JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NOS. 30 & 31/95

MOTION NO. 1/96

BEFORE: THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BRIAN BERNAL
v.
THE QUEEN

Frank Phipps, Q.C. and Dr. Lloyd Barnett for the applicant

Lloyd Hibbert, Q.C., Senior Deputy Director of Public Prosecutions, and Marva McDonald for the Crown

October 6-8, 15-17 and November 6, 1997

PATTERSON, J.A.:

Brian Bernal and one Christopher Moore were jointly tried and convicted in the Resident Magistrate's Court for the parish of Kingston on informations charging them for the joint possession of ganja, dealing in ganja and taking steps preparatory to the export of ganja. His Honour Mr. M. J. Dukharan heard evidence on a number of dates between the 5th September, 1994, and the 29th March, 1995. Both Bernal and Moore appealed against conviction and sentence, and each filed lengthy grounds of appeal. Their appeals were heard by the Court on dates between the 25th September and the 17th

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the 15th December, 1995, but judgment was not delivered then, and the 26th January, 1996, was fixed as the new date.

On the 26th January, 1996, prior to the delivery of the judgment of the Court, Mr. Phipps, Q.C. moved the Court for leave to adduce fresh evidence in the case on behalf of Bernal, pursuant to section 28(b) of the Judicature (Appellate Jurisdiction) Act. The notice of motion, supported by affidavits of Dwight Moore, the brother of Christopher Moore, and Richard Small, counsel for Bernal at the trial and before the Court of Appeal, was dated and filed on the 25th January, 1996. The ground of the application was:

> "...that the evidence set out in the said affidavits is relevant to the defence of this appellant and it is in the interest of justice that the evidence be admitted in particular it would have supported and will support the following limbs of the appellant Bernal's defence:
>
> (a) that the Appellant Bernal did not know that there was ganja inside the boxes,
>
> (b) that there was a realistic possibility that ganja was already in tins, which were in the sealed boxes, unknown to this Appellant, when the boxes were collected at Sampars Cash and Carry Limited."

The further evidence sought to be adduced appeared in the following paragraphs of Dwight Moore's affidavit:

> "3. That shortly after the arrest of Christopher and Brian Bernal, Christopher spoke with me at my house about the incident the subject of the appeal herein. He drove with me to a house in Norbrook and said that was the

> appeal herein. He drove with me to a house in Norbrook and said that was the house he would have bought if he had got through with the drugs which he had arranged for Bernal to convey in the tins labelled as juice.
>
> 4. That I asked Christopher if Bernal knew what he was carrying and he said Bernal did not know and with his diplomatic status he would not need to know.
>
> 5. That on that same occasion Christopher explained to me that by taking Bernal with him to Sampars, Bernal would not question the contents of the tins being exported since he would regard them as authentic.
>
> 6. That Christopher told me that the tins containing the ganja had been pre-arranged by him to be collected at Sampars so that Bernal would be led to believe that it was a normal purchase of pineapple juice."

The Court considered objections to the hearing of the notice of motion from Mr. Ramsay, counsel for the appellant Moore and Mr. Andrade, Q.C., the Director of Public Prosecutions, and, by a majority, struck out the application. In the event, the Court delivered judgment dismissing the appeals of both appellants against conviction and sentence, without hearing the application to adduce fresh evidence.

The appellants were granted leave by the Court to appeal to Her Majesty in Council against conviction and sentence, and the Court certified a number of questions as involving points of law of exceptional public importance. One of those questions related to the dismissal in a summary

manner of the application of Bernal to adduce fresh evidence, and it was formulated in the following terms:

> "***(a)*** whether or not the Court of Appeal has authority to hear an application to adduce fresh evidence at any time before the delivery of judgment,
>
> **(b)** whether or not on the facts in the instant case it was in the interest of justice for the application to adduce further evidence to have been heard."

That question was answered by their Lordships' Board in these terms:

> "The Court of Appeal has jurisdiction to hear an application to adduce fresh evidence at any time before the delivery of judgment and indeed at any time before the order of the Court is drawn up. On the facts of this case it was in the interest of justice for the application to adduce fresh evidence to have been heard." (See ***Brian Bernal and Christopher Moore v. The Queen*** (unreported) Privy Council Appeal No. 56 of 1996 delivered 28th April, 1997).

Sir Brian Neill expressed the opinion of their Lordships' Board in the following terms:

> "Their Lordships are satisfied that this application should not have been dismissed in the summary manner in which it was dismissed. The application was dismissed before Mr. Phipps had had a proper opportunity to advance his arguments in support of the application. It may be that the delay in not issuing the notice of motion until 25th January 1996 could have been satisfactorily explained. It may be that Mr. Phipps would have been able to demonstrate the importance of the fresh evidence in a case in which the Resident Magistrate had based his conclusions on a finding of actual knowledge.

> Their Lordships are satisfied that the interest of justice requires that this part of Bernal's appeal should be allowed and that the application for leave to adduce fresh evidence should be remitted to the Court of Appeal of Jamaica to be heard by a differently constituted court."

