[HOUSE OF LORDS]

STAFFORD . . . . . APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS . . . RESPONDENT

LUVAGLIO . . . . . APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS . . . RESPONDENT

[CONJOINED APPEALS]

1973 July 9, 10, 11, 12, 16, 17; Oct. 18

Lord Pearson, Viscount Dilhorne, Lord Diplock, Lord Cross of Chelsea and Lord Kilbrandon

Crime—Court of Appeal—Verdict of jury—Court to allow appeal if they think "verdict unsafe or unsatisfactory"—Reference by Home Secretary—Fresh evidence adduced—Approach to be adopted by court on hearing reference—Function of House of Lords on hearing appeal from Court of Appeal (Criminal Division)—Criminal Appeal Act 1968 (*c.* 19), *ss.* 2 (1) (*a*), 17 (1) (*a*), 35 (3)

The appellants were convicted in 1967 of the murder of S. Their applications for leave to adduce further evidence and to appeal against their convictions were dismissed. In March 1972 the Home Secretary, having received representations alleging that a miscarriage of justice had occurred, referred the cases of both appellants to the Court of Appeal under section 17 (1) (*a*) of the Criminal Appeal Act 1968. Pursuant to that reference and the provisions of section 23 (4) of the Act a large amount of fresh evidence was before the court.

The Court of Appeal dismissed the appeals, holding that despite the additional evidence the inference of guilt was irresistible and that the verdict of the jury could not possibly be described as unsafe or unsatisfactory for the purposes of section 2 (1) (*a*).[1]

The appellants appealed:—

Held, dismissing the appeals, (1) that for the appeals to be allowed the House must come to the conclusion (which it did not) that the verdicts were unsafe or unsatisfactory and that it would not suffice to show that the Court of Appeal had erred in their approach when the matter was before them (post, pp. 890D, 894B, 906A–C, F–H, 907A–C, 912C–G).

(2) That where fresh evidence was called on an appeal against conviction there was no rule of law that in every case the appellate court must decide what in their view the jury might or would have done if it had heard the fresh evidence; for although such an approach was correct it meant only that the court thought that the fresh evidence might have led to a different result and that consequently that the verdict

[1] Criminal Appeal Act 1968, s. 2 (1): "... the court ... shall allow an appeal against conviction if they think—(*a*) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; ..."

was unsafe or unsatisfactory (post, pp. 890D, 893A–C, 906F—907A).

Per curiam. For determining an appeal under section 2 (1) (*a*) of the Act of 1968 the Court of Appeal has to decide whether the verdict was unsafe or unsatisfactory and no different question has to be decided when the court allows fresh evidence to be called (post, pp. 890D, 891F—892D, 906H—907A).

Reg. v. *Cooper (Sean)* [1969] 1 Q.B. 267, C.A. approved.

Reg. v. *Parks* [1961] 1 W.L.R. 1484, C.C.A. considered.

Decision of Court of Appeal (Criminal Division) affirmed.

The following cases are referred to in the opinion of Viscount Dilhorne:

Reg. v. *Cooper (Sean)* [1969] 1 Q.B. 267; [1968] 3 W.L.R. 1225; [1969] 1 All E.R. 32; 53 Cr.App.R. 82, C.A.

Reg. v. *Parks* [1961] 1 W.L.R. 1484; [1961] 3 All E.R. 633; 46 Cr.App.R. 29, C.C.A.

The following additional cases were cited in argument:

Anderson v. *The Queen* [1972] A.C. 100; [1971] 3 W.L.R. 718; [1971] 3 All E.R. 768, P.C.

Chung Kum Moey v. *Public Prosecutor for Singapore* [1967] 2 A.C. 173; [1967] 2 W.L.R. 657, P.C.

Craig v. *The King* (1943) 49 C.L.R. 429.

Gallacher v. *H.M. Advocate*, 1951 J.C. 38.

McMartin v. *The Queen* [1964] S.C.R. 484.

Reg. v. *Andrews-Weatherfoil Ltd.* [1972] 1 W.L.R. 118; [1972] 1 All E.R. 65; 56 Cr.App.R. 31, C.A.

Reg. v. *Barker* (unreported), January 12, 1971, C.A.

Reg. v. *Blair* (unreported), November 15, 1971, C.A.

Reg. v. *Brett* (unreported), October 13, 1966, C.A.

Reg. v. *Caborn-Waterfield* [1956] 2 Q.B. 379; [1956] 3 W.L.R. 277; [1956] 2 All E.R. 636; 40 Cr.App.R. 110, C.C.A.

Reg. v. *Clark* [1962] 1 W.L.R. 180; [1962] 1 All E.R. 428, C.C.A.

Reg. v. *Curbishley* (unreported), December 10, 1970, C.A.

Reg. v. *Davies* (unreported), April 22, 1971, C.A.

Reg. v. *Dinsmore* (unreported), November 18, 1969, C.A.

Reg. v. *Dwyer* (unreported), November 16, 1970, C.A.

Reg. v. *Flower* [1966] 1 Q.B. 146; [1965] 3 W.L.R. 1202; [1965] 3 All E.R. 669; 50 Cr.App.R. 22, C.C.A.

Reg. v. *Fry* (unreported), January 19, 1967, C.A.

Reg. v. *Harris* [1966] Crim.L.R. 102, C.C.A.

Reg. v. *Hinds* [1966] Crim.L.R. 100, C.C.A.

Reg. v. *Isaac* [1964] Crim.L.R. 721, C.C.A.

Reg. v. *Merry* (1970) 54 Cr.App.R. 274, C.A.

Reg. v. *Mervyn* (unreported), March 20, 1967, C.A.

Reg. v. *Nabarro* [1972] Crim.L.R. 497, C.A.

Reg. v. *Scudder* [1965] Crim.L.R. 36, C.C.A.

Reg. v. *Siddique* (unreported), July 30, 1969, C.A.

Reg. v. *Swabey* [1972] 1 W.L.R. 925; [1972] 2 All E.R. 1094, Ct.-M.A.C.

Reg. v. *Terry* (unreported), December 16, 1966, C.A.

Reg. v. *Weston* (unreported), February 17, 1970, C.A.

Reg. v. *Williams* [1964] Crim.L.R. 456, C.C.A.

Rex v. *Buckle* (1949) 94 Can.Crim.Cas. 84.

Rex v. *Edwards* (1912) 8 Cr.App.R. 38, C.C.A.

Rex v. *George* (1909) 2 Cr.App.R. 318, C.C.A.

Rex v. *Jackson* (1910) 4 Cr.App.R. 93, C.C.A.
Rex v. *Nicholson* (1909) 2 Cr.App.R. 195, C.C.A. A
Rex v. *Osborne* (1908) 1 Cr.App.R. 144, C.C.A.
Rex v. *Sayegh* (1924) 25 S.R.(N.S.W.) 61.
Rex v. *Sichel* (1913) 13 S.R.(N.S.W.) 259.
Rex v. *Schmidt* (1911) 6 Cr.App.R. 288, C.C.A.
Rex v. *Walker* (1910) 5 Cr.App.R. 296, C.C.A.
Woolmington v. *Director of Public Prosecutions* [1935] A.C. 462, H.L.(E.). B

APPEALS from the Court of Appeal (Criminal Division).

On March 15, 1967, the appellants, Dennis Stafford and Michael Luvaglio, were convicted at Newcastle Assizes of the murder of Angus Stuart Sibbett, and sentenced to life imprisonment. Their applications for leave to call additional evidence and to appeal against their convictions were, on July 30, 1968, dismissed by the Court of Appeal (Criminal Division) (Edmund Davies and Fenton Atkinson L.JJ. and Waller J.). C

On March 3, 1972, the Secretary of State for Home Affairs, having received representations alleging that a miscarriage of justice had occurred, referred both cases to the Court of Appeal (Criminal Division) under section 17 (1) (*a*) of the Criminal Appeal Act 1968 to enable the appellants to submit such applications to adduce evidence as they might be advised. Their applications to call evidence were granted. Pursuant to section 23 (4) D of the Act of 1968 a large number of witnesses were examined before Croom-Johnson J. and their depositions were admitted as evidence at the hearing of the appeals, when witnesses were also heard by the court.

On February 26, 1973, the Court of Appeal (Lord Widgery C.J., James L.J. and Eveleigh J.) dismissed the appeals. The court certified that a point of law of general public importance was involved in the decision but refused leave to appeal. On April 17, 1973, the House of E Lords granted leave to appeal.

The facts are set out in the opinion of Viscount Dilhorne.

Lewis Hawser Q.C. and *Bryan Anns* for the appellant Stafford. The Court of Appeal asked the wrong question in that they took as the test the effect of the fresh evidence on their minds and not the effect that that F evidence would have had on the mind of the jury. It is not the function of the Court of Appeal to evaluate fresh evidence, save in a limited sense, namely, to consider whether it is honest, believable, relevant and not de minimis. Further, the Court of Appeal applied a wrong and far too high standard by placing upon the appellant the burden of showing, in effect, that the fresh evidence made the prosecution's case impossible. The burden placed upon appellants is substantially diminished by the Criminal G Appeal Act 1966. The Court of Appeal's test is higher than that which pertained before 1966. Alternatively, if the Court of Appeal did ask themselves the right question, the appeal should still be allowed because, although they applied the correct standard, in the light of their findings and their evaluation of the evidence the appellants have satisfied the burden placed upon them. H

There are three categories to be considered in respect of fresh evidence coming before the Court of Appeal: (1) Evidence of such a character that the court considers that no one would believe it. (2) At the other

A extreme, the court considers the fresh evidence so strong that no reasonable person would disbelieve it. There is then (3), Evidence which the court considers A might reject, but B would accept. In this situation, the evidence must weigh in favour of the appellant because the onus is always on the prosecution to prove its case.

If the Court of Appeal receive evidence which is credible and relevant and of a substantial nature, bearing directly on the crucial issues in the B case in favour of the defence, then whatever test is adopted, the appeal must be allowed, with of course the court having power to order a new trial. As to the functions of this House on an appeal from the Court of Appeal, see the Criminal Appeal Act 1968, section 35 (3).

There was circumstantial evidence which pointed to the guilt of the appellant, but there was evidence at the trial and now further evidence is available, which plainly raises a reasonable doubt in respect of the C prosecution's case. At the very least, this is a case where an appellate court ought to order a new trial.

There are three inter-linked questions to be considered. (1) The burden placed upon an appellant. (2) Whether the test in fresh evidence cases is the effect the fresh evidence and all the evidence in the case has on the mind of the Court of Appeal, or whether it is the duty of that D court to consider the possible effect of the evidence on the mind of the jury. (3) The effect, if any, of the power to order a new trial in the fresh evidence situation. These questions are directed to the language of section 2 (1) (*a*) of the Act of 1968.

The only reported decision where the words " unsafe or unsatisfactory " have been considered is *Reg.* v. *Cooper* (*Sean*) [1969] 1 Q.B. 267 which is distinguishable for, where there is fresh evidence, it is its effect on the E mind of the jury and not on that of the appellate court which is the relevant test.

The following early cases show the approach to be taken on questions 1 and 2, but do not lay down a test: *Rex* v. *Osborne* (1908) 1 Cr.App.R. 144; *Rex* v. *Nicholson* (1909) 2 Cr.App.R. 195; *Rex* v. *George* (1909) 2 Cr.App.R. 318. *Rex* v. *Jackson* (1910) 4 Cr.App.R. 93 seems to be F against the appellant's proposition on the burden of proof, but it is interesting to note that nevertheless it was not disputed that what had to be considered was the effect of the evidence on the mind of the jury. See also *Rex* v. *Walker* (1910) 5 Cr.App.R. 296. In *Rex* v. *Schmidt* (1911) 6 Cr.App.R. 288 there starts a consistent line of authority which lays down the correct test: The jury might have acquitted the accused if the evidence had been called. It is conceded that in *Rex* v. *Edwards* (1912) G 8 Cr.App.R. 38 no very clear distinction is drawn between the effect of the fresh evidence on the mind of the jury and its effect on the mind of the appellate court.

