



Neutral Citation Number: [2011] EWCA Crim 1258

Case No: 201005576 D2

**COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM CENTRAL CRIMINAL COURT**  
**MR JUSTICE SEEBAG SHAW**  
**18TH MARCH 1975**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 24/05/2011

Before :

**LORD JUSTICE HUGHES VICE PRESIDENT OF THE COURT OF APPEAL**  
**CRIMINAL DIVISION**  
**MR JUSTICE HENRIQUES**  
and  
**MRS JUSTICE MACUR DBE**

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Between :

George Davis  
- and -  
The Queen

**Appellant**

**Respondent**

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Mr D R B Whitehouse QC and Miss H Oliver (instructed by Shaw Graham Kersh) for the  
Appellant George Davis  
Mr R Whittam QC (instructed by Crown Prosecution Service) for the Crown

Hearing dates : 23<sup>rd</sup> and 24<sup>th</sup> February 2011  
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**Approved Judgment**

**Lord Justice Hughes :**

1. Just over 35 years ago in March 1975 George Davis was convicted by a jury at the Central Criminal Court of participating in an armed wages robbery, in the course of which two guns were carried and a pursuing policeman was shot in the leg.
2. Davis' case has been referred to this court by the Criminal Cases Review Commission (CCRC) under s 9 Criminal Appeal Act 1995. By statute, the effect of that discretionary decision to refer is that the case comes before us in all respects as if it were a timely appeal against conviction: s 9(2).
3. The present decision of the CCRC to refer the case to this court was made in 2010. It comes after successive refusals to refer, by Home Secretaries when the decision was theirs, and subsequently by the CCRC itself in 2005. The Crown has asked us to look at the reasons which the CCRC gave for the most recent refusal in 2005. It is clear that we cannot do so. Whatever those reasons were, they cannot detract from our duty to decide, now that there is a valid "appeal" before us, whether the conviction is securely based or not: in the language of section 2(1) of the Criminal Appeal Act 1968 the question is whether or not the conviction is "safe".
4. The passage of so long a time since the offence and the trial does make for very real difficulties in considering an appeal against conviction. Witnesses have in some cases been asked in the last two years to try to amplify or explain their actions, and to recall their states of mind, of some 35 years ago. That is a nigh impossible task, and the reliability of their attempts to do what has been asked is, however hard they may try to help, bound to be questionable.
5. We should however make it clear that when this court decides whether a conviction is or is not safe it is not deciding whether or not the defendant is guilty. It may sometimes happen that it is demonstrated on appeal that a defendant did not commit the offence; fresh DNA evidence, for example, is sometimes capable of doing that. But in a great many other cases it is simply impossible to know whether the defendant is guilty or not. He may be, or he may not be. The question for this court is whether the jury's verdict is safe, that is to say securely based, not whether he is positively exonerated. In the present case, when the then Home Secretary, Mr Roy Jenkins MP, remitted the balance of the defendant's sentence in May 1976, he did so on the basis that he was

"satisfied that the identification evidence has been seriously weakened"

but that he did

“not have evidence of innocence to justify recommending a free pardon.”

As will become clear, we are in a similar state of ignorance whether or not the defendant committed this robbery and we are unable positively to exonerate him. But that is not the question for us.

6. Even where a decision of this court cannot positively exonerate a defendant, it may be important that it be understood that, if a conviction was unsafe, his reputation is in consequence unscathed. It is unfortunate to have to record, in the present case, that the defendant's reputation is not unscathed. In September 1977, just over a year after the Home Secretary remitted his sentence on the present robbery, the defendant committed a similar armed robbery at the Bank of Cyprus; he was caught in the act and in due course he pleaded guilty and (after appeal) served a sentence of 11 years' imprisonment. His case has been presented to us explicitly on the basis that he has no expectation of compensation or other recognition. His reputation is, clearly, that of an armed robber whatever the result of this reference.
7. For the reasons explained, none of that affects the duty of this court, once the appeal is before us, to examine the conviction and to decide whether or not it is securely based, that is to say, safe. If it is unsafe, the fact that Davis was a serious active criminal cannot justify it remaining in existence.