In obedience to the said order, on the 6th, 7th and 8th October, 1997, we heard the application to admit fresh evidence. We do not find it necessary to recite the facts of the case in any detail. Bernal's defence was that he had no knowledge that the 96 tins labelled pineapple juice which he had in his possession contained ganja and not genuine pineapple juice. The Resident Magistrate found as a fact that he had actual knowledge that the tins contained ganja. It was submitted that well established principles on which the Court acts in the exercise of its undoubted jurisdiction to admit fresh evidence were present in the instant case. Those principles were summarised in this way by Lord Parker, C.J. in ***R. v. Parks*** [1961] 3 All E.R. 633 at page 634:

> "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 this court to decide whether it is to be believed or not, but it must be 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."

Section 28(b) of the Judicature (Appellate Jurisdiction) Act gives the Court a wide discretionary power to "order witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court." But the overriding test is whether the Court "think it necessary or expedient in the interest of justice."

The Application to Adduce Fresh Evidence

It was plain to us that the evidence outlined in the affidavit of Dwight Moore, was not available to the defence at the time of the trial. Mr. Richard Small, in his affidavit, related the circumstances in which the evidence came to his attention. The witness Dwight Moore kept telephoning him without disclosing his identity, and only did so around mid-October, 1995, at a time when the appeal was being heard by this Court. It was possible, in our view, for Mr. Small to have taken more positive steps to procure a written statement from the witness before the conclusion of the hearing of the appeal, but we accepted his explanation for the delay.

The evidence, if believed, was relevant to the defence of Bernal. The main thrust of his defence was that he had no knowledge that the tins contained ganja and not pineapple juice. The tins containing ganja were found in the physical custody and under the physical control of Bernal. The issue, therefore, was whether he knew that the tins contained ganja. In deciding that issue, the tribunal of fact must take into account all available evidence and the inferences which can

be drawn from the evidence. The Resident Magistrate did not have the advantage of considering the fresh evidence which clearly is directed to the issue of the mens rea of Bernal. He considered the circumstances of the case and the evidence adduced by the prosecution and the issues raised by the defence, and correctly found that Bernal had actual knowledge that the tins contained ganja. He found as a fact that Christopher Moore purchased four cases of genuine pineapple juice from Sampars self-serve wholesale and that both Moore and Bernal, acting in concert, switched those cases for the four which they knew contained ganja. Therefore, an admission by Christopher Moore that the switch had taken place inside Sampars and before he emerged from the store with the four cases on the trolley, would be relevant to a final decision on the crucial issue of the mens rea of Bernal.

We had grave misgivings as to whether the proposed evidence was credible in the sense that it was well capable of belief. We considered this question to be of great importance to our decision as to whether the fresh evidence should be allowed. We were referred to an affidavit sworn by one Valerie Levy, a real estate dealer. She deposed that between June and September, 1994, she advertised for sale a house on Norbrook Way and erected a "For Sale" sign on the premises. Christopher Moore and a female companion viewed the property and they had discussions about the price which he said his father would pay. Christopher Moore made an

offer subsequently which was considerably lower than the asking price, and so it was refused. This supported, to some extent, the allegation in the affidavit of Dwight Moore that he had been shown a house by Christopher Moore in Norbrook, although he said that that occurred "shortly after the arrest of Christopher and Brian Bernal." They were arrested on the 6th April, 1994. There was just a possibility that if the evidence was admitted and believed there was room to argue that it could have affected the decision of the Resident Magistrate.

We also considered whether the proposed evidence would be admissible if put forward by the defendant in support of his defence. Christopher Moore and Bernal had been tried together. Basically, the proposed fresh evidence was hearsay and inadmissible; it certainly could not be put forward by the Crown. But it was the defence that was seeking to adduce it, not in support of the case for the Crown, but in support of the defence of lack of knowledge on the part of Bernal. We were referred to the judgment of their Lordships' House in the case of ***Regina v. Myers*** (unreported, delivered on the 24th July, 1997). Their Lordships made it plain that the admission of guilt of one of two defendants which exculpates the other defendant is cogent and admissible evidence for and on behalf of that other defendant, whether or not it prejudices the maker. We expressed the view earlier on that the evidence was relevant in support of the defence put forward by Bernal.

When all the factors mentioned above were taken into account, and bearing in mind the wide discretion conferred on the Court by virtue of the provisions of section 28 of the Judicature (Appellate Jurisdiction) Act, we thought it desirable in the interest of justice to grant the motion and order the witness Dwight Moore to attend and be examined before the Court.

The Fresh Evidence

Dwight Moore appeared before the Court on the 15th October, 1997. His evidence in chief was directed primarily to what he said his brother Christopher Moore told him "in or around June", 1994. But he also testified about the good relationship that existed between his brother and himself ever since the date he heard that the Bernals had been arrested. No doubt the relevance of that evidence was to meet any suggestion by the Crown as to his bias or partiality in relation to his brother and Bernal, and to bolster his credibility. His evidence was examined carefully, and it was helpful to bear in mind the dates of certain relevant events. Brian Bernal and his younger brother were apprehended at the Norman Manley Airport on the early morning of the 6th April, 1994, and were subsequently arrested and charged for breaches of the Dangerous Drugs Act. Later that day, Christopher Moore was arrested and charged jointly with the Bernals. The defendants were on bail and would have appeared before the Resident Magistrate's Court on a number of occasions before the trial which commenced on the 5th September, 1994, and

continued on a number of dates until the 29th March, 1995, when Bernal and Moore were convicted and sentenced. Their appeals were heard on dates between the 25th September and 17th November, 1995.