Reg. v. *Parks* [1961] 1 W.L.R. 1484 contains an authoritative and the plainest possible statement of principle of how the Court of Appeal approach the question of fresh evidence. *Reg.* v. *Williams* [1964] Crim.L.R. 456 H illustrates that the *Parks'* test is the test applicable. In *Reg.* v. *Isaac* [1964] Crim.L.R. 721 the new trial provision contained in the Criminal Appeal Act 1964 was used possibly for the first time and it is to be observed that the *Parks'* test was applied. In *Reg.* v. *Scudder* [1965]

Crim.L.R. 36 the same test was applied. *Reg.* v. *Flower* [1966] 1 Q.B. 146 is totally consistent with the appellant's present argument. [Reference was made to *Reg.* v. *Hinds* [1966] Crim.L.R. 100 and *Reg.* v. *Harris* [1966] Crim.L.R. 102.] The following cases were decided after the coming into force of the Criminal Appeal Act 1966: *Reg.* v. *Brett* (unreported), October 13, 1966; *Reg.* v. *Fry* (unreported), January 19, 1967; *Reg.* v. *Siddique* (unreported), July 30, 1969; *Reg.* v. *Weston* (unreported), February 17, 1970. *Reg.* v. *Merry* (1970) 54 Cr.App.R. 274 illustrates the correct approach, as does *Reg.* v. *Dwyer* (unreported), November 16, 1970. As to *Reg.* v. *Curbishley* (unreported), December 10, 1970, it shows that, the first function of the Court of Appeal in relation to fresh evidence is to ascertain (a) whether it is fit to be put before the jury at all: are the witnesses honest or dishonest witnesses? Is the evidence credible? (b) Is it relevant evidence? Further (c) it well may be that the court has to consider the weight of the evidence. But here where the fresh evidence is honest, credible, relevant and of great weight, it must be evidence fit to go to the jury. Strong reliance is placed on *Reg.* v. *Barker* (unreported), January 12, 1971. It is entirely in line with the present appellant's argument and is strikingly similar to the present case. The approach in that case is totally at variance with the approach of the Court of Appeal in the present case for there Lord Parker C.J. said "the court is quite unable to say that (the fresh evidence) is incapable of belief; the sole question is what weight should be given to it. For that purpose one has to imagine a jury, who band their evidence together with all the other evidence in the case, and ask oneself whether nevertheless the jury must have come to the same conclusion." [Reference was made to *Reg.* v. *Davies* (unreported), April 22, 1971 and *Reg.* v. *Blair* (unreported), November 15, 1971.]

A perusal of the above cases shows that the authorities are consistent throughout, before and after the Criminal Appeal Act 1964. The question for the court is what effect will the fresh evidence have on the mind of the jury.

As to the application of the proviso to section 4 of the Criminal Appeal Act 1907, now to be found in section 2 of the Criminal Appeal Act 1968, the appellate court in determining that question does not ask itself: "Are we sure the accused is guilty notwithstanding the defect at the trial?" but "Are we sure that the jury would inevitably have come to the same conclusion?" Accordingly, exactly the same test is applicable when the court is considering whether there has been a miscarriage of justice, as when it is considering whether the verdict of the jury was unsafe or unsatisfactory. It is to be observed that in *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462 the Court of Criminal Appeal operated the proviso which this House on appeal therefrom declined to do. As to the operation of the proviso, see *Chung Kum Moey* v. *Public Prosecutor for Singapore* [1967] 2 A.C. 173, and *Anderson* v. *The Queen* [1972] A.C. 100.

It is emphasised that the test and only test applicable in relation to fresh evidence is what would be the effect of that evidence on the mind of the jury, for the following reasons: (1) There is a long line of consistent English authority to that effect. (2) It is supported by the Commonwealth

A authorities. (3) There is powerful support for it in the strongly analogous position of the proviso and its interpretation. (4) The distinction between civil and criminal appeals. The Civil Division of the Court of Appeal is a court of appeal on fact and law and proceedings before that court are a rehearing and the court can draw all necessary inferences of fact. The Criminal Division of the Court of Appeal is not a tribunal of fact. It is not there to evaluate evidence as such except for the purpose of applying B the test. Therefore, where fresh evidence satisfies the test, that is, it might have caused the jury to have a reasonable doubt, the function of the court ceases. The jury is the sole tribunal of fact in criminal cases. Once fresh evidence comes before the Court of Appeal, it must in operating the test consider: (i) Whether the evidence is honest or dishonest; (ii) Whether the evidence is relevant or not; (iii) Whether the evidence is of such weight that it might affect the mind of the jury. English law recognises C in theory and practice that faced with the same evidence and witnesses, two persons or two tribunals might take a different view of the facts, see the observations of Lord Widgery C.J. in *Reg.* v. *Andrews-Weatherfoil Ltd.* [1972] 1 W.L.R. 118, 125, 126. (5) The effect of the new trial provision. If a verdict is only unsafe or unsatisfactory if the fresh evidence raises a reasonable doubt in the mind of the Court of Appeal, then it follows that D a new trial would never be ordered unless the court's task were to consider the possible effect of the evidence on the mind of the jury. The fact that the court has power to order a new trial shows that it is intended to deal with the situation where the court feels that the fresh evidence might raise a reasonable doubt in the mind of the jury. A new trial cannot be ordered unless the appeal is allowed on the ground that the verdict was considered unsafe or unsatisfactory. (6) The proposition that if the Court E of Appeal is sure of the guilt of the appellant that therefore a jury having the fresh evidence would also be sure of his guilt is a proposition that cannot stand. It does not follow from the mere fact that the Court of Appeal would uphold the conviction that the fresh evidence might not raise a reasonable doubt in the mind of the jury. (7) It is the test because if there are two possible tests, one of which is more favourable to the F accused, then that is the test to be applied because the purpose of the Criminal Appeal Act 1966 was to make it easier for an appellant to succeed.

As to whether the Court of Appeal in determining the appeal is limited to the terms of the reference, the answer is in the negative, see *Reg.* v. *Caborn-Waterfield* [1956] 2 Q.B. 379 and *Reg.* v. *Swabey* [1972] 1 W.L.R. 925 which establish that in considering the effect of fresh evidence the court is entitled to look at the whole evidence and the background of the G case and if the summing up was defective it is entitled to take that factor into account in considering the effect of the fresh evidence on the mind of the jury.

As to the extent of the burden placed upon an appellant, if the test in relation to fresh evidence were "would such evidence raise a reasonable doubt in the mind of the jury?" there would never be grounds for granting H a new trial. In libel cases, it is for the judge to decide whether the words complained of are capable of a defamatory meaning, i.e., whether a jury might reasonably find that the words are defamatory. The view expressed in the Scottish case of *Gallacher* v. *H.M. Advocate*, 1951 J.C. 38 is not

the view taken by the English cases under the Criminal Appeal Act 1907: see *Reg.* v. *Parks* [1961] 1 W.L.R. 1484. A fortiori it is not the position under the Criminal Appeal Act 1968. If the *Gallacher* test were adopted, it would mean that an appellant would be in a worse position in a fresh evidence case than he would be on a straight appeal on the grounds of misdirection.

As to the onus adopted by the Court of Appeal, on any view the court put the matter far too high and virtually stated that unless the defence could knock out the prosecution's case, the appeal would fail. The irresistible inference to be drawn from the evidence cannot depend on the absence of an adequate theory by the defence because that would be to reverse the onus. The Court of Appeal arrived at its conclusion by applying the wrong standard of proof and the approach adopted by the court goes against the fundamental principles of the common law. If the right test is applied, the appeal must succeed on the findings of the Court of Appeal for one cannot say that a reasonable jury could not have a doubt as to the guilt of the accused on hearing the fresh evidence.

Anns following. The courts have always leant against the reception of fresh evidence in both civil and criminal cases, but a distinction is to be drawn between the receipt of such evidence and, when received, what test is to be adopted in evaluating it. The reason why the courts lean against the receipt of fresh evidence is to prevent a litigant "having his cake and eating it." It was to prevent delay in giving evidence, for example, in the hope that stronger evidence might arise later which in civil cases led to the provisions of R.S.C., Ord. 59, r. 10 (2). There is no comparable provision relating to criminal trials where the overriding approach is to reach a just result.

Up to 1964 the number of appeals which were allowed as the result of fresh evidence was very small indeed. Section 4 of the Criminal Appeal Act 1966 amended section 4 (1) of the Act of 1907 by, inter alia, substituting as a ground for allowing an appeal that there had been a miscarriage of justice the ground that under all the circumstances of the case the verdict of the jury was unsafe or unsatisfactory. This new provision is now to be found in section 2 (1) of the Act of 1968.

The words of the statute, "the court . . . shall allow an appeal against conviction if they think . . .," in a fresh evidence case entail what the jury might have thought, the reason being that the court has to take the provisional view and consider what effect fresh evidence might have on the mind of the jury. The court cannot exclude what the jury might have done with the fresh evidence. A verdict of a jury must be unsatisfactory if reliable and cogent evidence exists which was reasonably not before the jury at the trial. If a jury has considered only part of the evidence in a case, that in itself shows that the verdict was unsatisfactory.

John Hazan Q.C. and *D. A. Jeffreys* for the appellant Luvaglio. Section 2 of the Criminal Appeal Act 1968 is a matter of the greatest practical importance in the administration of the criminal law. There are on the average 1,500 applications a year for the admission of fresh evidence, and about a third of these applications are granted. There are also on the average three to ten references a year from the Home Secretary

A to the Court of Appeal, mostly in section 19 (1) cases and mostly cases of fresh evidence.

The following alternative argument is put forward to that for Stafford in case the House feels unable to accede to the full width of that argument. One of the predominant features of section 2 of the Act of 1968 is the effect that the evidence might have had on the jury, for in section 2 (1) (*a*) the Court of Appeal has to consider the verdict of the jury. The proper B approach in looking at that question is: the jury had to consider certain evidence; there is now fresh evidence available and the question arises, "what effect would the evidence taken as a whole have on the evidence given at the trial?" That is a common sense approach. An appellant has now a lesser burden placed upon him for he has to show only that the verdict was unsafe and not that it was unreasonable. In considering the approach to be taken by an appellate court in considering a fresh evidence C case it is useful to remember a phrase to be found in one of the older cases, "has the appellant fairly lost the chance of acquittal?" Common sense requires such an approach as that given above, otherwise one would have two opinions on the evidence; first that of the jury and then that of the court.

If a common sense approach be taken of the retrial provision, section 7, D three different situations can be envisaged: (1) The fresh evidence is entirely clear and adverse to the appellant. (2) The exact opposite. The fresh evidence is so cogent that the court could not envisage a jury not acquitting if it had heard it at the trial. (3) The intermediate position. Here there is fresh evidence which certainly might have affected the evidence given at the trial. True, the prosecution have a strong case, nevertheless this fresh evidence ought to go to the jury. The present case comes under the E third category. It is a case where pre-eminently one would call for a new trial if the fresh evidence became available shortly after the original hearing. If that be so, and a new trial be no longer practicable, then the only safe course is for the convictions to be quashed. Having regard to some of the findings of the Court of Appeal in the present case, the ultimate conclusion of the court is not supportable. There cannot be an irresistible inference F of guilt where the fresh evidence relates to fundamental and not peripheral matters. For a good example of the approach that a court should adopt where there has been fresh evidence: see *Reg.* v. *Clark* [1962] 1 W.L.R. 180. *Reg.* v. *Barker* (unreported), is an apt illustration of the (3) situation. It is a classic case for the ordering of a new trial. The Court of Appeal here were wrong in resolving the conflict in relation to credible and relevant evidence by dismissing the appeal. The court should either have quashed G the convictions or allowed the appeal to the extent of ordering a new trial. The following Commonwealth authorities are consonant with the above argument: *Rex* v. *Buckle* (1949) 94 Can.Crim.Cas. 84; *McMartin* v. *The Queen* [1964] S.C.R. 484; *Craig* v. *The King* (1943) 49 C.L.R. 429; *Rex* v. *Sichel* (1913) 13 S.R.(N.S.W.) 259 and *Rex* v. *Sayegh* (1924) 25 S.R.(N.S.W.) 61.

H In *Gallacher* v. *H.M. Advocate*, 1951 J.C. 38 the court was concerned with a situation quite different from the present case. It was not a reference case.

