson dated June 3rd 1993 Exhibit ‘IT1’ as exhibited in Inspector Thompson's affidavit is the same statement from Neville Johnson dated June 3, 1993, that I had seen on the file which was handed to me at my office just before prosecution.
5. This matter had been on the trial list in Home Circuit Court since the 13th March 1993 and I came into the matter on the 17th June 1996. As far as I can recall, I assumed that since Counsel had been in the matter for some time before that they were in possession of the depositions and also the police statements. As far as I can recall, none of the Defence Counsels said anything to me that would lead me to believe the contrary.
6. That Neville Johnson's statement dated 3rd June 1993 on my reading of it, did not carry the Crown's case any further as he did not purport to identify any one and more importantly, he did not mention anything, about masks.
7. That I have been shown a copy of Mr Neville Johnson's affidavit dated June 24, 1998 where he made mention that the statement he had given after the incident revealed that all the men had had on a ‘*balaclava*’ but this was never mentioned in the statement dated 3rd June 1993.
8. That being aware of the authority of *L d86 inton Berry* (1992) 41 WIR 244, and being very particular about [practising] in the interest of justice it would be

inconceivable to me that, '*balaclavas*' i.e. masks would have been mentioned in the statement of 3rd June 1993 and I did not make Defence Counsel aware of it.

9. As far as I can recollect, I did mention the existence of the statement Exhibit 'IT1' and I believe that I showed it to several of the attorneys who were present at the time. This is supported by the fact that in the spirit of full disclosure I elicited evidence on oath from Inspector Thompson about Mr Neville Johnson's whereabouts at pages 347 and 348 of the Transcript of the notes of evidence. Mr Lynden Wellesley, Counsel for the Defence even tried several times to stop me because he thought that Mr Johnson's evidence was irrelevant to the issue joined. The transcript of the notes of evidence is littered with occasional mention of Mr Neville Johnson.
10. That having seen the skeleton arguments of the defence received on 22nd April 1999 at the Director of Public Prosecutions' office, I found the tenor and tone of the submissions on disclosure very surprising. I also found the Affidavits of Defence Counsel re being unaware of Neville Johnson's statement, mystifying in light of the fact that at page 347 I asked the express question *inter alia* and I quote:

'On June 3rd, did you cause anything in particular to be taken from Neville Johnson?'
11. That the above was an obvious reference to his statement is clear. To my certain knowledge, there was no other statement by Mr Neville Johnson in existence apart from Exhibit IT1 dated June 3, 1993.
12. That I could not have led the date if there was no statement from Mr Johnson in existence dated 3rd June 1993. I would therefore have alerted Counsel for the Defence to its existence.
13. That not only did Mr Wellesley seek to prevent me from eliciting on oath more disclosures from Inspector Thompson in respect of Mr Johnson's whereabouts, but also the lack of cross-examination from all

Defence Counsel in the matter re Mr Johnson or any demand for his presence would support my perception that what was contained in the statement of the 3rd June 1993 was within the knowledge of counsel and that they also felt that it was irrelevant to both the Crown's case and the case for the Defence. This is [borne] out by the transcript.

14. That if there had been any statement in existence from any person purporting to 'put masks' on the faces of the assailants, I would have in the interest of justice in the spirit of *R v Linton Berry* and as a matter of fairness certainly served it on Defence Counsel as soon as I had come into the matter and also I would have enlisted the police's aid to find that person. This is how I have always practiced as a prosecuting attorney."

14. In its judgment delivered by Rattray P on 20 September 1999 the Court of Appeal rejected the appellants' submissions that there had been a material irregularity in a failure to disclose the statement of Neville Johnson made to the police on 3 June 1993. Rattray P stated:

"Quite apart from whether the defence was aware of the existence of the witness Neville Johnson, and it does appear that the defence was so aware, contrary to the affidavits of counsel who represented the applicants at the trial, the material in the possession of the prosecution must be examined to see whether it could assist the defence in the presentation of its case.

It is clear that since Neville Johnson did not identify (sic) the persons who committed the offence and, further, since he gave no evidence in his statement in terms of the persons being masked it would not be possible to conclude that his statement could assist the defence in the presentation of their case.