Dwight Moore is the eldest of six children born to Charles and Bernice Moore; Christopher Moore is the youngest and the only other boy. We were not told what is the difference in age of the two brothers, but Dwight said that they got on very well while growing up with their parents. However, as Christopher grew older he "created" his own friends and that affected the close relationship between the brothers. It appears that the strained relationship could have started from as far back as 1990. According to Dwight, from then on they had a "consultative" kind of relationship, and that lasted up to the day that he heard that the Bernals had been arrested. He said that Christopher came to his office, and in the presence of his father, they spoke and discussed the matter. He advised Christopher to make arrangements for legal representation, and that he should contact the police before they came to find him. He recommended Mr. Howard Hamilton, Q.C. and after that Mr. Ian Ramsay as suitable lawyers. He even accompanied Christopher, his father and possibly his mother to the home of the Bernals, but did not find them. It was from that very day that Christopher and himself "became very close and kept extremely close relationship." He involved Christopher in social activities and in his business. They were regularly

together at his home, in his business or even on vacations from April onwards.

That was the background evidence leading up to the conversation between Dwight Moore and his brother Christopher Moore, which Mr. Phipps contended was true, and when considered with the rest of the evidence in the case, it established a miscarriage of justice. This was what Dwight Moore said happened. "In or around June, during daily interactions", Christopher and himself were driving from his home in Norbrook. Christopher, who was driving his (Dwight's) car, took him to a residence in Norbrook which he pointed out to have been his intended home. The importance of the bit of evidence which followed requires a verbatim transcript thereof. This is what was said:

> **MR. JUSTICE BINGHAM:** Could you tell us what he said?
>
> **WITNESS:** This is the place he would have bought; he was going to buy.
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> **MR. JUSTICE BINGHAM:** This is the place he was going to buy.
>
> **WITNESS:** If he had gotten through with his shipment.
>
> **Q:** As a result of that did you ask him anything?
>
> **A:** Yes, sir. I asked him about the circumstances under which his shipment was to have gone through.
>
> **Q:** What did he say?
>
> **A:** He told me he had taken Bernal with him to Sampars to purchase...
>
> **MR. JUSTICE PATTERSON:** Just a minute. Yes.

WITNESS: To purchase ganja labelled as pineapple juice for the purpose of gaining Bernal's confidence as to the contents that was bought.

MR. JUSTICE PATTERSON: Gaining Bernal's confidence as to what?

WITNESS: As to what Christopher had purchased, the contents.

Q: Did you ask him anything? Of anything as a result of what he said?

A: Yes, sir.

Q: What you asked him?

A: I asked him did he know, did Bernal know what he was carrying?

Q: Did he respond?

A: Yes, sir.

Q: What was his response?

A: He told me, 'No, he did not know what it was he was carrying,' and based on his status, Mr. Bernal's son, Brian Bernal, I believe...

Q: Yes.

A: As a result of this he would not need to know, and he intended was for him to have delivered the product successfully to Washington D.C.

Q: Did he say anything in respect to handling at Sampars?

A: He told me that he previously arranged for him to...

MR. JUSTICE HARRISON:Dr. Barnett, I don't think this is the type of evidence - I don't think you should lead a thing like that.

DR. BARNETT: Well, M' Lord, arrangements at Sampars.

MR. JUSTICE HARRISON: In other words, the content of what he is saying. It is going as to a situation existing at Sampars, and you led to buy in June, in the month of June, which is something I did not say anything to, but those are the issues. All right.

DR. BARNETT: I thought that...

MR. JUSTICE PATTERSON: Yes.

Q: What else did he say if anything?

A: Christopher, my brother, told me that arrangements were previously made to have - sorry, M'Lord.

MR. JUSTICE PATTERSON: Arrangements?

WITNESS: ...were made prior to Chris going to purchase the product. He further explained to me that this would have been enough for Bernal to witness to be assured as to what and the source he was taking along with him. We also...

MR. JUSTICE PATTERSON: Just a moment.

WITNESS: I am sorry.

MR. JUSTICE PATTERSON: This was enough for Bernal to witness and what?

WITNESS: Witness as to what he, what he was carrying or what was going to carry. What he was going to take abroad. Chris further explained and asked of me to assist him in getting similar ganja packed and labelled as pineapple juice or other juices into a distribution network of a supermarket.

MR. JUSTICE PATTERSON: Repeat that. I am not getting that.

WITNESS: That Christopher asked me to assist him...

MR. JUSTICE PATTERSON: In getting similar?

> **WITNESS:** Ganja packaged product labelled as juices.
>
> **MR. JUSTICE PATTERSaN:** To?
>
> **WITNESS:** Into supermarkets so that public reaction and the result would be similar to the circumstances under which he and Bernal gained possession of the goods bought at Sampars."

Dwight said all the conversation took place in Norbrook on the same occasion, but not exactly at the point where Christopher showed him the house. He said he was totally taken aback, he was disappointed and he told Christopher that was something he could not "support or associate with." He said Christopher broke down and cried. They embraced and Christopher said he "never meant for anything like this to happen to Bernal." This was said at his home in Norbrook. He said he reassured Christopher that they "would work things out."