If the matter be approached historically, it can be seen that originally

(i.e., under the Act of 1907) an appellant came up against a fairly substantial barrier in that he had to prove that there had been a miscarriage of justice. Subsequently the burden was eased; the appellant only had to show that in all the circumstances of the case it would be unsafe or unsatisfactory to allow the verdict of the jury to stand. There were also situations which arose in the Court of Criminal Appeal where there was a case against the defendant but the defendant had had a defence and the court considered the situation was a very unsatisfactory one because, although the summing up was impeccable, there was still an element of doubt about the case. This led to the enactment of the new trial provision. It is to be noted that this provision was introduced in the Act of 1964 and it was not until 1966 that the court was given power to consider whether a verdict was unsafe or unsatisfactory.

A consideration of the liberalising of procedure lends support to the intermediate position. That is a situation which can arise since 1968. The House should not hold on this cumulative evidence that the jury must have inevitably come to the same conclusion. It is not part of the English criminal process that an appellant in order to succeed must put forward evidence or a theory which virtually exculpates himself. This is what the Court of Appeal have, in effect, held here. It is said that circumstantial evidence depends on links in a chain. But where, as here, the fresh evidence breaks many links in that chain, the prosecution case fails. The presence or absence of a motive for the crime is very relevant where all the evidence is circumstantial.

John Cobb Q.C., *Paul Kennedy Q.C.* and *Rudolph Castle-Miller* for the respondent. The words of section 2 of the Act of 1968 are clear and unambiguous and the proper and only approach is that taken by the Court of Appeal who did not take into account the views of a hypothetical jury. There is nothing in the Act or in the cases which support the view that the Court of Appeal should allow the appeal when they do not themselves think that the verdict was unsafe or unsatisfactory, or when they are themselves convinced of the guilt of the appellant but consider that some hypothetical jury might have thought otherwise. It is not consonant with the statute or with common sense to adopt an objective test. The test is: does the court in all the circumstances now consider that the verdict is still safe or satisfactory? The statute contains many instances of the adoption of an objective test: see section 2 (1), section 5 (2), section 6 (1), section 11 (3), sections 13, 14, 16, 17 and 23. Section 3 (1) reinforces the above argument for that subsection specifically requires the adoption of an objective test. If the appellant's contention were correct, one would have expected similar language in section 2 (1), in relation to the receipt of fresh evidence.

There are two types of unsafe situation: the fresh evidence situation and the lurking doubt situation. The same test must be applicable to both. It is unthinkable that there should be different tests. It must be the subjective test of the approach of the Court of Appeal itself. It is not for the Court of Appeal to ask itself what the jury might have done in the light of fresh evidence, but whether the Court of Appeal itself, consisting of three reasonable men, has reasonable doubt and will therefore quash the conviction as unsafe. It would be wholly wrong for the Court of Appeal to speculate what another body of persons might consider on the totality

of the circumstances. The appellants' submissions ignore that there are two separate stages: (1) The Court of Appeal having decided to receive the fresh evidence have the evidence and then (2) Consider it. The court then decides whether to allow the appeal and quash the conviction or not. It is only then that the court considers whether a new trial should be ordered. But it is said: once there is a possible ground for allowing the appeal because there is fresh evidence, which is relevant and credible and substantial, then there should be a new trial. The above argument is based on a false premise.

A perusal of the Act of 1907 shows clearly that there were cases under it where the conviction was quashed where under later legislation a new trial would have been ordered. It is said that the lot of appellants has been made easier by later legislation. In some respects it has been made harder because on a retrial an appellant has been convicted at the second trial: see *Reg.* v. *Isaac* [1964] Crim.L.R. 721 and *Reg.* v. *Terry* (unreported), December 16, 1966. As to those authorities where the court has used the expression "the jury might have acquitted," the court is merely using a formula that the court itself, as composed of reasonable men, have a reasonable doubt as to the guilt of the accused. See, for example, *Reg.* v. *Dinsmore* (unreported), November 18, 1969.

There is no case where the Court of Appeal has stated that the court has no doubt in all the circumstances of the guilt of the accused, nevertheless, it is of the opinion that a reasonable jury might have thought otherwise. It is for the House having all the powers of the Court of Appeal to reach its own decision, having seen all the evidence. As to the onus, it is conceded that the judgment appealed from is not always happily expressed.

Hawser Q.C. in reply. The test which the Court of Appeal must apply here is the possible effect on the mind of the jury and it is not for the Court of Appeal to ask itself what effect the fresh evidence has on the Court of Appeal, except in determining the possible effect of the evidence on the mind of the jury in relation (1) to its relevance, (2) its credibility (*Reg.* v. *Blair* (unreported), November 15, 1971; *Reg.* v. *Flower* [1966] 1 Q.B. 146) and (3) whether the evidence is of sufficient weight in the light of all the circumstances that a reasonable jury might have had a reasonable doubt. This is the test laid down in *Reg.* v. *Parks* [1961] 1 W.L.R. 1484. These words were repeated by Lord Parker C.J. and other judges after the enactment of the Act of 1966. The *Parks* case was a case where the Court of Appeal had before it the original evidence and additional material. The respondent contends that what the Court of Appeal meant was that what was material was what the Court of Appeal's view was of the evidence. Lord Parker C.J. meant what he said. In view of the fact that the Act of 1966 was passed after the *Parks* case and that subsequent decisions adopted the test adumbrated in the *Parks* decision the House would be very loath to depart from *Parks* and the long line of authorities which are consonant with it.

It is quite plain that since the Act of 1966, the Court of Appeal can now upset the verdict of a jury even although the summing up was impeccable and there was evidence sufficient to convict the appellant. It follows that in that situation the Court of Appeal recognise that the jury

was reasonable in reaching their verdict, nevertheless the court is saying in that situation that it considers that the verdict was unsafe. If this be so the converse must be true, namely, that, although the Court of Appeal have no reasonable doubt themselves despite the fresh evidence, nevertheless a reasonable jury might. *Reg.* v. *Barker* (unreported), January 12, 1971 lays down the test in the clearest possible terms. It is the last in the long line of consistent authority and is an exceedingly striking case akin to the present.

The real test is whether the fresh evidence might have affected the mind of the jury. It cannot be a valid proposition that all reasonable men must come to the same conclusion and therefore as the Court of Appeal consists of reasonable men, they must inevitably come to the same conclusion as a jury. Take the case of an appeal from justices to the Crown Court. The Crown Court on hearing exactly the same evidence may come to a different decision on the rehearing. It was said that the proviso was of no relevance, but in proviso cases it has been held on numerous occasions that the court does not dismiss the appeal on a wrong direction of law by the judge at the trial, if the jury even on a right direction might have come to a different verdict.

As to what an appellant has to show, the respondent has brushed aside the question of the onus as a matter of small consequence but this is astonishing in the light of English criminal law. What the Court of Appeal has done here is to reach a conclusion of an irresistible inference of guilt because the appellants have not put forward evidence which knocks out the Crown's case. If the Court of Appeal had applied the *Parks* test [1961] 1 W.L.R. 1484, they could not have reached the decision they did. The question of onus is of vital importance. As to the approach in the present case, see *Reg.* v. *Swabey* [1972] 1 W.L.R. 925.

In conclusion, the question may be put thus: does fresh evidence cast doubt on essential elements in the prosecution's case? and (2) does or may the fresh evidence support the defence case? The more the fresh evidence tends to cast doubt on a prosecution's case and does not tend to support the defence case, the less weight can be given to the verdict of the jury. The Court of Appeal here applied the wrong test and if they had applied the right test on their own findings of fact, they would have found in the appellant's favour.

Hazan Q.C. in reply. Once the issue of the proper test has been established by this House, it will always be a question of fact in subsequent cases. As to the approach to section 2 of the Act of 1968, it is submitted that the correct test is that laid down in *Reg.* v. *Parks* [1961] 1 W.L.R. 1484. This is repudiated by the Crown. When in the course of argument there arose the test, the court, while determining the question, should take into account the effect of the fresh evidence on the mind of the jury. This is attractive, but has difficulties. One way of determining whether the verdict of the jury is safe or satisfactory is to ask the question: at the end of the day is one free from risk if the fresh evidence had been before the jury?

The phrase "unsafe or unsatisfactory" is disjunctive. It is possible to have a verdict which is safe, but nevertheless is unsatisfactory: see *Reg.* v. *Nabarro* [1972] Crim.L.R. 497.

The introduction of the word "unsafe" into the legislation shows that an appellant cannot be any worse off than he was under the Act of 1907: it introduces a new element, in that fresh evidence could be introduced which could be said to show that there was something wrong with the verdict. It is said by the Crown that the cases show the use of a mere formula, but Lord Parker C.J. was known for the precision of his language and in *Reg.* v. *Parks* he laid down the test to be applied in such cases. The House would be very slow to interfere with the practice of the Court of Appeal as laid down in that case. *Reg.* v. *Isaac* [1964] Crim.L.R. 721 and *Reg.* v. *Fry* (unreported), January 19, 1967, support the above argument. The position after 1964 is that if there is an issue on both sides and the court consider that the jury would not necessarily come to the same verdict, a new trial will be ordered. *Reg.* v. *Mervyn* (unreported), March 20, 1967, shows that even in a case where there is strong evidence against the accused, nevertheless where there is fresh evidence the court may order a new trial. The strongest case of all in the appellant's favour is *Reg.* v. *Dwyer* (unreported), November 16, 1970, which was decided after the coming into force of the Act of 1968.

When one looks at the overwhelming mass of new evidence in the present case, if the Court of Appeal had asked the right question, which they never did, it could not possibly be said that the jury was bound to come to the same conclusion.

As to the supposed difficulties on the adoption of what has been called the intermediate position, the test must be whether the evidence *might, not* would, have raised a reasonable doubt in the mind of the jury. The new trial provisions must make it less onerous for an appellant to succeed on appeal than was possible under the Act of 1907. If that approach be right and the Court of Appeal asked the wrong question and applied the wrong standard of proof, then even on the Court of Appeal's findings of fact except their final conclusion, the Court of Appeal must have allowed the appeal. The finding of an irresistible conclusion of guilt cannot be right because it was earlier stated in the judgment that there were improbable features on both sides of the case. That is the classic case of doubt. The Court of Appeal here have stood the classic test propounded in the *Woolmington* case [1935] A.C. 462 on its head. This is a very serious matter.

On a submission of no case to answer the judge has to ask himself what effect the evidence would have had on the mind of a reasonable jury. As to the situation where the Court of Appeal will allow an appeal because it has a lurking doubt, see *Reg.* v. *Cooper* (*Sean*) [1969] 1 Q.B. 267. That was not a fresh evidence case. If that be right, then where there is a case which involves fresh evidence, the appellant should not be in any worse position.

Where two juries on the same facts come to different verdicts, the Court of Appeal will not interfere on the ground that one verdict was unreasonable: see *Reg.* v. *Andrews-Weatherfoil Ltd.* [1972] 1 W.L.R. 118.

Gallacher v. *H.M. Advocate*, 1951 J.C. 38 was prior to the decision in England of *Reg.* v. *Parks* [1961] 1 W.L.R. 1484 and has no relevance here because of the "unsafe or unsatisfactory" provision. Further, there

was not at that time in Scotland, nor is there now, provision for an appellant to obtain a new trial. It is necessary to revert to the absurdly high standard of proof which has been placed upon the appellant here. It is often thought that the decision in *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462 is merely a students' textbook case on the question of reasonable doubt but this is not so. Viscount Sankey L.C. said (pp. 481, 482) that no attempt to whittle down the principle promulgated in that case was to be entertained. If the Court of Appeal be right in the present case, then the "golden thread" which runs through the criminal law, namely, that the prosecution has to prove the case beyond reasonable doubt, is in rags and tatters. The Court of Appeal's approach in the present case comes very near to the inquisitorial system to be found under the Napoleonic Code. [Reference was also made to *Reg.* v. *Clark* [1962] 1 W.L.R. 180; *Archbold Criminal Pleading Evidence & Practice*, 38th ed. (1973), para. 920.]

Counsel for both appellants addressed the House in extenso on the facts of the case on the question whether the verdict was unsafe or unsatisfactory.

Their Lordships took time for consideration.

October 18, 1973. LORD PEARSON. My Lords, in my opinion the verdict of the jury is not unsafe or unsatisfactory. I have had the advantage of reading the speech prepared by my noble and learned friend Viscount Dilhorne and I agree with the reasons which he has given. I would dismiss the appeals.