Furthermore, it is also abundantly clear that the defence was aware that Neville Johnson had been present in the room on the night when the murders took place."

15. On their appeals to the Board the appellants renewed the submission that there was a material irregularity because of the

failure by the prosecution to disclose Neville Johnson's statement of 3 June 1993. It is a submission which their Lordships reject. It is abundantly clear from a number of passages in the transcript of the evidence at the trial that defence counsel were fully aware that Neville Johnson had been present in the house at the time of the killings.

16. In her evidence Nicola Bowers said at page 29 of the transcript:

"Q. And apart from you, who else was at home in the house?

A. My father, Neville Johnson ...

Q. Hold a minute. Who is Neville Johnson?

A. Neville Johnson, that is my father's best friend."

And at page 32:

"Q. Now, just before you rushed under the bed, Nicola, where was your father, Winston?

A. I leave him and Neville Johnson sitting on the hassock when we rushed under the bed."

And at page 53:

"Q. So, where was Neville Johnson when he got shot?

A. Miss, he was in the house.

Q. So, when Neville Johnson got shot, where were the men?

A. Miss?

Q. When Neville Johnson got shot, where were the men?

A. In the house."

17. In her evidence Nicola Bowers referred to Neville Johnson as "Wells". She said at p 55:

"Q. So, after the men left, what happened next?

A. Then 'Wells', 'Wells' get up and said ...

Q. That is Neville Johnson?

A.Yes, miss. ‘Wells’ say, ‘Tracey’, that is Keneisha Johnson name. Him called the whole of we by we name.

Q.Neville Johnson called the whole of you by your name?

A.Yes.”

18. In cross examination Mr Walters, counsel for the appellant Boreland, put the following questions to Nicola Bowers at p 139:

“Q. Thank you. You told us that the last time you saw Wells, was the Sunday after the incident, correct?

A.Yes, sir.

Q.You know – and it is yes or no – you know if Wells gave a statement to the police?

A.I don’t know, sir.”

And at p 143:

“Q. Now, when you went under the bed, where was Wells, was he still sitting on the hassock?

A.Sir, he was still in the house, but I don’t remember if he was sitting exactly on the hassock or ...

Q.Are you saying you don’t know where he was?

A.Sir, I leave him sitting on the hassock, but ...

Q.After you went under the bed, you don’t know where he went? Is that what you are saying?

A.Sir, but he was inside the house.

Q.But you don’t know where in the house he was after you went under the bed? Is that what you are saying Nicola?

A.No, sir.

Q.What are you saying then?

A.Sir, I don’t remember if he was sitting there, sir.”

19. In cross examination Mr Davis, counsel for the appellant, Wright, put the following questions to Nicola Bowers at p 145:

“Q. And Neville, how long have you known him?

A. Long time, sir. Long years back.

Q. Before you moved there?

A. Yes, sir, him and my father ah did best friend, sir.”

20. In his evidence Inspector Thompson was asked the following question by Ms Llewellyn at p 302:

“Q. On June 3rd, did you cause anything in particular to be taken from Neville Johnson?

A. I cannot recall.”

21. It is therefore clear that the statements made in the affidavits sworn by four of the counsel for the appellants that they were not aware of the witness Neville Johnson are completely erroneous.

22. It appears that the affidavits were sworn in response to enquiries from the solicitors acting for the appellants in their appeal to the Privy Council as to whether defence counsel were aware at the time of the trial of the evidence contained in Neville Johnson’s affidavit that the attackers wore balaclavas. The relevant part of a fax message dated 28 July 1998 from Messrs. Allen & Overy was as follows:

“In the course of our preparations for the hearing at the Privy Council, we discovered some fresh evidence. It is on the basis of that fresh evidence that we will Petition the Attorney-General to refer Titus Henry’s case back to the Court of Appeal.

This fresh evidence was supplied by Neville Johnson, the adult eye-witness to the crime. His evidence is enclosed by way of affidavit. The most significant part of his evidence is that he claims that the offenders wore balaclavas. Obviously, this evidence casts doubt over the identification evidence.”

