[2016] JMCA Crim 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 45 & 46/2012

BEFORE: THE HON MS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

ANTHONY ATKINSON
PAULSTON MAIRS v R

Ms Althea McBean for the applicants

Ms Kelly-Ann Boyne for the Crown

1 December 2015 and 5 February 2016

F WILLIAMS JA (AG)

Background

[1] This matter came before us as an application by both applicants for leave to appeal against conviction for the offence of arson. The applicants were jointly tried by a judge and jury in the Hanover Circuit Court on an indictment containing two counts: the first charging them with setting fire to a shop; and the second with setting fire to a bird coop. They were found guilty on 21 February 2012 at the end of a two-day trial. On 9 March 2012 the applicant Atkinson was sentenced to four years' imprisonment on each count; and the applicant Mairs was sentenced to five years' imprisonment on each count. The sentences for each applicant were ordered to run concurrently.

[2] When the matter came before us on 1 December 2015, we made the following orders:

> "1. The applications for leave to appeal against conviction in respect of both applicants, Anthony Atkinson and Paul Mairs, are refused.
>
> 2. The sentences in respect of both counts and for both applicants shall be reckoned from 9 March 2012."

[3] We promised then to put our reasons into writing. This is a fulfillment of that promise.

[4] The case against the applicants in, summary, was that on 25 January 2009 they went to the home of Mr Garfield Saunders, the virtual complainant, and there set fire to his shop, which was to the front of his dwelling house, and to his bird coop. On Mr Saunders' evidence, he actually saw the applicant Mairs with a lighter in his hand in the company of the applicant Atkinson and another man, near to the coop which was on fire. He approached them and asked: "wha dis fah?" and both applicants and the other man ran. He testified as well to having been in a confrontation over land earlier that day with the two applicants and his (the virtual complainant's) father's wife, during which the applicants had threatened that "…they going to kill me, burn down me place and kill me or something…" (see page 9, line 25 to page 10 line 2 of the record).

[5] Apart from the virtual complainant, the Crown also led evidence from the investigating officer, Sergeant Hugh Mendez, who arrested and charged the applicants and testified to his observations when he visited the scene of the fire.

[6] In respect of the defence, the applicants made unsworn statements and called as a witness one Mr Oneil Graham. By his evidence, Mr Graham placed himself at the scene of the fire on the night in question. He observed, he testified, the virtual complainant leave his house and the entire premises shortly after the fire was brought to his attention. The virtual complainant did not return whilst he, the witness, was there, that night. (Inferentially, therefore, the virtual complainant would not have been there to have identified anyone; and so, his testimony in that regard must be false.)

The grounds of appeal

[7] Ms McBean for the applicants argued (with the leave of the court), two grounds of appeal contained in the supplemental notice and grounds of appeal dated 7 November 2015 and filed on 10 November 2015. The grounds of appeal were:

> "1. The verdict was unreasonable having regard to the evidence before the Court.
>
> 2. Evidence of an expert witness not placed before the Court is contradictory to evidence given by witnesses at the trial and this resulted in a material irregularity, an unfair trial and miscarriage of justice."

Ground one: verdict unreasonable having regard to evidence

[8] The focus of Ms McBean's submissions in respect of this ground, was to highlight inconsistencies, discrepancies and omissions in the evidence and to submit that these were not addressed adequately (or, in some cases, at all) in the learned judge's summation to the jury. In addition, she submitted that the learned judge did not

properly direct the jury how to treat with the evidence from the preliminary examination and that the identification evidence in the case was weak.

Discrepancies and inconsistencies

[9] In respect of the inconsistencies and discrepancies, these were the main submissions that she made in her skeleton arguments filed on 27 November 2015:

> "1. There were such material inconsistencies that the complainant's evidence was not credible and should not have been relied on by the Jury to arrive at a conviction as it was unsafe to rely on such inconsistent evidence….
>
> 4. When he came out he saw the top part of his house and verandah on fire, yet the Appellants were indicted for burning down or setting fire to a shop that was in front of the house. His evidence is that the shop is three quarters of an arm's length from the house yet the police officer puts it at 8-9 feet away. P 31.
>
> 5. There was also a discrepancy in respect of words spoken by the Complainant. He said he went up to them and said "a wah dis fah". In cross-examination, he recounted his words as being "Marley and Earl what dis fah?" This was also not in his statement to the police and is again a critical aspect of the case and smacks of recent fabrication."