VISCOUNT DILHORNE. My Lords, in March 1967, the appellants were convicted at Newcastle Assizes of the murder of Angus Stuart Sibbett and sentenced to life imprisonment. They applied to the Court of Appeal (Criminal Division) (Edmund Davies and Fenton Atkinson L.JJ. and Waller J.) for leave to call additional evidence and to appeal against their convictions. The court, after hearing argument and seeing the statements of the witnesses the appellants wished to call, on July 30, 1968, dismissed both applications.

On March 3, 1972, three and three-quarter-years later, the Home Secretary referred both cases to the Court of Appeal under section 17 (1) (*a*) of the Criminal Appeal Act 1968. He had, he said, received representations that a miscarriage of justice had occurred, representations which had the support of many responsible persons, including members of both Houses of Parliament; and he made the reference, he said, to enable the appellants to submit such applications to adduce evidence as they might be advised. Their applications to call evidence were granted. Pursuant to section 23 (4) of the Act of 1968, a large number of witnesses were examined before Croom-Johnson J. and their depositions were admitted as evidence at the hearing of the appeals, when witnesses were also heard by the court.

After a hearing lasting six days, on February 26, 1973, the Court of Appeal dismissed the appeals and certified that a point of law of general public importance was involved, namely:

"Whether in considering an appeal against conviction referred to the Court of Appeal by the Secretary of State under section 17 (1) (*a*) of

A the Criminal Appeal Act 1968, involving the calling of fresh evidence, the correct approach of the Court of Appeal is to evaluate the fresh evidence, to endeavour to set it into the framework provided by the whole of the evidence called at the trial, and in the end to ask itself whether the verdict has become unsafe or unsatisfactory by the impact of the fresh evidence notwithstanding that it was found to be safe and satisfactory on the earlier occasion when the court refused leave to
B appeal."

As section 17 (1) (*a*) provides that, where a case is referred under that provision, it is to be treated for all purposes as an appeal to the court, no significance is to be attached to the fact that the cases came before the Court of Appeal in consequence of a reference by the Home Secretary.

Section 4 (1) of the Criminal Appeal Act 1907 required the Court of
C Criminal Appeal to allow an appeal if they thought:

(i) that the verdict was unreasonable; or
(ii) could not be supported by the evidence; or
(iii) that the judgment of the trial court should be set aside on the ground that there was a wrong decision on a question of law; or
(iv) that on any ground there was a miscarriage of justice.

D It contained the proviso that the court might, notwithstanding that they were of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they considered that no substantial miscarriage of justice had actually occurred.

This section was amended in 1966. Under the Act of 1907 it might not have been possible to say that a verdict was unreasonable or not
E supported by the evidence or that a miscarriage of justice had occurred and so quash the conviction although considerable doubt was felt as to its propriety. So in 1966 a wider discretion was given to the court by Parliament and section 4 (1) was amended.

It is now replaced by section 2 (1) of the Criminal Appeal Act 1968, a consolidation Act. That section provides:

F "Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think—(*a*) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or (*b*) that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or (*c*) that there was a material irregularity in the course of the trial,"
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It also contains a proviso in the same terms as that of the proviso to section 4 (1) but with the omission of the word "substantial."

The Act thus gives a wide power to the Court of Appeal and it would, in my opinion, be wrong to place any fetter or restriction on its exercise. The Act does not require the court, in making up its mind whether or not
H a verdict is unsafe or unsatisfactory, to apply any particular test. The proper approach to the question they have to decide may vary from case to case and it should be left to the court, and the Act leaves it to the court, to decide what approach to make. It would, in my opinion, be

wrong to lay down that in a particular type of case a particular approach must be followed. What is the correct approach in a case is not, in my opinion, a question of law and, with respect, I do not think that the question certified in this case involves a question of law.

In *Reg.* v. *Cooper* (*Sean*) [1969] 1 Q.B. 267, 271, an appeal in which no fresh evidence was heard, Widgery L.J. said:

> "However, . . . we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it."

That this is the effect of section 2 (1) (*a*) is not to be doubted. The court has to decide whether the verdict was unsafe or unsatisfactory and no different question has to be decided when the court allows fresh evidence to be called.

Where such evidence is called, the task of the Court of Appeal may be extremely difficult. They have not heard the evidence the jury have heard. They can only judge of that from the shorthand note. They know, however, that the jury by their verdict have accepted some part, it may not be all, of the evidence for the prosecution and at least sufficient of it to satisfy them of the accused's guilt. They know too that the jury must have rejected the defence put forward.

Mr. Hawser argued that all the Court of Appeal was entitled to do was to consider whether the fresh evidence was relevant and capable of belief. He based this argument primarily on some observations of Lord Parker C.J. in *Reg.* v. *Parks* [1961] 1 W.L.R. 1484, where Lord Parker said that it was not for the Court of Criminal Appeal to decide whether the fresh evidence was to be believed or not. Lord Parker was then stating the principles which the court would apply in relation to the exercise of its discretion to admit fresh evidence under section 9 of the Criminal Appeal Act 1907 (now replaced by section 23 of the Criminal Appeal Act 1968). He said the evidence must be relevant and credible. Then he said that it was not for the court to decide whether it was to be believed. I agree that in deciding whether to admit fresh evidence, the court, which at that stage has not heard the evidence, has not to decide whether it is to be believed but I do not agree that, when the court has heard the evidence, it has not to consider what weight, if any, should be given to it. Lord Parker's fourth principle, as he called it, was that the court, after considering the evidence, would 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. I cannot see how the court can consider this question without considering what weight should be given to the fresh evidence they have heard; and I do not see that this principle is applicable to the question whether the

evidence is to be admitted. It is only after it has been admitted and, it may be, subjected to cross-examination, that its weight can be assessed and the court decide whether it might have affected the jury's verdict.

I do not suggest that in determining whether a verdict is unsafe or unsatisfactory, it is a wrong approach for the court to pose the question—"Might this new evidence have led to the jury returning a verdict of not guilty?" If the court thinks that it would or might, the court will no doubt conclude that the verdict was unsafe or unsatisfactory. Mr. Hawser in the course of his argument drew attention to the many cases in which, since 1908, and since the amendment made in 1966, the court has quashed a conviction saying that in the light of the fresh evidence the jury might have come to a different conclusion, but I do not think that it is established as a rule of law that, in every fresh evidence case, the court must decide what they think the jury might or would have done if they had heard that evidence. That it is a convenient approach and a reasonable one to make, I do not deny. When a court has said that, it means and can only mean that they think that the fresh evidence might have led to a different result to the case, and that in consequence the verdict was unsafe or unsatisfactory.

Mr. Hawser strongly urged that the court should recognise that reasonable men can come to different conclusions on the contested issues of fact and that, although the court came to the conclusion that the fresh evidence raised no reasonable doubt as to the guilt of the accused, they should nonetheless quash the conviction if they thought that a jury might reasonably take a different view.

I do not agree. It would, in my opinion, be wrong for the court to say: "In our view this evidence does not give rise to any reasonable doubt about the guilt of the accused. We do not ourselves consider that an unsafe or unsatisfactory verdict was returned but as the jury who heard the case might conceivably have taken a different view from ours, we quash the conviction" for Parliament has, in terms, said that the court should only quash a conviction if, there being no error of law or material irregularity at the trial, "they think" the verdict was unsafe or unsatisfactory. They have to decide and Parliament has not required them or given them power to quash a verdict if they think that a jury might conceivably reach a different conclusion from that to which they have come. If the court has no reasonable doubt about the verdict, it follows that the court does not think that the jury could have one; and, conversely, if the court says that a jury might in the light of the new evidence have a reasonable doubt, that means that the court has a reasonable doubt.

It is well settled that the Court of Appeal should only apply the proviso to section 2 (1) if it is of the opinion that, if the jury had been properly directed, it would inevitably have come to the same conclusion. While, of course, the proviso cannot be applied where the court thinks the verdict unsafe or unsatisfactory, Mr. Hawser argued that in a "fresh evidence" case the court should follow the same principle as that applicable to the proviso and only hold that a conviction was safe and satisfactory if they thought that a jury which heard the fresh evidence would inevitably have come to the conclusion that the accused was guilty. I cannot accept this argument. When the application of the proviso is under consideration,

something has gone wrong in the conduct of the trial. In a "fresh evidence" case nothing has gone wrong in the conduct of the trial and I see no warrant for importing the principles applicable to the proviso into the determination of whether a verdict is or is not safe and satisfactory. The words of section 2 (1) (*a*) are clear and unambiguous and they are the words which have to be applied.

For the purpose of disposing of an appeal to this House, the House may exercise any powers of the Court of Appeal (section 35 (3) of the Act of 1968). That means, as I see it, that to allow these appeals, the House must come to the conclusion that the verdicts were unsafe or unsatisfactory. It will not suffice to show that the Court of Appeal has erred in its approach. This House is now called upon to decide whether the verdicts were of that character.

This House suffers the disadvantage that it has not heard or seen any of the witnesses. It can only base its opinion on the shorthand notes of the evidence at the trial, on the conclusions that can properly be drawn from the jury's verdict of guilty, on the depositions taken before Croom-Johnson J. and the shorthand note of the evidence heard by the Court of Appeal.

It will be apparent from what I have said that I do not see anything to criticise in the approach of the Court of Appeal as stated in the question certified by them though I am not sure I understand why the words "notwithstanding that it was found to be safe and satisfactory on the earlier occasion when the court refused leave to appeal" were included. They do not affect the approach that court should have made and I take it that they were inserted to indicate that that court was unaffected by the previous decision.

However that may be, I, for my part, approach the evidence without regard to the conclusions on the issues of fact to which the Court of Appeal has come on two occasions.

Sibbett and the two appellants were business associates. They were employed by Social Club Services Ltd., a company which appears to have been controlled by Vincent Luvaglio, a brother of the second appellant. The business carried on by that company consisted of furnishing clubs, installing fruit machines and providing cabarets. Sibbett collected the takings from fruit machines. He had a dark green Jaguar Mark 10 saloon car of which the registration number was MUP 11D.

At 5.15 a.m. on January 5, 1967, that car was stationary on the A.182 road in South Hetton facing towards Easington. It had then the dead body of Sibbett lying partly on the back seat and partly on a box which was on the floor at the back of the driver's seat. His body was in a contorted position towards the offside of the car.

The front of the car was damaged with the glass of both front offside headlights broken and some bars of the radiator grill bent and one bar missing. There was some distortion of the bonnet. Examination of the car revealed that it had lost the coolant from the radiator through two small holes in one of the radiator tubes and that the engine had become so overheated that it was on the point of seizing. The evidence was that the overheating due to the loss of coolant would have caused the car to stall when the engine was on the point of seizing.

The ignition key had been left turned on; so had the de-mister of the

rear window. The sidelights were on but very dim, a fact which suggests that the car had been stationary in that position for a considerable time after the engine had ceased to run. The front offside window was down and the glass from the rear offside window was missing.

The car was a little distance from the kerb in South Hetton, on a slight bend in a built up area near or partly under a railway bridge which crosses the road called Pesspool Bridge. It is very difficult to believe that a motorist would choose to leave his car in that position if he could help it. One witness described it as a daft place to leave a car. One can, I think, safely assume that it was not a place where a murderer would have chosen to leave a car with his victim in the back if he could have avoided doing so.

On these undisputed facts no other conclusion appears to me possible than that the car came to rest at that point not by the choice of the driver but as a result of engine failure. The jury must, in my view, have so concluded.

How long had the car been there in that condition? It was a cold, dirty night with flurries of snow. At 5.15 a.m. the car had a light covering of snow. During the night a number of miners going to and from neighbouring collieries and other persons had passed the spot where the car was at 5.15 a.m. and had seen a car there. A bus conductor who passed it between 11.35 and 11.45 p.m. said that he saw a car there. P.C. Grierson and P.C. Hafferty saw no car there at 11.50 p.m. A bus driver did not see one there at 11.55 p.m. and a driver driving in the same direction as the car was facing at 5.15 a.m. and who would have had to pull out to pass it, said that there was no car there when he passed under Pesspool Bridge between 12.04 and 12.10 a.m.

Another driver saw a Jaguar car there at 12.30 a.m. and between 12.30 a.m. and 5.15 a.m. a car was seen there by 39 persons, many of them identifying it as a Jaguar and some of them thinking that it was in a slightly different position from that shown in the photograph taken after the police had arrived on the scene. Though the times stated may not be entirely accurate, witnesses said that a car had been seen there at 12.30, 12.45, 12.50, 1.10, 1.15, 1.25, 1.30 and 1.50 a.m.