Dwight Moore continued his testimony by relating subsequent events to confirm his continued close relationship with his brother, and indeed his family. He spoke of a "mini family re-union" that he organised at the Jamaica Grande Hotel on the occasion of a visit in August by his sister, Denise, who lives abroad. He said Christopher and his girlfriend were in the family group. He assumed the position as "almost guardian" of Christopher and monitored his activities. He said he limited Christopher's access to his motor vehicles as he "could not be sure what he might do and

how that could directly affect me and the rest of the family." He said he accompanied Christopher to court at the request of his parents. He spoke to the investigating officer, Inspector Rhone, and also to one of the defence attorneys-at-law at the request of Christopher Moore. As a result of what Christopher had told him, he had discussions with the Honourable Minister of National Security and Justice, who gave him certain advice. He contacted Mr. Richard Small, Bernal's attorney-at-law, on several occasions. He said he was aware that the trial at Sutton Street had been completed, he knew the result and that there was an appeal to the Court of Appeal. So much for his examination in chief.

Mr. Hibbert, Q.C., cross-examined the witness. His cross-examination was directed primarily at eliciting facts to show that the witness was biased against his brother and indirectly partial to Bernal. By that means he sought to impeach the credit of the witness and thus show that his testimony was not capable of belief. Dwight said he could locate the house that Christopher showed him, but he could not recall the name of the street on which it was situated. He could not recall if a "For Sale" sign was there. Christopher and himself had been driving aimlessly around the corporate area for about one to two hours, and it was towards the end of that drive that Christopher pointed out the house and told him about it. Between April and June, they were extremely close and had taken many drives together, but that

occasion was the first that Christopher made mention of the house. Dwight did not know or could not recall the exact date that his brother was arrested. He had advised his brother to get a lawyer on the very day that he heard that the Bernals had been arrested, because his brother had told him of his involvement. He said Christopher told him he had given Brian Bernal pineapple juices to take to Washington - that was the day Bernal was held at the airport - that he had bought it the day before and given it to Bernal then. He said he had got information by then that Christopher would be arrested, but Christopher made no mention of ganja to him. However, between April and June he had been getting information regarding Christopher, and he had confronted him with the information.

He said that Christopher told him he had purchased the ganja at Sampars and the Bernals did not know what the tins contained. He had asked Christopher about the circumstances under which his shipment was to have gone through because he had information that Christopher had done it before. He said he was not aware of Valerie Levy and Associates advertising a house in Norbrook for sale, nor his father and Christopher expressing interest in purchasing the same. He did not agree that Christopher and himself were not on good terms in June, 1994, and that Christopher never showed him a house in Norbrook. It was put to him that Christopher never told him about purchasing ganja at Sampars, but he insisted that Christopher did. He was cross-examined at length about his

relationship with his brother in particular and his family members in general. He admitted that the relationship between Christopher and himself "cooled off" from the early 90s, but said it was not true that since 1992 their relationship, and his relationship with the rest of the family was not good. He said that up to 1994 he occupied at least four properties that belonged to his father. He said he paid rent for all of them, and it was not exactly true that problems arose between his father and himself over the non-payment of rent. However, he later admitted there were such problems. He admitted saying that his father was condoning Christopher in his wrongdoings. He said he had no disagreement with any other member of the family, but again, he later admitted disagreement with Andrea - his sister - on one occasion. His answers to questions concerning the circumstances surrounding his removal from his father's properties were extremely evasive. He admitted being served notice to quit and deliver up possession of his father's premises at Hughenden, but he denied knowledge of court proceedings instituted by his father to evict him from premises at 32 Hagley Park Road and 3 Chilo Close in about May, 1995. But he admitted hearing about mid-year 1995 that the bailiff had warrants to evict him from the premises and then obtaining a stay of execution of the warrants. He said he left the premises voluntarily sometime around July or August, 1995, and now he carries on business at 34 Dunrobin Avenue. He is the Managing Director of three companies,

Diamond Imports Limited, Supertyre World Limited and Worldtron Limited. His father is the Chairman of those companies, but at present his father is not involved in the management of any of them. There were two other companies, Moore's Transport, operated by his father Charles Moore, and Moore and Sons Service Station, which Christopher operated from 1991 - "on and off until he resumed in mid 1994." The companies were in operation in early 1995. Dwight admitted that in January, 1995, he caused a notice to be published in the ***Gleaner*** newspaper which stated that Christopher Moore, Moore's Transport and Moore and Sons Service Station were not authorised to transact any business on behalf of the three companies which he managed nor to act as agents for certain products he traded in. He said he was not then on bad terms with Christopher, but their relationship "was cooled."

He said he removed the companies' property from 32 Hagley Park Road in July or August, 1995, at a time when the relationship with his father "was at its lowest level."