[10] On behalf of the Crown, Ms Boyne, whilst recognizing that there were indeed several inconsistencies and discrepancies in the evidence, pointed the court to several portions of the summation, as a basis for contending and submitting that the learned trial judge had dealt with these adequately. She further submitted that it was axiomatic that the mere presence of discrepancies and inconsistencies in a trial do not render evidence unreliable or inadmissible; and that a jury might be given directions as to how to deal with them, as was done in this case.

[11] It was further submitted on behalf of the Crown that there were two inconsistencies that arose on the evidence and one discrepancy. These inconsistencies were: (i) whether the virtual complainant saw the applicants two hours before the incident (as he had testified at the preliminary examination); or whether after the confrontation he had not see them again until the incident; and (ii) whether the bird coop was 40 feet from the back of his house or half a chain from the house (as he had said at the preliminary examination). In relation to the discrepancy, that discrepancy emerged between the evidence of the investigating officer, on the one hand, who testified that the shop was some 8 or 9 feet away from the house; and, on the other hand, the evidence of the virtual complainant, who said that the distance between the two was some 2 feet or three-quarters of an arm's length.

Discussion

[12] In his summation, the learned trial judge began by giving what might be regarded as the standard opening direction on inconsistencies and discrepancies – that is, *inter alia*, that it is not uncommon to find them in a trial. This was what he said at page 6, line 23 onward of the record:

> "So, I am to tell you, members of the jury, that it is not unusual for there to be discrepancies or inconsistencies in a criminal case, especially when the facts about which witnesses speak are not of recent occurrence. And, you will remember, members of the jury, that the charges laid in the indictment concerned an incident which took place in January of 2009—10, 11, 12 – so, we are three years down the road.

> Now, where discrepancies or inconsistencies occur, it is your duty to take them into account and decide what you make of them. What one witness says on a particular point may be completely different from what another witness says on the same point. Discrepancies may arise because witnesses do not remember in the same detail all that happened on a particular occasion. One witness' recollection may be quite clear while that of another may be dull. The occurrence of disparity in the testimony of witnesses recognizes that in observation, recollection and expression, the ability of individuals vary."

[13] Further on in his summation, the learned trial judge dealt specifically with the particular inconsistencies being discussed when he said of the virtual complainant's evidence, at page 8, beginning at line 20:

> "Now, in this court, he told us that having seen—after the confrontation between 9:00 and 10:00 that morning, the next time that he saw the accused was outside the foul [sic] coop and he said, well, he said, I think, "I don't remember if I saw them again that day". But she reminded him of the evidence. She put it to him and he agreed that he told the judge, that's the judge in the magistrate's court that he knew them a long time and that he spoke to them about two hours before the incident. He saw them down at his father's wife's house. That's what he said in that court. So there is an example of that.
>
> Now, in any case, and I will point out a few more examples of --examples that you may consider to be inconsistencies. Now, in any case where you find there is a discrepancy or inconsistency, you are to ask yourselves whether the inconsistency or discrepancy is a major or minor one. That's the question you have to ask yourself."

[14] The learned trial judge further stated in relation to this issue at page 10, lines 5-9 of the record:

> "You have seen and heard the witnesses and it is for you to say whether the inconsistencies are profound and

> inexplicable or whether the reasons which have been given, if any, for the inconsistencies are satisfactory."

[15] With specific reference to the discrepancy between the virtual complainant's evidence and that of the investigating officer as to distance, we have had regard as well to the learned judge's assessment of the virtual complainant, when he observed at page 41, lines 11-18:

> "…there is light up there, and is forty feet away, that is less— although in fairness to Mr. Saunders he does not appear to be a man who can judge distances well because he is calling, if you accept the sergeant over him, what he is calling two feet the sergeant says is 8 or 9 feet. So, he is not so good on distances, if you accept the sergeant." (Emphasis added).

[16] Although this was done in the context of discussing the identification evidence, it serves as well to address (satisfactorily in our view), the complaint made by the applicant in relation to the discrepancy as to distances.