In view of the evidence of the two police constables, who could not have failed to notice a car left in that position, and that of the bus driver who said that there was no car there at 11.55 p.m., I conclude that the bus conductor who said that he saw a car there between 11.35 and 11.45 p.m. was mistaken as to the time.

The conclusion to which I have come on this evidence is that a car stopped at Pesspool Bridge shortly after midnight and before 12.30 a.m.

Two suggestions were put forward by the defence which I must now examine. It is not, of course, for the defence to establish the innocence of the accused. Rejection of suggestions and theories put forward by the defence does not mean that the appeals should be dismissed. The House has to consider, as had the Court of Appeal, whether there is any possible explanation of proved facts consistent with innocence.

One suggestion put forward was that the car first seen at Pesspool Bridge was not Sibbett's car and that at some time during the night it was taken away and replaced by Sibbett's car with his body inside it. The other suggestion was that if it was Sibbett's car there, it was there

without Sibbett's body in it and that later it was taken away and brought back to the same place with his body in it.

Why should anyone want to leave a car there? If some wicked persons planned to murder Sibbett and make it look as if the appellants were guilty, what conceivable object could they have had in leaving a car there, whether Sibbett's car without his body in it or another car, before 12.30 a.m.? What conceivable object could there have been in taking the car or Sibbett's car without his body in it away from there and then taking Sibbett's car back to the same place with his body in it? Sibbett's car in the condition in which it was found got to Pesspool Bridge and could get no further. It is not conceivable that anyone could have planned to get it there in such a state that it could go no further. In the light of these considerations I cannot regard either suggestion as in the least credible.

Stress was laid on the fact that none of those who saw the car there before 5.15 a.m. saw that it was damaged, yet Sibbett's car in its damaged condition must have been there for some time before 5.15 a.m. on any view. While one would have expected that some at least of those who saw the car would have noticed that it had sustained some damage, the fact that no one saw that the glass of two headlights was broken, the bars of the radiator grill bent, the bonnet slightly distorted and the glass in the offside rear window out on that dirty winter night does not deserve to have much weight put on it. The fact that no one saw the damage really lends no support to the theory that there was a change of cars at that place that night or to the theory that Sibbett's car was there in the first place and then taken away and brought back in a damaged condition.

The witness who saw the car there at 1.50 a.m. told the police that its number was MUP 11. The number of Sibbett's car was MUP 11 D. He saw no damage to the car. He said he went to the front of the car and felt heat coming from the engine. There was expert evidence that on a night like that the engine would cool in an hour or so. If his evidence is to be relied on, the heat from the engine meant that the car had got there less than an hour or so before 1.50 and could not have been there before 12.30 a.m. If Sibbett's car with his body in it was taken there less than an hour or so before 1.50 a.m., those who took it there were fortunate that no change of cars was seen by those who saw a car there at 12.45, 12.50 and 1.10 a.m. In view of the reliance placed by the defence on this witness, I have examined the shorthand note of his evidence with care.

He made a statement to the police on January 7, 1967. In it he said that he had felt the heat of the car and that he never saw any body in the car, saying: "I wouldn't have seen anyone lying on the back seat from the way I looked in." He made a statement to a solicitor after the appellants had been convicted in which he said:

> "I could also see into the back of the car a matter of 4" to 9" below the top of the back seat. If there had been anyone in the car sitting up, I would have seen them."

He said in evidence that he had received and read a book designed to show that the appellants were wrongly convicted. After he had done that, he made a third statement to a solicitor in which he said for the first time

that he would have been bound to have seen any body in the car if one had been there.

He gave evidence before Croom-Johnson J. and before the Court of Appeal. He entirely failed to give a satisfactory explanation for omitting to say in his first two statements that he would have been bound to see a body in the car if one had been there. He tried to explain his first statement by saying that the body had not been found lying on the back seat. The photograph taken after the body was found shows that a considerable part of the body was on the back seat.

There were other unsatisfactory features about his evidence to which I do not think it necessary to refer. Apart from his evidence that the number of the car was MUP 11, which establishes that Sibbett's car was there at 1.50 a.m., I do not think that any reliance can be placed or that a jury could reasonably have placed reliance on his evidence that he felt heat coming from the engine.

The question whether there had been any change of cars was put to the jury by O'Connor J. In the course of a long and careful summing up he said:

> "Now, you will know that no less than four witnesses speak to the Mark 10 Jaguar being in that position 25 minutes to one and 10 minutes to one when they came by, and it is entirely for you as to whether you think that that car was, indeed, there. It is significant because it is the very position in which it was subsequently found and one of the matters which you may think you wish to ask yourselves as well, is 'Was it driven away between 10 minutes to one and a subsequent time and put back in the same place.'"

And a little later he posed the question after referring to the car that at 5.15 a.m.:

> "Was it the same Mark 10 Jaguar as had been seen by the group of witnesses round about quarter to 12? That is the first thing upon which you will consider. . . . Was it the same car? If so, you will know that . . . it is in a position close to the bridge shortly after half-past 12. Did it move away from there? Well, you may think not between 12.35 and 12.50 when witnesses saw it. Did it move away between that time and 25 minutes past two when it was seen to be in this very position? Did it move away between 25 minutes past two and a quarter past five when it was seen to be in this position?

Their verdict shows that they concluded that that could not have happened.

In my opinion, the only obvious and only conclusion to be drawn from the factual evidence as to the position of the car throughout those hours of the night is that Sibbett's car was driven in its damaged condition some time about or shortly after midnight and before 12.30 a.m. to the place where it was found at 5.15 a.m. with Sibbett's body inside it, that it stopped there because it could be driven no further and that its driver then left it in a hurry.

Evidence given since the trial shows that the car was there before 12.30 a.m. The evidence at the trial was that it must have been there before 25 minutes to one.

I say that the jury must have concluded that it was the same car there throughout the whole period for if they had thought that there might have been a change of cars, in the light of the other evidence which they heard and to which I shall refer, they would not have returned a verdict of guilty.

It follows from this conclusion that the damage to the car and the death of Sibbett must have occurred before 12.30 a.m.

Mr. Vincent Luvaglio was the owner of a red E-type Jaguar. He and the two appellants had been on a holiday in Majorca. From there the appellants returned to Newcastle on January 3. Vincent Luvaglio had returned to London with them and then had gone back to Majorca. On January 4 the appellants went to the garage where the E-type was kept and borrowed it. From then on until about 12.30 to 12.40 a.m. it was, according to their evidence, in their possession. They returned to their office from the garage in it. Stafford drove the car to 109 Westmorland Rise, Peterlee, 23½ miles from Newcastle, where he lived and where he was joined by the appellant Luvaglio and where a witness, Wells, said he saw Stafford and the E-type, first he said at about 11 p.m. and later he said between 11.5 and 11.35 p.m. and he said he heard the car being driven off. Stafford's mistress said that the appellants left there about 11.30 to 11.45 p.m. and Luvaglio's mistress between 11.40 and 11.50 p.m. Another witness put the time at 11.45 p.m. Luvaglio said that he was expecting a telephone call from his brother in Majorca to 5 Chelsea Grove, Newcastle, where he lived, about midnight and that he had a date to meet Sibbett at the Bird Cage Club in Newcastle at 12.30 a.m.; and so he and Stafford returned from Peterlee to Newcastle.

If they wanted to receive a telephone call from Majorca at about midnight in Newcastle, it is unlikely that they left Peterlee, 23½ miles away so late as 11.40 p.m.

Stafford said that he got to 5 Chelsea Grove just after midnight, that they did not wake up the man who was there and who was not a witness at the trial, and that after about fifteen minutes, no telephone call having come, they went to the Bird Cage Club in the E-type, arriving there at 12.30 to 12.40 a.m. according to the statements they made to the police, and with the E-type undamaged.

While they were there Stafford said that he went out to the E-type parked outside to get some cigarettes from the car. He then found that the E-type had been damaged. It looked, he said, as if somebody had gone into the back of the car. This was about 1.45 to 2 a.m. so if that evidence was true the car was damaged between 12.30 a.m. and 2.0 a.m.

The next morning at 9 a.m. the E-type was taken to a garage to be repaired. The same day it was collected by the police. It was found to have sustained damage. The perspex covering both rear lights was broken and some damage done to the rear number plate.

There was green paint found on the E-type which exactly matched layer for layer the green paint of Sibbett's car; and there was red paint on Sibbett's car which matched that of the E-type.

So the two cars had collided on the night of the 4/5th January. The experts thought there had been two collisions at an angle. One might have been caused by the Mark 10 running into the back of the E-type and the

other as the driver of the Mark 10 tried to pull out from behind the E-type and failed to clear it.

However that may be, the important and unchallengeable fact is that somewhere at some time that night the two cars collided. Could it have been after the appellants had said they arrived at the Bird Cage Club at 12.30 to 12.40 a.m. and the time when Stafford said he found the E-type damaged, 1.45 to 2 a.m.?

If the Mark 10 was the car at Pesspool Bridge in South Hetton before 12.30 a.m. and the times at which a car was seen there are at all accurate, the Mark 10 cannot have travelled to Newcastle and run into the E-type there outside the Bird Cage Club before 1.45 to 2 a.m. and have been back at Pesspool Bridge at 1.50 a.m.

On the other hand, if the Mark 10 was at Pesspool Bridge from before 12.30 a.m. and remained there until 5.15 a.m., could the E-type have been taken from outside the Bird Cage Club, driven to Pesspool Bridge, 16½ miles away, backed into the Mark 10, driven back to the Bird Cage Club and left there damaged by 1.45 to 2 a.m.? I cannot imagine any conceivable object for such an operation.

The conclusion that it was the Mark 10 at Pesspool Bridge from before 12.30 a.m. to 5.15 a.m. inevitably means that no credence can be given to either of these suggestions.

If the jury came to that conclusion as their verdict shows they did—and, as I have said, in my view the only and obvious conclusion on the evidence as to that car at the trial and one on which no doubt could be cast in the minds of reasonable men by the fresh evidence—then it follows that the jury must have rejected the evidence of Luvaglio and Stafford that they arrived at the Bird Cage Club with the E-type undamaged, and that it was later damaged as untrue.

Further, if the collision took place at Pesspool Bridge or where the E-type was parked outside the Bird Cage Club, it is inconceivable that some fragments of glass from the broken headlights of the Mark 10 and some fragments of perspex from the rear lights of the E-type would not have been found either at Pesspool Bridge or outside the Bird Cage Club. None were. Two rubber rings from the rear lights of the E-type were found outside the club but no glass.

Debris was, however, found in two places. On January 9 and 10, on the left side of the A.182 going towards Peterlee, 6/10ths of a mile from Pesspool Bridge in the direction of Peterlee and in the open country, were found glass from the headlights of the Mark 10, glass from the offside rear window of the Mark 10, pieces of perspex from both rear lights of the E-type, Sibbett's broken spectacle frames and glass from his spectacles and five cartridge cases of cartridges which had been fired from a revolver.

The suggestion that all this debris was collected either at Pesspool Bridge or outside the club that night without leaving any fragments of glass or perspex and later deposited on the A.182 is one to which no weight can be attached.

Sibbett had been shot three times. In addition two bullets had hit the car, one, which presumably went through the offside rear window, struck the back of the driver's seat near the top, the other hit the door pillar

between the two offside windows. Presumably both these shots were fired while Sibbett was in the car and the other three while he was getting out of it or when he was out of it.

The presence of this debris at this spot points very strongly indeed to it being the place where the murder and the collision between the cars took place. Indeed, on the evidence given at the trial I do not think that any other conclusion was either possible or would have been reasonable. The appellants, however, contend that in the light of the further evidence, the jury might, if they had heard it, not have come to that conclusion or had a reasonable doubt as to its correctness.

The other place in which debris was found was in Pesspool Lane, some 300 yards from its junction with the A.182. That lane joins the A.182 the Peterlee side of where the debris on the A.182 was found. Travelling from that point in the direction of Peterlee, it is the first turn on the right. At that point were found on January 7 the greater part of the perspex from the offside rear light of the E-type and some of the glass from the offside rear window of the Mark 10.