It was after August, 1994, that he spoke by telephone to the Honourable Minister of National Security and Justice. It could have been September or October, 1994, that he contacted Mr. Small, but he did not call him about what Christopher had told him. He later said it was about what Christopher told him, and that with the information he had he "wanted to assist the investigation of the case to bring about the truth." His explanation for failing to disclose his identity to Mr. Small was that he "did not wish to have

his person identified." Nor did he "want to appear disloyal", but he wanted the truth to be established without his direct identification. We were at a loss to understand how that could be achieved without Dwight coming forward, since the information he said he had was peculiarly to his sole knowledge. But he said he telephoned Mr. Small to give him all the information he had got from Christopher. At that time, the trial at Sutton Street was still in progress. He also gave Mr. Small additional information that he had got from other sources. He had seen Mr. Small at the Resident Magistrate's Court when he went there on two or three occasions, but he did not speak to Mr. Small. However, he spoke to Inspector Rhone (the investigating officer) at court on several occasions, trying "to point him down the road of truth." He did not mind being identified by Inspector Rhone. He also thought the Director of Public Prosecutions could assist in getting the truth out, so he spoke with the prosecuting counsel by telephone, but again, he did not identify himself. He knew Mr. Hibbert, Q.C. and Mr. Pantry, Q.C., both senior Deputy Directors of Public Prosecutions, but he did not speak to them about what he knew. He admitted seeing his mother at court on one occasion during trial, but denied that he ignored her; he did not speak to her as court was in session and he left before the adjournment.

Mr. Hibbert, Q.C., explored the reason for Dwight Moore's delay in coming forward with the information he said he possessed. Dwight admitted that although he had the

information from about June, 1994, he did not speak to Mr. Small until possibly the 29th September, 1994, and he did not disclose his identity until "maybe just a little before 20th October, 1995." The delay was as a result of his concern to assist without identifying himself to Mr. Small, since "he had no intention of being involved in court and due to family concern." He was aware that Bernal had been convicted and sentenced to a term of imprisonment from March, 1995, but did nothing although he considered that grave injustice had been done.

Having identified himself to Mr. Small, Dwight said he contacted his attorney-at-law, Mr. Garth McBean, and they had a conference on the 21st October, 1995, "outlining what I knew about the matter pertaining to Brian Bernal." About two days after he had another conference "enlarging on what I had said at the first conference." He continued by saying that he told Mr. McBean specifically at the second conference that Christopher said he had made arrangements previously at Sampars to collect the ganja and did so as pre-arranged. He could not recall if at the first conference, Mr. McBean took several pages of notes. He said he could neither agree nor deny that it was only at the second conference that he spoke of the arrangements which his brother had told him of.

He said Mr. Small might have advised him to speak to the Director of Public Prosecutions in October, 1995, while the appeal was in progress, but he waited until January, 1996, to do so because he was still having second thoughts.

In October, 1995, when he informed Mr. Small that he was willing to give evidence, he imposed two conditions; he needed personal security for himself and his family and payment of legal bills that may be involved. He was not confident that the Director of Public Prosecutions could assist. The Commissioner of Police had told him he could not provide protection for him against assassin bullets. He intended giving evidence on behalf of the Crown and he so instructed his attorney-at-law, but he did not tell the Director of Public Prosecutions that when he spoke with him.

Mr. Hibbert, Q.C., returned to the question of the eviction warrants issued for the recovery of premises at 32 Hagley Park Road and 2 Chilo Close, which are adjoining premises. He elicited from the witness that he was on those premises in May, 1995, and that both the bailiff and Christopher were also there then. Dwight said he saw articles from his office placed outside, but those articles were not from his personal office. He denied that both his father and Christopher were actively engaged in the eviction process, and that he hurled abuses at them.

The witness admitted that he was displeased with Christopher driving his mother's Honda motor car prior to 1994. On one occasion when he knew that Christopher used the car, he reported to the police that the car had been stolen from his mother's home. On another occasion, he saw the car away from his mother's home, and he drove it away using a key that he had for it. He said he did not report the car stolen

to get Christopher in trouble, nor did he drive it away to embarrass Christopher - he saw the car where he thought it should not have been.

Dwight denied making a report to the police that ganja was on the premises at 32 Hagley Park Road and telling his mother that he had caused the police to carry out a raid on the premises. He recalled his mother visiting his home in November, 1995, and having discussions with her about the case. He said he told her that he understood that she was saying that Christopher would "get away", but he did not tell her that he would see to it that that did not happen. Once more, he denied that Christopher and himself were not on good terms after Christopher had been arrested. He did not agree that it was untrue that they went for drives together and that Christopher showed him the house in Norbrook and that the conversation then took place between them. He said he was not making up that story through ill-will for Christopher, and the delay in coming forward with the story was not attributable to falsehood. He explained that it was in January, 1996, after speaking with Mr. Winston Spaulding, Q.C., "about the upcoming appeal of [his] brother" that he told Mr. Spaulding, Q.C., what he knew, and then "reconsidered" and "adjusted" his position. That was as far as the fresh evidence went.

Evidence in Rebuttal

Mr. Hibbert, Q.C., was granted leave to adduce evidence in rebuttal. It is quite clear and well established that the

Court has a discretion with regard to the admission of evidence in rebuttal. Where fresh evidence is allowed to be introduced by a defendant, and the Crown could not possibly have foreseen the nature of such evidence, then clearly, it is within the discretion of the Court to allow relevant and admissible evidence in rebuttal to be adduced by the Crown.

The Crown called two witnesses in rebuttal, the father and mother of Dwight Moore and Christopher Moore. The main thrust of their rebuttal evidence was directed at showing bias on the part of Dwight Moore against his brother Christopher. As a general rule, a party may not call witnesses to impeach the credit of his opponent's witness by contradicting the witness on matters of credit or other collateral matters; the witness's answers will be generally conclusive. But there are exceptions to the general rule, and one such exception is when a witness denies bias or partiality in relation to one of the parties. In such a case, facts showing that the witness is biased or partial in relation to the party may be independently proved. In ***R. v. Mandy*** [1976] 64 Cr. App. R. 4 at page 6, the Court said:

> "It has always been permissible to call evidence to contradict a witness's denial of bias or partiality towards one of the parties and to show that he is prejudiced so far as the case being tried is concerned."