[17] A careful reading of the notes of evidence as well, leads to an undermining of any support for the contention that the virtual complainant spoke only to seeing his house (and not his shop), on fire. At page 13, lines 2 to 9, this was the virtual complainant's evidence:

> "A. Mi pull mi back door and went out.
>
> Q. Went out where?
>
> A. I go check on the front and me see di shop is on fire.
>
> Q. Now, you said you check on the front and you saw the shop on fire, where is this shop in relation to your house?

A. Just like two feet about from mi house."

[18] Similarly, this was the further evidence in relation to the burning of the shop at page 25, line 20 to page 26, line 11:

"Q. You mentioned that the shop was on fire?

A. Yes, sir.

Q. What is the shop made out of?

A. The shop made out of plywood, sir, and board.

Q. Plywood and what?

A. And board.

Q. Now, did you do anything in relation to the shop that was on fire?

A. Say that again for me, please.

Q. Did you do anything in relation to the shop that was on fire?

A. Well, mi try to erase it with some wata.

HIS LORDSHIP: Try to erase it with some water? I see. That is the fire?

THE WITNESS: Yes.

Q. By 'erase' what is it that you mean?

A. It mean like throwing wata on di fire."

[19] We are also of the view that the foregoing extracts from the summation reflect an adequate treatment by the learned trial judge of the matters relating to the inconsistencies and discrepancies that arose in this case and so render the challenge to the verdict on this ground ineffective. In our view, proper directions were given and

there was sufficient evidence for the jury to have arrived at the verdict at which they arrived in this case.

The omission

[20] The complaint about the omission is contained in paragraph 2 of the appellant's skeleton arguments as well as in paragraph 5 (previously set out at paragraph [9] of this judgment). Paragraph 2 reads as follows:

> "2. The Complainant's evidence is that he saw Marley trying to light another part of the coup [sic] and had a lighter. This was not in his statement to the police and would appear to be a recent fabrication as it is critical to the case that he saw the accused man with a lighter trying to light another part of the coup [sic]. P. 34".

[21] The basis for the complaint in relation to the contents of both paragraphs 2 and 5 is that the learned trial judge did not mention, in his directions to the jury, the fact and significance of these particular omissions, or how omissions generally are to be treated.

[22] Whilst acknowledging that the learned trial judge did not specifically direct the jury on how omissions were to have been dealt with, Ms Boyne submitted that the absence of such specific directions did not work an injustice in this case as the central issue in this case was that of credibility. She maintained that, read as a whole, the summation addressed that central issue adequately, in a sense subsuming omissions under the directions relating to inconsistencies and discrepancies.

Discussion

[23] Having combed through the summation, we found ourselves to be in agreement with Ms Boyne for the Crown that, although there was no specific mention of the word "omission" and any particular directions as to how to treat with omissions, that could not be fatal to the conviction. The reason for this is that the summation, when taken as a whole, could be viewed as indirectly treating with omissions and adequately addressed the central issue of credibility around which matters such as omissions, inconsistencies and discrepancies revolve. Of significance too is how the learned trial judge dealt with the two matters of complaint in paragraphs 2 and 5 of the skeleton arguments. This is to be seen at page 34, line 10, to page 35, line 1 of the summation:

> "And he said he went over to them, "I went over to them and said, 'a wha dis fah?' and they ran off." Now, that's what he said in chief. And you may or may not consider this an inconsistency, but when he was cross-examined he said, he said to the men, "Marley and Earl, what dis fah?" And you may recall that he was cross-examined on it as to whether or not that was in his statement. And his statement was read to him and he said that that was not in the statement. Neither was it in the statement that Marley was trying to light a different part of the fowl coop. So here he has said that Marley was trying to light a part of the fowl coop, but he never said that to the police in his statement. You will decide what you make of that." (Emphasis added).

[24] We bear in mind that there are several cases that state that a trial judge is not required to highlight every discrepancy, inconsistency and omission in his or her summation; but is just required to summarize the evidence and to highlight what he or she considers to be the main issues to the jury. In the House of Lords case of **R v**

Lawrence (Stephen) [1982] AC 510, for example, Lord Hailsham of St Marylebone gave the following guidance at page 519:

> "It has been said before, but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book. A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."