The prosecution's case was that after the collision and murder on the A.182, the two cars, after Sibbett's body had been placed in the back of his car, were driven down the A.182 towards Peterlee, turned right into Pesspool Lane and stopped so the cars could be examined and debris removed; that they had then been driven on down the lane which is 14 feet in width and in which it might have been difficult to turn a long car like a Mark 10 Jaguar in the dark; that they had then turned right on to a road which brought them back on to the A.182 north of Pesspool Bridge; that they had turned right at the junction with the A.182 and that the Mark 10 had then come to a standstill by Pesspool Bridge as it could go no further due to the loss of coolant.

The last witness to see Sibbett alive was a Mr. Oxley who entered the Dolce Vita Club in Newcastle at about 11.15 p.m. on the night of January 4, just as Sibbett was leaving.

A Mr. Knight left Houghton-le-Spring at about 11.30 p.m. and drove down the A.182 towards Peterlee. When he was close to what are called the Four Lane End cross roads, he saw coming into the A.182 from his right two distinctive cars, an E-type Jaguar and a large saloon Jaguar going slowly and close together. He followed them for some distance and then overtook them as they were travelling at about 30 m.p.h. or less. He was certain that the leading car was an E-type Jaguar.

A Mr. Johnson, an overman at South Hetton Colliery whose shift that night ended at about 11.25 p.m. saw, when on his way home along the A.182 a red E-type Jaguar followed by a dark Jaguar saloon go by. He noted that there was one person in the E-type and that there were two in the saloon. He was at a bus stop and looked at his watch to see how long he had to wait for a bus. He said it was 11.46 p.m.

A Mr. Sanderson was also going home from the colliery when he was passed, he said, by an E-type followed by a dark saloon Jaguar travelling slowly.

Since the trial a Mr. Reay has been found who was also at the Four Lane End cross roads coming along the road from Murton which joins the A.182. He too saw two cars come out of the road from Chester-le-Street

on to the A.182 but he said that the first car was a Jensen and not an E-type. Whether or not a Jensen is easily mistaken for an E-type on a dark winter's night, I do not know, but in view of the evidence of Mr. Knight, another motorist, of Mr. Johnson and of Mr. Sanderson, I cannot feel that his evidence raises any doubt that it was a red E-type followed by a Jaguar saloon that went along the road that night.

The only importance of their evidence is that, if true, it shows that an E-type and a Jaguar saloon were travelling south-east along the A.182 towards Peterlee and the place where debris from Luvaglio's E-type and Sibbett's Mark 10 was found.

In the light of this evidence the prosecution suggested that the murder took place at about 11.50 p.m.

A Mr. Golden who also worked at the colliery gave evidence at the trial. He said he was cycling home along the A.182 in the direction of Peterlee when he was passed by an E-type and a saloon Jaguar going in the same direction and close together and travelling, he estimated, at about 60 m.p.h. He estimated that he was 300 yards from the junction of the A.182 with Pesspool Lane when the cars passed him. He heard no noise of a collision. He did not hear any shots fired.

One can, I think, safely assume that defended at the trial, as the appellants were, by able counsel, it cannot have escaped them that if Mr. Golden was 300 yards from the junction with Pesspool Lane when the cars passed him, he must have been nearer to the place of the alleged murder at the time of the murder than where he was when the cars passed and that the nearer he was, the more extraordinary it was that he neither heard the noise of a collision or of shots being fired. How close he would have been to the place where the debris was found, would depend on the speed at which he was cycling, the time it took for the cars to get to him from where the debris was, how long they had stopped there after the shooting and on whether his estimate of his distance from Pesspool Lane when the cars passed him was reliable.

The jury saw him and heard his evidence. What view they formed of him as a witness and how reliable they thought his evidence, one does not know. It cannot, however, have made them doubt that the place where the debris was found was the place of the murder, for it is inconceivable that they would have found the appellants guilty if they had had any doubt about that, the establishment of that place as the place of the murder being a vital ingredient of the case for the prosecution.

Since the trial experiments have been conducted to try to fix how far Golden must have been away when the murder took place from the place where the debris was found. If he was 300 yards from Pesspool Lane when the cars passed him, the distance from there to where the debris was found was 1,200 yards. It was said that Golden would probably cover 400 yards a minute on his bicycle, that is to say, that he would have been travelling at 13.6 miles an hour in which case, when the cars passed him, he would have been three minutes cycling time from where the debris was found. The cars, it was said, would take about a minute to get from that point to where they passed him, so he would be 800 yards away from that point when the cars started moving, and if two minutes elapsed after the

firing of the shots and before the cars started moving, actually at the scene of the murder; if not two minutes, but only one minute, 400 yards away. A

These calculations could have been made before the trial and have been put before the jury. If they had been, might they have affected the jury's conclusions, to which, as I have said, their verdict shows they came, that the place of the murder and of the collisions was the place where the debris was found? Might these calculations, based as they were on Golden's evidence and on the assumption that he was cycling at 13.6 miles an hour, B have given rise to a reasonable doubt in their minds?

I do not think so. The presence there of the debris from the E-type and the Mark 10, of Sibbett's spectacle frames and glass from his spectacles and of the five cartridge cases points so conclusively to that being the place of the murder that in my opinion the evidence of Golden and the calculations based thereon are wholly insufficient to raise any doubt. C

A Mr. Pearce, the joint managing director of a firm of London gunmakers gave a statement to the appellants before the trial but was not called as a witness. In his opinion the five cartridge cases would not have been distributed as they were when they were found, with three scuffed as if they had rubbed against the road surface on the offside of the A.182 going towards Peterlee and two on the nearside verge without a mark on them, had they not been deliberately placed there. He stated that each cartridge D case would have been ejected at right angles to the direction in which the revolver was pointing, to the right. If all the five shots were fired when the car was stationary on the nearside of the A.182 and the person firing them was on the offside of the car and fired them from a position to the rear of the car towards its front, then the cartridge would, when ejected, have fallen on the roadway and not on the verge but if two of the shots were fired when the gunman was standing by the bonnet, facing towards the E back of the car, then those cartridges would have been ejected towards the verge and as on ejection they would, he said, travel about five feet, the cases might well have gone over the bonnet on to the nearside verge.

I do not therefore think that the position of the two cartridge cases on the verge is any evidence that the cartridges had been deliberately placed there. F

In my opinion, it was proved beyond a shadow of doubt that the collisions occurred at that point and the inference that the five shots were fired immediately after the collisions and Sibbett killed there is one from which there is no escape: nor is there any escape from the conclusion that the Mark 10 stopped at Pesspool Bridge because it could go no further and that it remained there with Sibbett's body in it from before 12.30 a.m. G until the police moved it.

The suggestion that was put forward that the two small holes in the radiator tube which allowed the coolant to escape had been deliberately made that night with a screwdriver or knitting needle or something of that sort by some ill-disposed person is one that, in my view, cannot have any weight attached to it. It could not have been done before Sibbett left Newcastle that night for the car would not have got to South Hetton. H What conceivable object could have been served by doing it? It is a fact that the honeycomb of metal which serves to cool the radiator was not damaged and that would appear to exclude the possibility that the holes

were made by the torsion bar of the Mark 10. Presumably the holes were made by small fragments of metal flying off as a result of the collisions or by stones flung up by the E-type when the Mark 10 was following closely behind it, part of the stone shield of the Mark 10 having been displaced by the collision. However this may be, it does not affect the conclusions I have just stated.

So much for what I may call the South Hetton part of the case.

The police made a test run from the Four Lane End cross roads, starting at 11.45 p.m. and drove to the point where the debris was found on the A.182. They stopped there for four minutes and then drove to the spot in Pesspool Lane where the other debris was found and stopped there for three minutes. They then drove round to Pesspool Bridge and stopped there for two minutes and then drove to the Bird Cage Club via Chester-le-Street. They kept to all the speed limits and did not exceed 70 m.p.h. The whole journey took them 46½ minutes, of which 37½ minutes was the actual driving time. That an E-type Jaguar driven from Pesspool Bridge after the Mark 10 had been left there would have kept to all the speed limits may well be doubted; and also that it would have gone via Chester-le-Street. That would have involved turning round and the way that Stafford said he normally went from Peterlee to Newcastle was along the A.19, a dual carriageway the whole way. To get on to the A.19, a car on the A.182 facing towards Peterlee would not have to turn round. The time it took for the police car to get to the Bird Cage Club from Pesspool Bridge is not known but it was suggested that the time an E-type driven fast would take to cover the 16½ miles would be of the order of 20 minutes.

In support of the appellants' alibi, two wholly independent witnesses were called at the trial, a Mr. Anderson who said that he had driven down Chelsea Grove at about midnight on January 4/5 and had noticed Mr. Vincent Luvaglio's E-type outside 5 Chelsea Grove, and a Mrs. Hill who lived next door to 5 Chelsea Grove. She had been working that evening at the Excel Bowling Club in Westgate Street where there had been a dance that night. She estimated that it would be about 11.20 p.m. that she finished her work at the club and locked up. She then went with her daughter, a Mrs. Walpole, to a snack bar in the club and had a meal and, after they had had their meal, they sat and talked for a while and then walked home. She said that they left the club about midnight and that a red car with a black top of a coupe type was outside 5 Chelsea Grove when they got home.

If Mr. Vincent Luvaglio's E-type was outside 5 Chelsea Grove shortly after midnight, then it is most improbable that it was his E-type which had been on the A.182 shortly before midnight.

The jury had therefore to consider whether reliance could be placed on these witnesses' estimates of time. Their verdict shows that they must have decided that it could not.

Mrs. Hill's daughter, Mrs. Walpole, was available to give evidence at the trial. She was not called but was heard by the Court of Appeal on whom she made a very favourable impression. I did not get the same impression from reading the shorthand note of her evidence, but I have not had the advantage of seeing and hearing her in the witness box and I therefore accept the Court of Appeal's view.

She said that her mother, Mrs. Hill, finished clearing up after the dance at about 11.40 p.m., then had fish and chips for which they had to wait about 10 minutes and that, directly after eating them, they walked home which she said would take about five or six minutes. It is to be noted that while Mrs. Hill said that after their meal they sat and talked for a while, Mrs. Walpole said that directly they had eaten, they walked home. If one allows five or six minutes for eating the fish and chips, if her evidence was correct, they got home a few minutes after midnight. She said that Mr. Vincent Luvaglio's car was then outside 5 Chelsea Grove.

Why Mrs. Walpole was not called at the trial when she could have been, one does not know. Perhaps it was thought that though she corroborated her mother's evidence, she did not add to it. It would have been odd if they had disagreed as to the time they got home.

If the jury thought that reliance could not be placed on Mrs. Hill's estimate of the time they got home, I see no reason to think that their view might have been different if they had heard Mrs. Walpole corroborate that estimate. If they thought that in the light of the evidence they had heard, the E-type must have got to 5 Chelsea Grove later than a few minutes after midnight, I see no ground for supposing that their opinion would or might have been different if they had heard Mrs. Walpole's estimate of the time they got home.

In this House great weight was placed by counsel for the appellants on the fact that Mrs. Walpole had said that when she saw the E-type outside 5 Chelsea Grove, it was undamaged. She had no reason to pay particular attention to the car that night and the jury might have thought if they had heard her that she might well have failed to notice that the perspex was missing from the two rear lights.

I do not consider that her evidence that the car was undamaged suffices to give rise to any reasonable doubt about the correctness of the conclusion to be drawn from the other evidence to which I have referred, that the E-type was in collision with the Mark 10 on the A.182 shortly before midnight.

I now turn to another matter which was canvassed at the trial. Stafford's and Luvaglio's clothes were collected by the police, some of them from the cleaners. In the pocket of one suit, which Stafford had said he was not wearing on the night of January 4, were found some particles of red paint and plastic. Stafford explained that by saying that he went through the pockets to see that they were empty before sending the suit to the cleaners and, before he had done so, he had gone out to the E-type to try to straighten up the number plate; and that, he said, was how some particles of paint were transferred into the pockets of that suit. That suit had apparently been cleaned when the police took possession of it. The other suits had not.

Apart from the particles of red paint no traces of paint from the E-type or from the Mark 10, no fragments of glass from the Mark 10, no mud and no blood were found by Mr. Lee on the clothing he examined.