We examined the evidence of Charles Moore and Bernice Moore, the parents of the witness and Christopher Moore. Both testified to the bad relationship that existed between

Dwight and Christopher. Charles testified that his sons were not on speaking terms between 1992 and up to 1994, and that after 1994 and up to 1995 he described the relationship as becoming "poor and very poor." Dwight's relationship with other members of the family he described as "between poor, very poor and 3/4 good." As regards his premises at 32 Hagley Park Road, Charles said he was there when the bailiff attended to execute the warrant of possession. His daughter Andrea and Christopher were also there. He heard Dwight telling Christopher that he will see to it that he goes to prison. As regards the notice that Dwight admitted publishing in the ***Gleaner*** newspaper in January, 1995, Charles said he had seen it, but that Dwight had not consulted with him before its publication.

When cross-examined, he said that both his sons kept very close to him "as a father." He said that Dwight did not have consultation with Christopher and himself after the arrest of Christopher.

Bernice Moore described the relationship between her sons as being "no good" since 1992. She described aggression between them both and even a fight in 1991 when she parted them. She described an occasion in 1993 when she was stopped by the police while driving her Honda motor car on her way home from Church. The police informed her that they had a report that the car had been stolen; but she had made no such report. Christopher had driven the car the night before, and she knew that Dwight did not approve of her lending the car

to Christopher at any time. He had threatened to report the car stolen if, at any time, she allowed Christopher to drive it. She said she spoke to Dwight asking him about the report to the police since he knew that she had loaned the car to Christopher the night before. She said Dwight admitted that he had reported to the police that the car had been stolen. In 1995, she was at 32 Hagley Park Road when the police came and searched the premises. She spoke to Dwight asking him why he had sent the police to search the premises for drugs, and he said it was because he wanted to delay the execution of the warrant of possession.

In November, 1995, on a visit to Dwight's home, he told her that he had heard that she had been telling people that Christopher would get off, and that Bernal would be convicted, and that "he said he was going to make sure that does not happen" and that she will hear about it. She said she told him that the only person she had spoken with was the Lord.

When cross-examined, she said that up to 1994 and after the arrest of Christopher, both brothers were not on any speaking terms "to any appreciable degree - have never seen them speaking up to now." She had seen Dwight at court sitting with the Bernal family, once or twice during the trial. She said that after Christopher was arrested, Dwight did not go with her and other members of the family to the home of the Bernals.

That constituted the evidence called by the Crown in rebuttal. Mr. Phipps, Q.C., made submissions on two areas of the evidence. Firstly, he submitted that the relevant evidence presented on behalf of the appellant was uncontradicted and remained at the end of these proceedings competent evidence, which, considered with the rest of the evidence in the case, established a miscarriage of justice. Secondly, that the only challenge to the additional evidence on appeal was as to the credit of the witness who testified. This, if successful, would do no more than show bias on the part of the witness. Bias, where established, would not make the evidence worthless and incapable of belief. Unchallenged evidence, even where there is bias, not considered by the trial judge, must result in a miscarriage of justice.

This Court, in determining the appeal in the light of the fresh evidence, must approach the matter in accordance with the provisions of sections 14(1) and (2) of the Judicature (Appellate Jurisdiction) Act, which are:

> "**14.-(1)** The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the

> appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.
>
> (2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

These provisions make it quite plain that the Court, in light of the fresh evidence, must consider and decide whether under all the circumstances the verdict of the Resident Magistrate should be set aside on the ground that it is unreasonable, or if on any ground there is a miscarriage of justice. The decision must be made by the Court itself on a review of the relevant evidence, and in the circumstances of the instant case, also on the findings of fact by the Resident Magistrate. The Court is not obliged to come to its decision on the basis of what conclusion the Resident Magistrate would or might have arrived at if he had heard the fresh evidence. If the Court concludes that the verdict is unreasonable in light of the fresh evidence, or that there is a miscarriage of justice in the circumstances, then the conviction should be quashed.

We were fortified in our views by the decision of their Lordships' House in ***Stafford v. Director of Public Prosecutions and Luvaglio v. Director of Public Prosecutions*** [1974] 58 Cr. App. R. 256. The following part of the headnote succinctly sets out the decision:

> "When fresh evidence is called on an appeal against conviction, the appeal court has to decide whether, in the light of that evidence, the verdict should be considered as unsafe or unsatisfactory. The statute does not require the appeal court in coming to its decision to apply any particular test, and the proper approach to the question may vary from case to case. There is no rule of law that, in every case involving fresh evidence, then the Appeal Court must decide what they think the jury would or might have done if they had heard the evidence. Although such an approach may be convenient and reasonable, it only means that, if the Appeal Court thinks that the jury might have come to a different conclusion if they had heard the evidence, then the Appeal Court will regard the verdict as unsafe; or unsatisfactory. The fact that in the opinion of the appeal court, the fresh evidence was relevant and capable of belief or that, though the Court does not itself consider the verdict unsafe or unsatisfactory, the jury might conceivably have reached a different conclusion, does not of itself render the verdict unsafe or unsatisfactory."