[25] We find in this case that the summation, taken as a whole, was adequate in focusing on the central issue of credibility and that the fact that the omission was not dealt with in greater detail is not fatal to the conviction.

The preliminary examination

[26] A complaint was also made concerning what was said to be the inadequate treatment by the learned trial judge of the references to matters arising from the preliminary examination. This was how the complaint was put in paragraph 3 of the skeleton submissions:

> "3. The Learned Trial Judge gave an inadequate or incomplete direction in respect of evidence at the preliminary enquiry. See p. 11. The Judge stated that what is said at the preliminary enquiry is not evidence in the case

> but did not go on to say that it affects the witness' credibility."

Discussion

[27] This was how the learned judge dealt with the matter in his summation (at page 11, lines 2 to 9):

> " Now, having done that, having done that, you decide whether you ought to reject the witness in totality, or only insofar as the inconsistency is concerned. But you must bear in mind, madam foreman and your members, that what was said at the preliminary enquiry, that is, before the magistrate, is not evidence in this case. It is what is said here."

[28] We are of the view that there is some merit in Ms McBean's contention as to the inadequacy of this direction. It would have been appropriate for the direction to have gone further by linking the inconsistency with the possible impact on the witness' credibility. This is how the relevant part of the specimen direction (direction 29) of the Judicial Studies Board's Specimen Directions, 2001, reads:

> "You may take into account the fact that he made such a statement when you consider whether he is believable as a witness."

[29] However, this part of the summation in relation to the preliminary examination came after directions on how the jury ought to have treated with inconsistencies and discrepancies. It also came in a summation in which the learned trial judge, in our view, made it clear to the jury that the central issues in the case were identification and credibility. In light of this, we consider the direction of the learned judge on this point,

considered against the background of the summation as a whole, to have been adequate.

The identification evidence

[30] A challenge was also mounted to the conviction on the basis that the identification evidence was weak. This is how the challenge was put in paragraph 6 of the applicants' skeleton arguments:

> "(i) The Complainant said there were three men at the coup [sic], although he said he went up to them, he couldn't make out one of the men.
>
> (ii) He saw shadows at the light coup [sic].
>
> (ii) The distances regarding lighting is not consistent."

[31] In relation to these issues, the Crown's response might be summarized as follows:

> (i) That the complainant gave an explanation as to what he meant when he said he could not make out one of the men – in essence that explanation was that that third man was like a stranger, although he knew the two applicants quite well.
>
> (ii) Otherwise, there was sufficient evidence for the jury to have arrived at the verdict that they did.

Discussion

[32] It is important and helpful to quote *in extenso*, the evidence in respect of the third man and the explanations given by the witness that served to clarify why he was not able to "make out" that third man. That evidence is to be found at page 74, line 20 to page 75, line 16 of the record. This was the evidence:

> "HIS LORDSHIP: So, the third person, where was he:
>
> THE WITNESS: He was up there too but me couldn't make out him face, him come een like a stranger, me couldn't make out him face.
>
> HIS LORDSHIP: One minute. So, he was facing you too?
>
> THE WITNESS: Yeah, he was also facing me.
>
> HIS LORDSHIP: And, when you say you couldn't make out his face, why weren't you able to make out his face?
>
> THE WITNESS: Through ah di first time me ah see him dats why me couldn't make him out.
>
> HIS LORDSHIP: I am not following. Where was he, it was not light enough for you to see his face, what?
>
> THE WITNESS: Light was there. Me see his face but me don't know is who, your Honour.
>
> HIS LORDSHIP: Oh, you didn't recognize him. That's what you mean by didn't make out his face?
>
> THE WITNESS: Didn't recognize him." (Emphasis added).

[33] These excerpts from the evidence serve to make clear the reason for the witness having been unable to recognize the third man, whereas he was able to identify the two other persons that he testified were the applicants.

[34] In relation to the complaints as to lighting and distance with regard to the identification evidence and as to whether these made the identification evidence weak, it is necessary again to quote as some length the relevant sections of the summation. The most helpful place to start is at page 38, lines 4 to 12, which read as follows:

> "And you look at the lighting. Look at the distance. What part of them he was able to see. Whether or not there was anything obstructing his view. And I have highlighted that evidence for you. But having highlighted that , members of the jury, I am to bring to your attention 2 bits of evidence, I consider to be weaknesses in the identification evidence…"

Page 39

> "Now, remember, members of the jury, what I said about an honest witness can be mistaken so you are to look at the evidence, members of the jury, and see if it is evidence that you can rely on."