In the course of listing the gaps alleged to exist in the circumstantial evidence, O'Connor J. in the course of his summing up said:

"Nothing found on either of these two men linking them with the

A Mark 10. Quite right, no bits of green paint, no bits of glass, or anything else."

Mr. Lee gave evidence before Croom-Johnson J. and when cross-examined agreed with the opinion of a Mr. Moss, another expert, that it was "extremely likely" that if the appellants were guilty "trace evidence would be found to establish a positive link between the appellants and the scene of the crime, the murdered man or his Mark 10 Jaguar."

B As he knew that Sibbett and the two appellants were business associates and had recently been together, he did not look for fibres of their clothing.

Mr. Walls, who had been director of the Metropolitan Police Laboratories, thought it "extremely surprising" that no trace evidence was found on the appellants' clothing if they had committed the murder. He thought there would have been bound to have been some contact between the C clothing of the persons putting the body into the car and the body of the car itself, which he imagined would have been quite muddy on a wet, dirty night in the middle of January. Although there was mud on Sibbett's body—it had been dragged on the road—there was no evidence that at that time the car was muddy and, to get the body into the back of the car, the rear door must have been opened. I must confess that I am at a loss D to see how it could be safely assumed that there must have been contact between the clothing of the appellants and mud on the outside of the car.

Counsel for the appellants argued that if the jury had known that it was the opinion of the three experts that it was extremely likely that, if they were guilty, trace elements would have been found, the jury would have attached more importance to the fact that no trace elements were found.

E They might, it is true, have done so; but whether they would have attached such weight as to doubt the inferences to be drawn from the circumstantial evidence is another question. It was only "extremely likely" that such trace elements would have been found if the clothing examined included all the clothing the appellants had been wearing that night. On such a night in January the appellants may have been wearing F overcoats or macintoshes or some other form of outer covering. If the jury thought it to be possible that the appellants had disposed of clothing before the rest of their clothes were taken by the police, they might have thought that that explained why no such traces were found.

I do not myself consider that the views of these experts that it was extremely likely that such traces would be found are in the circumstances sufficient to displace the conclusion that the E-type and Mark 10 collided G and Sibbett was murdered on the A.182 where the debris was found shortly before midnight when, according to Stafford's and Luvaglio's evidence, the E-type was in their possession, undamaged, and in or approaching Newcastle: nor do I consider that their views gave rise to any reasonable doubt as to the correctness of that conclusion.

In the course of the argument, every possible point, including those H raised at the trial and considered by the jury, was advanced by counsel for the appellants before this House. I am grateful to them for doing so. I have now referred to all the main contentions put forward. I do not think it necessary to add to the length of this speech by referring to the

other points raised. Suffice it to say that I have carefully considered all of them.

At the end of the day it is for this House to say whether in the light of the further evidence the verdict was unsafe or unsatisfactory. On the evidence the jury heard it cannot be maintained, indeed it was not asserted, that it was unsafe or unsatisfactory. In cases where no new evidence is heard, Parliament has enacted that it is for the Court of Appeal, and, if there is a further appeal, for this House to decide that question and Parliament has drawn no distinction between such cases and fresh evidence cases.

While, as I have said, the Court of Appeal and this House may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question.

I can myself see no grounds for concluding that in the light of the further evidence the jury might reasonably have doubted the correctness of their verdict.

In my opinion, there is no ground for saying that the verdict was unsafe or unsatisfactory. I can find no reasonable explanation for the presence of the Mark 10 in its damaged condition at Pesspool Bridge, for the presence there from before 12.30 a.m. of the car, for the debris on the A.182 and in Pesspool Lane which is consistent with the innocence of the accused, and the jury were, in my opinion, fully entitled to come to the conclusion that the appellants were not telling the truth when they said that when they returned to Newcastle the E-type was undamaged. I have endeavoured to form my opinion while ignoring the views expressed by the Court of Appeal on two occasions, but I am fortified in the conclusion to which I have come by the fact that the Lord Chief Justice and five Lords Justices reached the same conclusion.

For the reasons I have stated in my opinion these appeals should be dismissed.

LORD DIPLOCK. My Lords, I have read the speeches of my noble and learned friends Viscount Dilhorne, Lord Cross of Chelsea and Lord Kilbrandon. I agree with them that the statute under which this appeal is brought to this House requires each of us to ask himself the question: Under all the circumstances of the case as it now stands in the light of the additional evidence, am I myself satisfied that the verdict of the jury was safe and satisfactory? Those three speeches taken together contain a detailed analysis of the facts proved by the evidence adduced at the trial and on the reference to the Court of Appeal which is the subject of the present appeal to this House. In my opinion, too, those facts point irrefutably to the guilt of the appellants. In common with 12 members of the jury, with six members of the Court of Appeal and with the rest of your Lordships, I myself have no doubt as to their guilt. I would dismiss these appeals.

LORD CROSS OF CHELSEA. My Lords, I have read the speech prepared by my noble and learned friend Viscount Dilhorne and I agree with him

that these appeals should be dismissed; but in view of the importance of this case I will add some words of my own.

It was argued most strenuously by counsel for the appellants that the Court of Appeal ought to have asked itself expressly whether if the fresh evidence had been given at the trial together with the original evidence the jury might have had a reasonable doubt as to the guilt of the accused and that its failure to ask itself the question vitiated its judgment. I do not agree. Section 2 (1) (*a*) of the Criminal Appeal Act 1968 simply directs the court to allow an appeal against conviction if it thinks that under all the circumstances of the case the verdict is unsafe or unsatisfactory. In a fresh evidence case it is natural for the court to put itself in the position of the jury which convicted on the original evidence and to ask itself whether the addition of the fresh evidence might have induced a reasonable doubt in its mind. But that is only another way of asking whether it might have induced a reasonable doubt in the minds of the members of the court if they had constituted the jury. It is, of course, true that two equally reasonable men may differ as to whether there is a reasonable doubt as to the guilt of the accused. But if I feel sure that he is guilty and you feel a doubt on the point I must regard your doubt on that point as unreasonable however reasonable a person I consider you in general to be. Conversely, if I regard your doubt as reasonable I cannot feel sure that the accused is guilty. I do not think that the Court of Appeal when, in the cases to which we were referred, it asked itself whether the jury might have felt a reasonable doubt in the light of the fresh evidence, was intending the formula to cover a doubt which the court would think unreasonable though the jury might wrongly think it reasonable. It is to be remembered that in many fresh evidence cases the court does not commit itself to any view of its own as to the effect of the fresh evidence. At one end of the scale there are cases where the court will say:

> "This fresh evidence puts such an entirely new complexion on the case that we are sure that a verdict of guilty would not be safe. So we will quash the conviction and not order a new trial."

At the other end of the scale there will be cases where the court will say, as it said in effect in this case:

> "The fresh evidence though relevant and credible adds so little to the weight of the defence case as compared with the weight of the prosecution's case that a doubt induced by the fresh evidence would not be a reasonable doubt. So, we will leave the conviction standing."

But in many cases the attitude of the court will be:

> "We do not feel at this stage sure one way or the other. If this fresh evidence was given together with the original evidence and any further evidence which the Crown might adduce then it may be that the jury—or we, if we constituted the jury—would return a verdict of guilty but on the other hand it might properly acquit. So we will order a retrial."

It was argued that this approach to "fresh evidence" cases would be inconsistent with the approach of the court to "proviso" cases. It may

be, as my noble and learned friend suggests, that different considerations apply to such cases; but though I would not wish to express a concluded opinion on the point I am not—as at present advised—satisfied that it would be wrong for the court to say when there was, for example, a wrong direction in the summing up.

> "If the substitution of the right for the wrong direction led the jury to entertain a doubt as to the guilt of the accused which they would not otherwise have felt we are satisfied that such a doubt would not be a reasonable one—and so we shall apply the proviso."

Turning to the facts I have no doubt that a jury which convicted on the original evidence alone, but was led to acquit by reason of the fresh evidence would be acting unreasonably. One starts with the admitted fact that there was a collision on the night of January 4 to 5, 1967, between Sibbett's Mark 10 and the E-type belonging to Vincent Luvaglio which the accused borrowed in the afternoon of January 4 and returned to its garage in a damaged condition on the morning of January 5. If the account of their movements given by the accused was true the collision must have occurred between about 12.30 a.m. when they left the E-type outside the Bird Cage Club in an undamaged condition and about 1.45 to 2 a.m. when they came out of the club and found that another car had run into it. There is no doubt that at 12.30 a.m. a Mark 10 was standing in South Hetton at a little distance from the kerb facing southwards near the railway bridge and that at 5.15 a.m. Sibbett's Mark 10 was found at that spot, damaged owing to its collision with the E-type, with a hole in its radiator which had caused the coolant to escape, the engine to become overheated, and the car to come to a halt; and with Sibbett's dead body lying across the back seat. If the Mark 10 which was standing in South Hetton at 12.30 a.m. was Sibbett's Mark 10 and if it had already collided with the E-type, then the story told by the accused must have been untrue since according to them at 12.30 a.m. the E-type was in an undamaged state outside the Bird Cage Club in Newcastle some 16½ miles away. If their story was true and the Mark 10 which was standing near the bridge at South Hetton about 12.30 was Sibbett's Mark 10 it must then have been undamaged and have collided with the E-type in the course of the next hour and a half. Alternatively, the Mark 10 which was at South Hetton at 12.30 must have been another Mark 10 for which Sibbett's Mark 10, damaged, overheated and containing Sibbett's body, was substituted sometime between 12.30 and 5.15. If the jury were satisfied that the account of their movements given by the accused was untrue they were clearly entitled to infer that the accused played a part in the murder, though they may not have been the sole participants in it. Further, although the defence was under no obligation to advance any theory as to how the collision between the two cars had occurred, if the jury could not find any explanation consistent with the truth of the story told by the accused which had even a shadow of plausibility they would be bound to convict unless the theory advanced by the prosecution was itself open to serious objections.

One proceeds, therefore, to consider first whether there is any conceivable explanation of the collision which is consistent with the truth of the

evidence given by the accused. What is suggested is that there were people who wished to kill Sibbett and to throw the blame for his murder on the accused. There is nothing particularly improbable in that supposition. Next it is suggested that the method of throwing suspicion on the accused devised by these people was to engineer a collision between the E-type and Sibbett's Mark 10 that night and to leave incriminating traces in the shape of fragments of glass, perspex and paint belonging to the E-type near Sibbett's Mark 10 which had his body inside. Here one begins to run into grave improbabilities. The E-type did not belong to either of the accused but to Vincent Luvaglio. How did the conspirators know that the accused were going to borrow it for the night, and how did they know that the accused would come to the Bird Cage Club at 12.30 a.m. and about how long they would stay there? But assume that one credits the conspirators with the knowledge that the accused would be using Vincent's E-type that night and that they would bring it to the club about 12.30 a.m., where did the collision take place? Was Sibbett's Mark 10 brought to the club or the E-type taken away from the club? If the former, then the conspirators must have planned to remove and succeeded in removing every single scrap of the incriminating broken glass, perspex and paint from the gutter outside the club without leaving a slightest trace that the collision had taken place there and not at or near the scene of the murder. If one bears in mind that this is supposed to have been happening in the middle of a snowy night in January the supposition that the conspirators would have hoped to perform or could have succeeded in performing such a feat is altogether incredible. If, on the other hand, the plan was to take the E-type away from the club and to cause it to collide with Sibbett's Mark 10 at some suitable spot elsewhere where the incriminating debris could be left at the scene of the collision the conspirators were running the risk that the accused or one of them might leave the club before the E-type was returned and the further away the collision was staged, the graver that risk would be. But assume that the conspirators took this risk—and it is certainly a less wildly improbable supposition than that they engineered the collision outside the club—how does one account for the Mark 10 being found by the railway bridge and the incriminating traces at two different spots a considerable distance away? The whole object of the supposed exercise would be that those who found Sibbett's damaged car with his dead body in it would at the same time find evidence which showed that the car which had run into it was Luvaglio's E-type. But in fact no such evidence was found beside the car; it was found days later in the course of a prolonged search of the neighbourhood and might very well never have been found at all. Again, what conceivable reason was there for leaving a Mark 10—whether Sibbett's or someone else's—in an exposed position near Pesspool Bridge from 12.30 a.m. onwards 16½ miles away from the club from which the E-type would have to be taken and to which it would have to be returned as quickly as possible? And how does one account for the overheating of the car engine owing to the loss of the coolant unless Sibbett's Mark 10 came to a stop near the bridge involuntarily? It so happened that I had never heard of the Sibbett murder before I read the papers in this appeal and as soon as counsel made it clear that they accepted that the car which was in collision with

Sibbett's Mark 10 that night was Vincent Luvaglio's E-type I began to rack my brains—as I have no doubt the jury during its retirement racked its brains—to think of any explanation of the undoubted facts which would be consistent with the accused's account of their movements and at the same time might conceivably be true. I could find none. The evidence pointing to the conclusion that the accused were telling lies is indeed overwhelming.