It appears that if the four defence counsel had stated in their affidavits that they were not aware of the evidence contained in Neville Johnson’s affidavit that the attackers wore balaclavas, their statements would have been correct. But their Lordships observe

that it is a matter of serious concern that in these grave cases counsel in their affidavits made the much broader and erroneous statements that they were not aware of the witness Neville Johnson.

23. In paragraph 9 of her affidavit Ms Llewellyn states that as far as she can recollect she did mention the existence of Neville Johnson's statement of 3 June 1993 and believes that she showed it to several of the defence attorneys who were present at the time. She also refers to the question which she put to Inspector Thompson in her examination-in-chief.

“On June 3rd, did you cause anything in particular to be taken from Neville Johnson?”

24. There has been no rebuttal by defence counsel of the statements made by Ms Llewellyn in her affidavit. Therefore their Lordships think that it is very probable that Ms Llewellyn's recollection is correct and that the statement of Neville Johnson was shown to several of the defence counsel and that it is very probable that all the defence counsel were aware of the statement even if it was not shown to them by the prosecution. But even if the statement was not shown to all the defence counsel, their Lordships are satisfied that in this case there was no miscarriage of justice on that ground. The statement of 3 June 1993 contained no suggestion whatever that any of the men that came into the house wore masks or balaclavas; whilst the statement made no reference to whether or not the men were masked, it suggests that they were not masked because Neville Johnson says in the statement: “The man who shot me is of a clear complexion”. On one possible reading Neville Johnson said in his statement that there were four men whereas Nicola Bowers said that there were five men, but in the circumstances of this case where there was a terrifying attack on the people in the house, this was not a matter of any substance. Therefore, as the contents of the statement did not assist the defence, and as counsel for the appellants were fully aware that Neville Johnson was present in the room when the murders were committed, their Lordships are in agreement with the ruling of the Court of Appeal that there was no miscarriage of justice arising from a failure to disclose. Their Lordships note that there is a minor error in the judgment of Rattray P which says that the statement of Neville Johnson dated 3 June 1993 was given to Inspector Thompson, whereas it was given to Corporal Walters, but this error is immaterial and in no way affects the validity of the reasoning or the conclusion of the Court of Appeal on this point.

The second ground of appeal before the Board

The application to adduce the evidence of Neville Johnson contained in his affidavit sworn on 24 June 1998

25. In his affidavit Neville Johnson describes the killings which took place when he was present at Winston Bowers' house on the evening of 15 May 1993. He states that the attackers were wearing balaclavas. He also states that he told the police that he could not identify the attackers as they were all wearing masks. The relevant paragraphs of his affidavit are as follows:

“16. That evening I went to Kingston Public Hospital. Mr Thompson, a Police Inspector from Hunt's Bay Police Station, came to see me shortly after I had arrived at the hospital. He asked me whether I could identify the video that had been taken from Winston's house and I said that I couldn't. He asked if I could identify any of the men that were at Winston's house that evening. I said that I couldn't: they were all wearing masks. Mr Thomson then pointed to a man in a wheelchair at the hospital and asked if he had been involved in the shooting. I knew that the man in the wheelchair lived on Kid Lane. He was always asking me for money. I told Mr Thompson that I didn't know who had been involved.

17. I left the hospital the same evening. Two days later, on the Monday, I went to the Police Station in accordance with Mr Thompson's request. Once again, Mr Thompson asked me if I could identify who had been at Winston's house on the Saturday night. I told him that each man had a mask on. He forced me to identify them, but I just could not do it.

18. When I returned home after speaking with Mr Thompson, a man whom I did not recognise came by my house and said: 'They'll kill you. You're an eye witness. I heard this from down Spanish Town Road.'

19. That Monday evening I went back to Mr Thompson and told him what I had heard. Mr Thompson asked me if I had somewhere to go. He arranged for a jeep with two policemen to take me, my children and their mother, Ateline White, to Cayman Huts Park Estate in St. Catherine. I stayed there until I left for England. I feared for my safety. My brother who lives in Birmingham paid for my flight.

20. Before I left for England, the Police told me that they were holding some of the assailants and wanted me to identify them. Once again, I told them that I couldn't do it. I had not seen their faces as they had been wearing masks.