Page 39, line 20 to page 43, line 16

> "Now, the first bit of evidence, members of the jury, that I will bring to your attention is that, remember he said he could see from the house to the 'coob' and it is his evidence that anybody at the 'coob' could stay there and see down to the house. And, he ran from the house to the foul [sic] coop and he said he could hear his own footsteps and he got to within six feet of the men who were there doing an unlawful act but just standing and facing him, so crown counsel said to you that they went in the cover of night but if – and this is something for you, members of the jury, you are standing there, you can see down to the house and you are there doing something unlawful and you stand up there and wait until the men, the person whose place you're burning down come within six feet of you? Well, it is a matter for you if that makes sense, if that is evidence upon which you think you can rely that is a matter for you.
>
> Secondly, members of the jury, the evidence for the Prosecution is that what attracted Mr. Saunders was the

> flicker of the flashlight--- sorry the flicker of the lighter. The sergeant told you that there was light at the coop. Mr. Saunders told you that it was well lit. Now, in circumstances where the place is well lit, would light from a lighter be seen some forty feet away? Is light not light in darkness? That is one view of the Prosecution's case. So, the Prosecution is saying there was light up there in one breath and then it is the flicker of the lighter. You may well think, members of the jury, that the lighter flicker would have been a lot more noticeable if up where the lighter is being flicked is dark so that it lights up the place. I had said secondly but thirdly, learn this, members of the jury and I have to bring these witnesses as I see them to your attention, there is light up there, and is forty feet away, that is less -- although in fairness to Mr. Saunders he does not appear to be a man who can judge distance well because what he is calling, if you accept the sergeant over him, what he is calling two feet the sergeant says is 8 or 9 feet. So, he is not so good on distances, if you accept the sergeant. But it's forty feet away, that's less than the length of a cricket pitch and if it is well lit as he is saying, light from the brother house, light from the sister house, light on the foul coop, the men standing under the light, how come is shadows him see first? Shadows, that's a weakness in the identification evidence because he is less than a cricket pitch away. I don't know. Well, I would think that the men up there play cricket so they would have an idea and I should hope these older ladies have some interest in cricket so the analogy is not lost but if he is forty feet away and I give it, granted it could be more than forty feet because he is not so -- and the area so well lit, how come is shadows; him can't see anything until him get up there, can't make them out well. He didn't tell you that he is short-sighted, so you have to take him as an ordinary person who can see forty feet. Well, that is something for you to consider, members of the jury, in looking at the identification evidence."

[35] Again, the quotation of these excerpts from the summation should make it pellucid that these areas of concern to the applicants were, in our view, adequately addressed by the learned trial judge. We are satisfied that, this being a matter in which the verdict hinged on the correctness or otherwise of the identification evidence of the

virtual complainant, the learned trial judge complied with all of the **Turnbull** guidelines, in particular that which required him to bring to the jury's attention aspects of the identification evidence that he considered to be weak. (See **Turnbull v R** [1976] 3 All ER 54.)

[36] In the light of these conclusions at which we arrived in respect of each of these complaints under ground one, this ground was rejected.

Ground two: expert evidence not placed before the Court

[37] The main complaint raised under this ground is set out in the skeleton arguments as follows:

> "1. The evidence of an expert witness not placed before the Court is contradictory to evidence given by witnesses at the trial and this resulted in a material irregularity, an unfair trial and miscarriage of justice."

[38] It is the applicants' further contention that the chemist should have been called at the trial to speak to the contents of the forensic report. This position was seemingly taken as a result of a perception of an apparent conflict between, on the one hand, the testimony of the two Crown witnesses to the effect that they smelled something like oil or kerosene at the *locus in quo*; and, on the other hand, the contents of the report which, apparently, might have said otherwise.