One turns then to consider whether there are any countervailing objections to the theory advanced by the prosecution as to the time and place of the murder and the participation of the accused in it. In this connection it is to be observed that the "fresh evidence" in this case is not evidence of a character different from that called at the trial; it was simply further evidence reinforcing evidence of a type relied on by the defence at the trial. Four points in particular were relied on by counsel for the appellants. The first was that it was extraordinary that of the 39 people who were shown by the original evidence and the further evidence to have passed the Mark 10 by the bridge between about 12.30 and 3.45 a.m. not one observed that it was damaged. I can only say that judging by the photographs and having regard to the fact that this was happening in the middle of a snowy night in a not very well lighted street, I am not in the least surprised that no one noticed the damage. Of course if your attention is directed to it you can see it clearly enough but it is not the sort of damage which would strike the casual observer. What, to my mind, is the most significant item in the evidence given by these passers-by is the statement of Mr. Wood—who saw the car about 1.45—that its number, so far as he could read it, accorded with the number of Sibbett's car. On the accused's evidence the collision must have occurred before Wood saw the Mark 10 since they found the E-type in a damaged state outside the club at about 1.45 to 2 a.m. As people had been passing along the street at fairly short intervals between 12.30 and 1.45 it is extreme unlikely that Sibbett's damaged car could have been substituted for another undamaged Mark 10 in that hour and a quarter and, of course, if the damage occurred before 12.30 a.m. the accused must have been lying. Counsel did indeed throw out the suggestion that the conspirators had equipped another Mark 10 with a false number plate; but what was the point of using another Mark 10 at all—let alone providing it with a false number plate? The second point relied on was that if the murder was committed at the time and place suggested by the prosecution, then in the light of the fresh evidence as to his movements Mr. Golden would have heard the shots; but the calculations in question are based on assumptions as to the distance at which he was from the mouth of Pesspool Lane when the two Jaguars passed him and the speed at which he was cycling which may be far from accurate. It would not be reasonable to attach weight to speculations of that sort. The same sort of criticism can be directed against the third point relied on—namely, the evidence of Mrs. Walpole. This was to the same effect as the evidence of her mother which was given at the trial and depends on their estimate of the time at which they got home that night after clearing up and eating a supper at their place of work. They had no reason to note the exact time when they got back and if their estimate was only about a quarter of an hour out it would

make all the difference. Again it would be unreasonable to attach weight to evidence of that sort. Finally, counsel relied strongly on the evidence showing that if it was the accused who had lifted Sibbett's dead body from the road and placed it in the car there would certainly have been signs of contact between his body and their clothing. This point would undoubtedly have considerable force if one knew what the clothes in question were and that they had been examined by the prosecution expert; but one does not know that. Would it, for example, be in the least surprising that on a snowy night in January the accused should have been wearing mackintoshes? At the end of the day the position is, to my mind, that on the prosecution side of the scales you have evidence weighing, say, a hundredweight: that against that you have on the defence side original evidence weighing, say, five pounds, to which you add fresh evidence weighing, say, another three pounds. The balance remains overwhelmingly in favour of the Crown and on the totality of the evidence a doubt as to the guilt of the accused would be unreasonable. Consequently I do not think that the verdict is unsafe or unsatisfactory.

LORD KILBRANDON. My Lords, in these appeals the House is exercising, as the Court of Appeal in their turn were exercising, the appellate functions conferred by the Criminal Appeal Act 1968. The House, in virtue of section 35 (3) of the Act, may exercise any of the powers of the Court of Appeal; the relevant power of the Court of Appeal is that given by section 2 (1) (*a*). It is there provided that the Court of Appeal, and thus this House, shall, except as provided by the Act, allow an appeal against conviction if they think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. There are two other contingencies, with which we are not concerned, where appeals must be allowed, but unless one of the three is present the court, and thus this House, must dismiss the appeal.

One of the circumstances of the case which the court must take into account will be testimony of witnesses who may have been ordered to give evidence by the appellate court, after conviction, in virtue of section 23 of the Act, whether there has been a reference by the Secretary of State under section 17 or not. The fresh evidence has to be taken into account for the purpose of coming to a conclusion whether, under all the circumstances of the case, including the evidence at the trial, the verdict of the jury, and the conclusions which may be drawn from the verdict as to the way in which the jury evaluated the evidence which they had before them, the verdict is "unsafe or unsatisfactory."

The difference between these words and the phrase used in the Criminal Appeal Act 1907, "unreasonable or incapable of being supported" is important as indicating the erection of a standard for the setting aside of convictions which, until the new phrase was introduced in 1966, it would not have been deemed possible to quash. This is not truly a consequence of a different form of words necessarily and from its own content demanding a standard different from that operative theretofore. It would have been possible for the courts, after 1907, to have said that if a verdict was unsafe or unsatisfactory it was not reasonable. But this line was not taken; more emphasis was laid on the concluding part of the phrase, and verdicts

which were supported by evidence which in law the jury could accept—and it was for the jury to say whether they *would* accept—were held to be unassailable. A conviction depending solely on the fleeting identification by a single stranger could, for example, have been upheld, though on a different view of the statute of 1907 it would have been possible to condemn it as unreasonable, just as today it would very probably be thought unsafe or unsatisfactory, and be set aside on those grounds.

The setting aside of a conviction depends on what the appellate court thinks of it—that is what the statute says. If it were necessary to expand the question which a member of the court, whose thoughts are in question, must put to himself, it may be, "Have I a reasonable doubt, or perhaps even a lurking doubt, that this conviction may be unsafe or unsatisfactory? If I have I must quash. If I have not, I have no power to do so."

The primary criticism offered on behalf of the appellants against the Court of Appeal's approach was this: it was said that, having decided that certain significant new evidence was credible, in the sense that it was not, from the ill-demeanour of the witnesses or its inconsistency with other evidence, obviously unworthy of belief, the court, instead of asking themselves whether the new evidence might have caused the original jury, had they heard it, to have a reasonable doubt, asked the question whether the new evidence was a circumstance which caused themselves to have a reasonable doubt. This criticism seems to me to ignore the plain words of the statute, which, in the context we are here considering, direct the court to set aside the conviction if, and only if, "they think" the verdict is unsafe or unsatisfactory. We were referred to a number of cases in which, it was said, the potential effect on a jury rather than the actual effect on the appellate judges was held to be the proper test. I agree that this test may be one of the routes which a judge may follow in making up his mind; he may say to himself, "I think this verdict is unsafe, because the fresh evidence might have caused a jury to have reasonable doubt." But, in my opinion, he cannot say to himself, "After hearing the fresh evidence I have no reasonable doubt of the appellant's guilt, but I concede that a reasonable doubt is open, and might influence someone else, that is, a jury." To concede that a reasonable doubt is open is to admit that one has a reasonable doubt oneself. Having a reasonable doubt, one must "think" that the conviction is unsafe; on the other hand, being convinced, as the Court of Appeal was in the present case, that "the inference of guilt is irresistable," they could not think that the conviction was unsafe or unsatisfactory, and therefore had no statutory power to interfere with the verdict.

In common, I believe, with your Lordships, I find that some of the language used by the Court of Appeal may be open to the construction that certain incidents have caused them to doubt whether the verdict was safe and satisfactory, or that they considered that a burden was laid upon the appellants to displace by fresh evidence the case for the prosecution. My Lords, it is inconceivable that the Court of Appeal could have misdirected themselves on the second of these points. It is also plain that the language used must be read subject to their declaration that they were convinced of the appellants' guilt, after hearing the fresh evidence; this really disposes of the first point too. But, in any event, the question which is now in issue

is not whether the Court of Appeal were in all respects right in the way in which they expressed their conclusions, but whether this House, sitting as a court of criminal appeal under section 35 of the Act of 1968, thinks that the verdict was unsafe or unsatisfactory.

I have had the advantage of reading the detailed analysis of all the evidence now available made by my noble and learned friend, Viscount Dilhorne. I so entirely concur in it that it would be quite unhelpful if I were to venture on any such exercise on my own. I will refer to three matters only.

First, it need hardly be said that the defence is under no obligation to produce a plausible theory which will account for all the aspects of a perplexing series of incidents. On the other hand, when the weight of circumstantial evidence seems to lie heavily on the side of guilt, it is necessary that the jury, then successive appellate courts, look carefully at criticisms which are directed at that evidence in order to see whether they can be made good within the framework of circumstantial probability. If they can not, then as criticisms they have no force. It is not that no defence has been proved: it is that a strong circumstantial case has not been shaken. This is, in my opinion, the situation here. Each substantive criticism of the evidence relied upon by the prosecution involves such glaring improbabilities, when one tries to look at it as part of a coherent whole, that one finds it impossible of acceptance, and the case against the appellants remains unaffected.

Secondly, one has to begin with the verdict of the jury upon the evidence which they had before them. Upon it they came, for example, to an unfavourable conclusion as to the credibility of the accused, and of the alibi defence which had been proferred. Does the fresh evidence make that conclusion seem to us unsafe or unsatisfactory? It is suggested that the evidence of Mrs. Walpole should have that effect. I take this point in particular, because it illustrates the proposition that as of now it is the opinion of this House on the safety of the verdict that is in debate. I do not for my part altogether agree with the favourable view of her evidence formed by the Court of Appeal. This is no matter of appearance or demeanour in the witness-box; it stands on the record. She is wrong as to the regular presence of Vincent Luvaglio's E-type in Chelsea Grove from the summer right up to the New Year. This is vital to the question whether she inspected it sufficiently closely on that night as to be reliable when she say it was undamaged. Again, the jury no doubt had its own views as to whether on a "late night" the members of the bowling club dispersed precisely at the prescribed hour, how much time was spent in clearing up, how long it took to acquire a meal of fish and chips, and how long a time was taken over the consumption of it. The jury having apparently rejected Mrs. Hill's estimate of these passages of time, I agree with the Court of Appeal that that rejection cannot be regarded as unsafe because of another estimate from an equivalent source, presented years later, after ample opportunity for consultation, by a witness, as I would add myself, whose reliability in another matter, not specifically referred to by the Court of Appeal, is obviously open to question.

Thirdly, I refer to the fresh scientific testimony as to what has been called the trace evidence. I am bound to say that this part of the case has

given me some difficulty. It is a powerful circumstance, developed in the fresh evidence, that traces of an association among the persons of the accused, their clothing, the deceased, the debris resulting from the collisions and the mud on the road are not only awanting but might have been expected, in accordance with well known features of criminal investigation, to have been detectable. I have, however, come to the conclusion that this absence does not make the conviction, in all the circumstances, unsafe. In the first place, it was prominently before the jury. It seems inconceivable that experienced defence counsel could have contented themselves by saying to the jury that the absence of such evidence was a point in favour of the accused, without at the same time pointing out the other side of the coin, namely, that it constituted a formidable obstacle in the way of the prosecution. The fresh evidence really does no more than emphasise what is in the nature rather of a reasoned conclusion, already rejected by the jury, than testimony of something fresh.

In the second place, it is never possible to give the same weight, arguendo, to the absence of such evidence as to its presence, since the traces may have been there but overlooked. I do not, however, think this point would have been a fair one in the absence of the fresh evidence of Mr. Lee as to the relatively limited character of his examination. Thirdly, the weight of the absence of the trace evidence must be balanced against the overwhelming character of the circumstantial evidence pointing in the direction of guilt.

Since I do not think that the verdict, under all the circumstances, is unsafe or unsatisfactory, I would dismiss these appeals.

Appeals dismissed.

Solicitors: *L. S. de Meza, Jonas & Partners; Kingsley, Napley & Co.; Director of Public Prosecutions.*

J. A. G.

END OF VOLUME AND OF APPEAL CASES FOR 1974