In assessing the credibility of a witness, in general, the tribunal of fact will take into account the witness's knowledge of the facts to which he testifies, his demeanour, his veracity, his integrity, any interest he may have in the case, and any bias or partiality towards a party to the proceedings. It is open to the tribunal of fact to accept all that a witness has said, if satisfied that the witness has been truthful. It is also open to the tribunal of fact to reject the testimony of a witness whom they do not believe in part or in whole, if satisfied that the witness has lied in part or on vital issues. The failure to cross-examine a

witness on a particular point will not in all cases amount to an acceptance of the witness's testimony, e.g. where the story is itself incredible. Likewise, suggestions of falsehood made to a witness and rejected does not mean that his evidence on that score must necessarily be accepted.

In the instant case, in order to arrive at our decision, we considered not only whether Dwight Moore was a witness of truth, but also whether the confession which he attributed to Christopher Moore was itself capable of belief, on the hypothesis that Christopher Moore did confess. For even if we were impressed by the honesty of Dwight and believed that he had truthfully reported what Christopher did say, that would not mean that what Christopher had said must be accepted as truthful and must be believed.

We were satisfied that Dwight Moore did not speak the truth in regard to his having the conversation with Christopher. He appeared to be of above average intelligence, but we were not impressed with his demeanour. In cross-examination he was extremely evasive at times in answering simple questions. His veracity was put to the test. It was clearly established that he would tell vicious lies to advance his own ends. He lied to the police in reporting his mother's car stolen, no doubt with the intent that Christopher would have been arrested. We accepted his mother's evidence that he also lied to the police about drugs being on the premises at 32 Hagley Park Road, thereby causing the police to search the premises because he wanted to delay

the execution of a warrant of possession. He had no qualm in mischievously utilizing the services of the police to give vent to his indignation or vindictiveness. He would have us believe that after the arrest of Christopher, their relationship was extremely close. However, we were impressed by the frank manner in which both Charles and Bernice Moore testified, and we accepted their evidence that Dwight and Christopher were never on close terms from as far back as 1992, and in fact, they were not on speaking terms at the time of Christopher's arrest and thereafter. The advertisement placed in the ***Gleaner*** newspaper in January, 1995, clearly showed that the brothers were not on good terms. We accepted the evidence of Charles that at the time of the execution of the warrants of possession, Dwight told Christopher that he will see to it that he goes to prison. We also accepted the evidence of Bernice that, in effect, he told her he would make sure that it does not happen that Christopher is acquitted and Bernal convicted. Those are statements that clearly showed that Dwight was biased against Christopher and partial to Bernal.

Then there was the inordinate delay in disclosing what Dwight said Christopher had told him in June, 1994. It seemed quite clear that the first time he disclosed what he said Christopher had told him was sometime around the middle of October, 1995 - a time after the conviction of Christopher and Bernal, and while their appeals were being heard. It was also clear that it was not until the 25th January, 1996 - the

day before the delivery of the judgment of this Court - that he finally decided he would testify in the case and gave a statement to Mr. Winston Spaulding, Q.C. The reason advanced by Dwight for the inordinate delay in coming forward only then did not strike us as being true, and the long delay, in our view, was attributable to falsehood and certainly detracted from his credibility. The witness said he had the information long before the trial commenced in the Resident Magistrate's Court and he was most anxious to "bring about the truth." Yet he did not come forward, either at the Resident Magistrate's trial or at the hearing of the appeal, although he was aware of the times when both the trial and the hearing of the appeals were taking place. There were many other unsatisfactory features about the evidence of this witness which we considered, but which it is not necessary to add. However, the many contradictions, inconsistencies and discrepancies which flowed from his evidence convinced us that he was not a witness of truth, and although there was no evidence from Christopher himself denying the allegations, we were of the firm view that the witness was extremely untruthful, and that his testimony could not be relied on. We found as a fact that Dwight Moore had not spoken the truth and his evidence of a conversation he said he had with Christopher Moore cannot be believed and must be rejected. Consequently, the verdict remains unaffected. We formed the view that if this evidence had been available at the trial,

the Resident Magistrate would not have reasonably placed any reliance on it.

The conclusion we reached, as stated above, was enough to dispose of the matter before us. Nevertheless, we went on to consider what the position would have been, assuming that Christopher had indeed confessed to Dwight. In such a case, the Court must consider what weight, if any, should be given to the fresh evidence and then go on to decide whether it might have affected the decision of the guilt of Bernal. Had the fresh evidence been put forward at the trial, then Christopher Moore would have had the opportunity to confirm or deny it. Christopher Moore was not called as a witness in rebuttal. But, nevertheless, we examined the alleged confession in light of the evidence before the Resident Magistrate and his findings of fact on such evidence. The Resident Magistrate found as a fact that Bernal had actual knowledge that the tins contained ganja and not pineapple juice. The gist of the confession was that Bernal "did not know what it was he was carrying," because Christopher "had taken Bernal with him to Sampars to purchase ganja labelled as pineapple juice for the purpose of gaining Bernal's confidence as to the contents that was bought." Christopher had made previous arrangements for the delivery of the tins of ganja to him at Sampars. Shortly put, Christopher tricked Bernal. The Resident Magistrate did not have that evidence in deciding on the guilt of Bernal, and it was therefore crucial for us to consider and decide what effect, if any, it