[39] It was at first somewhat unclear to us whether what was intended was the making of an application to adduce fresh evidence. It appears that this uncertainty was shared by the Crown, which made submissions based on the cases of **R v Pendleton** [2002] 1 All ER 524 – a decision of the House of Lords; and **Patrick Taylor v R** –

SCCA No 85/1994, delivered on 24 October 2008. These were cited for the purpose of indicating the main test that was used in those cases, including a consideration of whether, with the new evidence, the conviction was rendered unsafe. A great deal depends on the cogency, relevance and reliability of the fresh evidence. It was further submitted by the Crown that: (i) it was not necessary, pursuant to section 4 of the Malicious Injuries to Property Act, under which the offence of arson was charged in this case, for any evidence to have been led about use of an accelerant such as kerosene; (ii) if the expert was needed, the defence could have subpoenaed him; and (iii) the jury was also warned by the learned trial judge not to speculate on this very matter.

Discussion

[40] It is helpful (perhaps required) to quote from the learned trial judge's treatment of this issue in the summation. At page 12, line 10 to page 13, line 23, this is what was said:

> "i. The sergeant and the complainant told you that they smell – well, the sergeant, he said he smelled something like kerosene and the complainant said that he smelled oil. Now, that is not the way you prove that there was oil used, whether kerosene or some other 'sene', like gasoline. That's not the way it's proved. So that is put out there, members of the jury, for you to speculate that that is what was used to light the place. But you cannot do that. If the Crown wants to rely on that, members of the jury, they must prove it. And the way to do that, is to bring the government analyst, the chemist, who will say that I checked the debris and I found evidence of so and so. But that is not before you. So don't go off speculating that somebody used kerosene and burn down the place. That's not what you are allowed to do when you are allowed to draw inference. And you can't draw that one, members of the jury, because you wouldn't be able to say it was kerosene. You wouldn't be

> able to say it was gasoline. You wouldn't be able to say it was diesel fluid, or the one that they use for aircraft. You wouldn't be able to say. So you would be going off on speculation. Remember what I say, members of the jury, that it must be a reasonable inference.
>
> Now, certain things, of course, cannot be proved by direct evidence, that is, by the evidence of the witness who said I saw or I heard. This is not one of those things. This is one of those things that can be proved, because they could have called the chemist to say it was gasoline, for argument's sake, or it was kerosene. But they haven't done that. So we are not talking about that, when we are talking about inferences."

[41] In these paragraphs, we see the learned trial judge warning the jury not to speculate in respect of the possible use of an accelerant and addressing head-on the absence from the prosecution's case of forensic evidence as to the use of an accelerant. We consider that the way in which it was dealt with was adequate. However, there are some other considerations in respect of this issue. For one, we accept Ms Boyne's submission that, the prosecution having failed to call the forensic expert, that could have been done by the defence.

[42] We are loath to speak to or conclude to be contradictory, the contents of a document that was not in evidence and that has not been accepted and received by this court as fresh evidence. Indeed, no application was made before us for the adducing of the document as fresh evidence. Nor, in our view, could any such application properly have been made. The reason for this lies in the principles that have been set out in several cases of some vintage and that have been followed and applied in many other cases over the years: in the civil arena there is the case of **Ladd v**

Marshall [1954] 3 All ER 745. In that case Denning LJ stated the principles thus (at page 748):

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

[43] Similarly, in the criminal case of **Regina v Parks** [1961] 1 WLR 1484, 1486, the principles were stated thus:

> "First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for the court to decide whether it is to be believed or not, but evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial."

[44] It will be realized that in both these statements of the principles governing the admission of fresh evidence, the principle that is first stated is that the evidence which it is sought to adduce ought not to have been available through the application of reasonable diligence for use at the trial. In the instant case, the applicants, had they applied for the admission of the report as fresh evidence, would have failed at this, the very first hurdle. The notes of evidence reveal that the relevant document appears to

have been in the hands of defence counsel at the trial and that she attempted to make use of it in cross-examination of the investigating officer. (See, for example, page 92 of the record.) We might add as well that it is doubtful that the evidence of the absence or presence of an accelerant would have had any significant effect (if any effect at all) on the issues in this case, which were identification and credibility; and ultimately on the jury's verdict. The main question in the case was: "who set fire to the virtual complainant's premises?" not "what was used to burn them?" or "at what rate of speed did they burn?" For these reasons, this ground of appeal also could not succeed.

[45] It was for the foregoing reasons that we made the orders stated at paragraph [2] hereof.