#### The robbery

8. The robbery with which we are concerned was carried out at about 1000 on the morning of 4 April 1974. Its target was a wages delivery at the offices of the London Electricity Board in Ley Street, Ilford. Four men used a gas cylinder to smash their way into the building and escaped with the money in cases to a waiting getaway car (a Ford Cortina estate with driver), parked just round the corner. They wore a variety of disguises and top clothing of the kind which it would be easy to discard or switch to confuse pursuers or observers. Two carried guns, one a revolver armed with .410 cartridges and the other a shotgun. Including the driver, there must, therefore, have been at least five of them in all.
9. Some of the robbery was seen by two detective constables, Grove and Appleton, in the area in an unmarked van. Grove bravely gave chase on foot and was shot in the leg by the man with the revolver. Appleton photographed the escape; this resulted in clear pictures of the outward appearance of the four who had gone into the LEB building, but given the disguises and bulky clothing no identification could be made from the photographs.
10. The robbers switched cars a few streets away to a Wolseley 1800 car which must previously have been put in position as a cut-out vehicle. They continued their escape. Other police vehicles from the area were alerted and gave chase. To evade pursuit the robbers abandoned the 1800 and hijacked a passing Ford Zodiac. In that car, they ran into traffic on Woodford Avenue. They left the Zodiac and split up.

Two of them hijacked a passing Ford Cortina and made good their escape, abandoning the car later. Others crossed the dual carriageway of Woodford Avenue and hijacked an American saloon, conveniently referred to at the trial and subsequently as a Dodge.

11. In that car they continued their escape until they lost control of it and crashed it into a lamppost at the junction of Brandville Gardens and Cranbrook Road in Barkingside. The occupants of the crashed car split up. Two ran, separately, into the adjacent grounds of a Dr Barnado's home. Of those two, one seems to have escaped northwards on foot, judging by the later finding of abandoned clothing in a public lavatory in that direction. The other circled round, jumped over the fence back out of Dr Barnado's grounds into Cranbrook Road, and there he commandeered yet a fourth hi-jacked car, a Ford Cortina driven by an unfortunate young mother with two young children in the back. In this he made off, and not long afterwards left it and its no doubt terrified occupants and made good his escape.
12. It is apparent that this was a professionally planned and executed crime, ruthlessly carried out. That no one was killed was fortuitous.

### The trial

13. Four men were tried for this audacious robbery: England, Ishmail, Davis and Hole. The evidence against them differed. England and Hole were acquitted by the jury. The jury was unable to decide about Ishmail, as was a second jury at re-trial, so that proceedings against him were, as convention required, discontinued. Davis was convicted by the jury.
14. The case against each defendant depended substantially upon identification. Police officers had seen the events of the robbery at three main stages. The scene of the robbery itself was seen by constables Grove and Appleton. The transfer into the Dodge car at Woodford Avenue was seen by three different officers, Messrs Newell, Lawie and Brady. Some of the events in and around Dr Barnado's were seen by two traffic officers, constables Moore and Pickett. In one of the Dr Barnado's buildings was Mrs Bone, the superintendent of a children's home in the complex. She came outside at the commotion and encountered one of the two robbers who went into the grounds. She was close enough to him to say to him that he was bound to be caught, thinking at the time that there had been no more than a traffic accident from which he was running away.
15. At the outset of the trial the Crown relied upon the identification of Davis, at identification parades, by (i) the three officers at Woodford Avenue and (ii) the two officers, Grove and Appleton, at the LEB offices. Those identifications had been made at separate parades, both attended also by a number of other potential witnesses. The three Woodford Avenue officers had viewed parades on 17<sup>th</sup> May 1974. DCs Grove and Appleton had not attended those parades but had instead viewed later parades on 10<sup>th</sup> and 11<sup>th</sup> July 1974. Mrs Bone had viewed the earlier set of parades (17<sup>th</sup> May) on which Davis stood, but had made no identification then. She was called

to give other evidence and, after leaving court, revealed that at the parade she had recognised the robber to whom she spoke but had not been able to bring herself to touch him. Moreover, she said, unasked, that she had recognised that man in court when giving evidence, and she described his position in a way which showed unequivocally that she was speaking of Davis. She was recalled, on the application not only of the Crown but also of England, and she gave what appears to have been forthright and positive evidence that Davis was the man she had spoken to.