21. I don't know if the Police put together a statement of what I had told them. I had told them what had happened on the evening of 15th May, 1993 at Winston's house. I can't read or write. The Police never read out anything to me and nor did I sign anything. I was not asked to give evidence at any trial. The Police knew that I was leaving for England. I left in June, a month after the incident."

26. The appellants submit that the new evidence contained in Neville Johnson's affidavit was highly material and of great importance because if the men in the house were wearing balaclavas or masks they could not have been recognised by Nicola Bowers as she claimed in her evidence at the trial. The Court of Appeal rejected the application to adduce the evidence of Neville Johnson and Rattray P stated:

"In relation to the fresh evidence itself, in view of the statement given to Miss Jemmett by Neville Johnson, looked at as against the statement given to Inspector Thompson by the same person, it would not be possible to conclude that the statement given to Miss Jemmett was credible.

Faced with these circumstances, we concluded that the application to call fresh evidence must fail and we consequently dismissed the motion before us."

It is clear from an earlier passage in the judgment that in referring to "the statement given to Miss Jemmett by Neville Johnson" Rattray P meant the affidavit of Neville Johnson which Miss Jemmett, a solicitor for the appellants, arranged to be sworn on 24 June 1998.

27. The issue of principle which arises on this ground is whether in the circumstances of this case it was right for the Court of Appeal to approach the matter on the basis that it could conclude that the evidence contained in Neville Johnson's affidavit was not credible without hearing Neville Johnson giving evidence in the witness box and, it may be, hearing evidence from other witnesses such as Inspector Thompson and Corporal Walters. Guidance on the proper approach of an appellate court to an application to adduce fresh evidence is contained in the judgment of the English

Court of Appeal in *R v Sales* [2000] 2 Cr App R 431. In delivering the judgment of the court Rose LJ stated at p 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.”

28. In the present case their Lordships consider that the fresh evidence of Neville Johnson falls within the third category described by Rose LJ. One factor which *prima facie* appears to give support to the credibility of the fresh evidence is that, unlike some fresh evidence which appellants seek to place before an appellate court, Neville Johnson’s evidence is not self-serving and there is no obvious reason why Neville Johnson would wish to assist the appellants. Their Lordships are fully aware that there may, in reality, be such a reason: for example, it is possible that Neville Johnson wishes to return to live in Jamaica in safety and that the appellants or their associates may be able to put pressure on him or on his family or friends in Jamaica. But their Lordships consider that his evidence cannot be rejected as unworthy of belief on such a ground without this possibility being examined in the course of evidence.

29. Their Lordships infer that the Court of Appeal was influenced by the consideration that whilst in paragraph 21 of his affidavit Neville Johnson states that he did not know “if the Police put together a statement of what I told them” and that he did not sign anything, it appears to be reasonably clear (although not certain, because Corporal Walters was not called as a witness at the trial) that he did sign the statement of 3 June 1993 in which he makes no mention of the men wearing balaclavas and in which he says that the man who shot him had a clear complexion. This is a point of weight, but as against this point there is the consideration that there is considerable consistency between Neville Johnson’s account of what happened in the house in the statement of 3 June 1993 and his account in his affidavit, and it is possible that he had forgotten that he had signed the statement. Moreover it is to be assumed that when Corporal Walters was taking the statement he would have

asked Neville Johnson if he would be able to identify any of the men who came into the house, and it is a possible view that it is a little strange that, apart from the reference to the man who had a clear complexion, there is no reference in the statement as to whether Neville Johnson could or could not identify any of the attackers.

30. Therefore their Lordships are of the opinion that the Court of Appeal erred in principle in not recognising that the fresh evidence fell into the third category described in *R v Sales* and in deciding that it could reject the evidence having considered it only in written form. The Board considers that this was a case where it was necessary in the interest of justice to hear Neville Johnson *de bene esse* in order to determine whether his evidence was capable of belief.

31. Accordingly, their Lordships will humbly advise Her Majesty that the appeals against the decision of the Court of Appeal not to hear the oral evidence of Neville Johnson should be allowed and that the case should be remitted to the Court of Appeal in order for it to hear the oral evidence of Neville Johnson and any other witnesses whom the Court of Appeal considers it appropriate to hear and to reconsider the case.