could have had on his decision. Having regard to the way in which the ganja was packaged, if Bernal may have been tricked into believing that what he had received at Sampars was really pineapple juice and not ganja, then the mens rea which is necessary to constitute the offence of possession of dangerous drugs could be lacking. The Resident Magistrate based his finding of actual knowledge in Bernal on the premise that genuine tins of pineapple juice were bought and taken from Sampars and a switch was subsequently made of those to the ones containing ganja to the knowledge of Bernal. But if the switch was made before the tins left Sampars, the question of possession in Bernal would have had to be considered with that in mind, having regard to his defence of lack of knowledge. In ***R. v. Cyrus Livingston*** [1952] 6 J.L.R. 95, it was authoritatively stated that there are two degrees of knowledge which are sufficient to establish mens rea in cases of this kind:

> "The first is actual knowledge, which the magistrate may find because he infers it from the fact of possession, or from the nature of the acts done, or from both. The magistrate may find this even if the defendant gives evidence to the contrary. The magistrate may say, II do not believe him; I think that that was his state of mind.' Or if the magistrate feels that the evidence falls short of actual knowledge, he had then to consider the second degree of knowledge, whether the defendant was, as it has been called, deliberately shutting his eyes to an obvious means of knowledge, whether he deliberately refrained from making inquiries the results of which he might not care to have. Either of these two degrees of knowledge would be sufficient to support

> a conviction though mere neglect to make such enquiries as a reasonable and prudent person would make, would not be sufficient."

It was the degrees of knowledge mentioned above that we considered in the light of the fresh evidence which the Resident Magistrate would have been obliged to consider.

The Resident Magistrate found as a fact that Bernal had actual knowledge that the tins contained ganja. That finding was found to be correct not only by this Court but also by their Lordships' Board.

In our view, the evidence of Lorna Allen-Lowe, Charles Rodrigues, George Ferguson, Keith Maxwell, and Hugh Parsons established beyond reasonable doubt that a number of cases of "Grace" pineapple juice, manufactured and canned by Grace Food Processing (Canning) Limited, were delivered to Sampars, a "Grace" outlet, and displayed on its shelves for customers to purchase, and that it was four of these cases that Christopher Moore took from the shelves in the supermarket, paid for them and left the supermarket with them on a trolley. From then on, Bernal and Moore were the persons who took possession of those four cases. Bernal was found in possession of four cases containing tins of ganja which bore "Grace" labels for pineapple juice. But the evidence clearly established that "Grace" did not manufacture those tins of ganja - those were not the four cases of "Grace" pineapple juice that left Sampars. The switch could only have taken place with the knowledge of Bernal. As Mr. Hibbert, rightly contended, it was inconceivable that Moore would have gone

through the difficulty of conspiring with someone to place four cases containing 96 tins of ganja labelled as pineapple juice inside Sampars and then go to buy them, only to trick Bernal that they were genuine pineapple juice. There would have been no necessity for such a plot. Bernal testified that Moore had asked him if he would mind carrying some pineapple juice to his sister in Washington and that he said it would not be a problem. He continued by saying:

> "Chris said that the next day he would have to bring the pineapple juice to send to his sister... I told him I had a few errands to do for my parents before I went back the next day. He suggested to me that since I had errands to do in the morning he could come for me and carry me to the different places. He said while we were doing this we could stop and buy the pineapple juice for his sister."

This bit of evidence clearly showed that there was no preconceived plot by Christopher to place the four cases in Sampars and then to take Bernal there to trick him. It was during the course of doing the errands that they went to Sampars and Christopher made the purchase. In any event, each of the four cases containing the 96 tins of ganja were similar to those used by "Grace" to package their genuine product and the label on each was "the same label that Grace uses." It is fair to say that those cases would, without doubt, pass off as containing genuine "Grace" pineapple juice. It is only when the tins themselves and the labels on them were inspected by the trained eyes of Lorna Allen-Lowe, the Quality Control and Development Manager of Grace Food

Processing (Canning) Limited, that it was revealed that "Grace" did not process those packages. The x-ray machine at the airport revealed the ganja contents. So it seems plain that there would have been no necessity whatsoever for Christopher to embark on such an elaborate plot if he was minded to trick Bernal. We had no doubt whatsoever that Christopher Moore did not tell Dwight Moore "that arrangements were previously made prior to Chris going to purchase the product" at Sampars. But even assuming he had said so, it was quite incapable of belief, and we rejected it, having regard to the rest of the evidence in the case.

Having heard and considered the fresh evidence, it was incumbent on us to say whether, in the light of that evidence, the verdict of guilty should be set aside on the ground that it was unreasonable, or that it could not be supported by the evidence or if there was a miscarriage of justice. On the evidence that the Resident Magistrate heard, there could be no doubt that the verdict of guilty pronounced against Bernal was correct. In our view, the fresh evidence would have had no effect on his verdict. But it was for us and us alone to decide what effect, if any, that evidence had on the case as a whole. We saw no reason to find that the verdict was unreasonable, nor that there was a miscarriage of justice. We were satisfied, therefore, that the additional evidence had not affected in any way the final decision as to the guilt of Brian Bernal. For these reasons, we ordered

that the dismissal of the appeal against conviction and sentence should stand.