16. The Crown also relied on identifications of the other defendants. England had been identified by a lady in Ley Street near to the LEB and by a second lady in the grounds of Dr Barnado's. Although both were clearly honest witnesses doing their best to help, neither identification was at all strong. The lady at Ley Street had also, mistakenly, identified a volunteer at the identification parade as having been one of the robbers, and the evidence in court of the second lady in Dr Barnado's grounds occasioned a warning in her case also; the judge described both identifications of England as 'unreliable' and cautioned the jury against treating either as safe. Apart from this, Ishmail had been identified by Grove and Appleton, and Hole had been identified by Grove. Hole had also initially been selected on parade by Appleton but he said both then and at the trial that he could not be sure. None of the defendants other than Davis had been identified by the Woodford Avenue officers, nor by Mrs Bone.
17. Although each of the defendants was said by one or more police officers to have made arguably incriminating remarks, these did not amount to confessions. There was an issue whether they had or had not been said, but they were treated by the judge in summing up as of minor significance even if uttered. The conduct of the defence involved making clear to the jury that all the defendants were from a criminal background. The judge advised the jury to treat the alleged remarks as, in effect, the kind of things which such people might say whether guilty or innocent. Thus it was the (different) identifications on which the case depended.
18. Each of the defendants advanced an alibi. Davis contended that on the morning of the robbery he had been driving his brother's car operating as a minicab, and that at the particular time of events at the LEB he had been driving a Mr Murphy to Ilford Golf Club to play golf.

### The Moulder Enquiry

19. After the trial there was a substantial enquiry conducted by Chief Superintendent Moulder of the Hertfordshire Police, occasioned by the making of a very large number of complaints against the investigating officers, not only by Davis, but also by the other defendants. The overwhelming majority of those complaints were found to be unsubstantiated. They appear to have amounted to an attempt to discredit the bona fides of a large number of police officers, including one now heavily relied upon by the appellant: the then Detective Inspector Reynolds, subsequently Assistant Chief Constable Reynolds in another force, prior to retirement. Moreover it was discovered

that there had clearly been a manipulative attempt prior to the trial, on behalf of one or more of the defendants, to compromise this officer. However, there emerged from the enquiry fresh information, particularly affecting the identifications of constables Grove and Appleton, on which the appellant now relies. That the appellant, or his wife on his behalf, made a large number of groundless complaints, and even if some might have been deliberately false, does not affect the question whether other information emerging from the enquiry and subsequently demonstrates that the conviction is unsafe.

### Grounds of appeal

20. After a comprehensive examination of the case, the CCRC referred to this court a single ground of appeal which in reality incorporates two matters:

- i) fresh material concerning the identifications by Grove and Appleton, some of which was available but not disclosed at the trial and some of which came into existence afterwards; and
- ii) fresh recent evidence from PC Moore.

In the interests of resolving all outstanding issues so long after the event, we permitted Mr Whitehouse QC to argue the case on a basis wider than the reference. Much of his additional argument represented in effect expansion of the ground concerning Grove and Appleton's identifications. Additionally, he raised the following matters by way of application for leave under s 14 (4B) Criminal Appeal Act 1995:

- iii) material said to cast doubt on the identification made by Mrs Bone;
- iv) post-trial information from the young mother whose car was the last hi-jacked in Cranbrook Road;
- v) a number of unused witness statements which were not in the hands of the defence at the trial;
- vi) a document examiner's report affecting a log book relied on by Davis at trial as supporting his alibi;
- vii) post-trial material affecting an officer with a co-ordinating role in the case.

## Identifications by Grove and Appleton

21. In their unmarked van, constables Grove and Appleton had driven along Benton Road to a T junction with Ley Street. They had seen what turned out to be the getaway Ford Cortina parked in Benton Rd, where it might have disgorged some of its occupants. When waiting at the junction to turn right into Ley St they had been passed on the inside by this car, which had pulled into Ley St somewhat ahead of them; it appeared to have at that time two people in it. They had had an opportunity to see the driver of the Cortina at that stage, but it was never suggested that Davis was the driver. They became suspicious and pulled up in Ley St, where they had some opportunity to see some of the robbers (whether having emerged from the car in Ley St or earlier) whilst en route to the robbery on foot and also whilst running away afterwards. Their viewpoints were not identical because of the different actions they undertook. The photographs which Appleton took clearly showed that of the four who went into the LEB premises, one was wearing a motor cycle helmet and carrying a pistol, and a second was wearing a flying helmet; the second can be seen to be carrying something long which appears to be the shotgun.
22. At the trial Grove gave evidence that he was able to identify Davis as the man who wore the flying helmet. He had seen that man, he said, en route to the robbery on foot, either not yet wearing the helmet or just putting it on. He also gave evidence that he was able to identify Ishmail as the man in the motor cycle helmet; it appeared that he had seen that man only when wearing the helmet. Thirdly, he said that Hole was another of the four robbers emerging from the LEB. He had identified each of these defendants at the two parades on 10<sup>th</sup> and 11<sup>th</sup> July 1974.
23. Mr Grove was undoubtedly extremely courageous on the occasion of this robbery. Having seen four armed men go into the LEB he went, unarmed save with a tommy bar from the van, to confront them as they emerged. He managed to strike a blow at one of them. He was shot in the leg by the man with the motor cycle helmet but nevertheless got up and pursued the four along Ley St and round the corner. Despite being shot at again he continued to give chase and nearly managed to seize hold of the last of the robbers as he was dragged into the already moving getaway car. He was significantly, although luckily not grievously, injured in the robbery and he was undoubtedly in some difficulties immediately afterwards, as might be expected. He was unable to work for some twelve weeks.
24. Prior to any identification parade being held, Grove had been asked to view albums of photographs held at New Scotland Yard. That was a perfectly proper procedure and rightly has not been criticised. What however emerged later is that in doing so he said that he recognised one of the photographs as that of one of the robbers. The person in that photograph was not any of the eventual defendants. Chief Superintendent Moulder obtained an account of the handling of this purported recognition from Detective Inspector Reynolds. Mr Reynolds, then stationed at Ilford, was the officer immediately in charge of this investigation in its early stages until it was taken over by the Robbery Squad in May 1974. According to Mr Reynolds, he received a telephone call from Scotland Yard informing him that Mr Grove had picked out a

photograph. In consequence, Grove was immediately asked to return to Ilford and there spoke to both Mr Reynolds and his superior, DCS Cater. According to Mr Reynolds, Grove was confident that the photograph he had picked out was of the man in the flying helmet, carrying a shotgun, that is to say the man who was subsequently alleged at the trial to be Davis. Said Mr Reynolds, he himself had already interviewed the man whose photograph Grove had picked out, and had, in his mind, excluded him because (a) he had a satisfactory alibi and (b) Mr Reynolds reckoned that he could assess the height of the robber from the photographs and the brickwork of the building behind him, and the man picked out was the wrong height. Mr Reynolds told Grove that he had made a mistake. According to him Grove accepted it but said again that he had been sure that he was right.

25. Whilst it was known by the time of the trial that Grove had viewed photographs at Scotland Yard, the critical fact was not known, viz that he had purported to identify one of them as the man in the flying helmet. Moreover, at committal proceedings, when asked about viewing the photographs, Grove had said that he had not seen anyone in them whom he now recognised, that he did see “quite a few people” who resembled the men at the robbery, and that he did not know whether any note had been made of which photographs those were. It is difficult to see how these statements, especially the last, can have been frank, given the return to Ilford and the discussion with his seniors. Moreover, after the trial when interviewed by Mr Moulder, Grove repeated that he had not specifically picked out anyone from the photograph albums; that too cannot have been frank. We are not at all sure how reliable Mr Reynolds’ assessment from the Ley St photographs of the height of the person selected by Grove can have been, but that is not the point. If the true position had been known, Grove would undoubtedly have been cross examined at the trial both about his identification from the photograph and his evidence at committal. The net effect was that the jury did not have the opportunity of considering the fact that Grove had made a positive identification, which he had been sure was right but which his seniors were satisfied was mistaken. That this was so was in part because at committal he mis-stated what had happened. The consequence was that the jury also had no opportunity to consider the impact on his evidence of his willingness to mis-state the facts.
26. Also prior to trial, Grove had been one of a number of officers who kept observations at a club where it was suspected relevant people might be present. There he purported to identify a person as one of the robbers. Subsequently, in the course of the Moulder enquiry, Grove said that he believed this to have been no more than a person resembling the man carrying the gas cylinder, and thus not a definite identification. Mr Reynolds told Moulder (albeit it would seem relying on second hand information) that Grove had said that this person was the man in the motor cycle helmet, ie the man he, Grove, subsequently identified at a parade as Ishmail, and that he was very positive, indeed excited, at the sight of him. Whichever it was, and there is scope for doubt especially after so long, the person concerned was subsequently arrested and satisfied the enquiry team that he could not have been involved in the robbery. Again, the jury did not know that Grove had made this second identification, regarded by his seniors as mistaken and perhaps of the person in the role he was now ascribing to Ishmail, before he purported to recognise Davis and Ishmail at the parades.



27. At the trial, counsel explored the fact that Grove (and Appleton) had not attended the first identification parades on 17 May when other police officers, especially the Woodford Avenue officers, had. The truth was that senior officers had by then doubted the ability of Grove (and Appleton) to make reliable identifications. Given the two erroneous identifications by Grove, that is unsurprising. Both officers had also, it would appear, been de-briefed and the opportunity taken to assess what they could say. It is clear that Grove was aware of the first parades and of the fact that he had not been asked to attend. Whether or not he knew the reason is unclear. Asked at trial whether he would have been available he said, first, that he was still on sick leave but, second, that he could have been taken to the parade. A little later he added that he had gone away to Gloucestershire at some point and could have been out of town at the time of the first parade. Mr Whitehouse asks us to say that his answer was disingenuous. We do not think that it is shown that it was, and his evidence included agreement that he could have been available if asked. But no one told Crown counsel that he had deliberately been omitted from the parade and the point was pursued no further by the defence. The consequence was that the judge told the jury in summing up that he had not attended because of his septicaemia and that no doubt Appleton had been treated similarly in order to avoid any suggestion that one partner might have prompted the other. It is of course true that the opinion of senior officers that Grove and/or Appleton would be less than reliable as identifying witnesses was irrelevant and inadmissible, just as their opinion that they were highly reliable would have been. But if the full circumstances had been before the court the jury would have heard not simply any irrelevant opinion, but also the hard facts of two previous mistakes in identification, one relating to the person said to be Davis and the other perhaps relating to the person said to be Ishmail. Nor would the judge have been led into the error he was.
28. Mr Moulder interviewed Grove at no little length. He clearly entertained doubt about his identifications and put him under some pressure to admit the possibility of unwitting mistake. Grove initially stuck to his identifications although agreeing that the acquittals of the other defendants gave him pause. Eventually, however, he accepted that he might have made an error in relation to Davis. He said that he had begun to doubt his identification after the trial when he had seen a person at a magistrates court who also looked like someone involved in the robbery, although not, it would seem, the man in the flying helmet identified as Davis. He said that he might have quelled his inner doubts out of a sense of loyalty to his colleagues.
29. At that stage Grove remained firm in his identification of Ishmail, despite the disagreements of the juries at his two trials. However, some weeks later when Mr Moulder showed him photographs of Ishmail in the motor cycle helmet he immediately said that this was not the man he had seen. The face was too full, and it was “just not him”. He thought that he had been influenced by a photofit prepared from descriptions, which photofit had resembled Ishmail.
30. We are not persuaded that the reference to loyalty to colleagues carries any sinister implication; the reaction described could be legitimate if it arose only after the trial. The circumstances of Grove’s acceptance of possible error in relation to Davis involved a senior officer putting him under great, albeit well-intentioned pressure, and

appealing to his sense of fairness. It may be that if that had stood alone it would have presented a difficult question as to its impact on his evidence. However, it does not, and combined with the several other features set out in paragraphs 24-29 above there can be no doubt that Grove's identification of Davis is fundamentally undermined. That identification is simply unreliable and the jury did not know it. It is true that the jury knew that Grove had made a different mistake at the identity parades, because he had picked out a volunteer as the driver of the getaway car, but that was much less significant; it was not a proven mistake about the men he was saying he was sure were Davis and Ishmail.

31. Appleton also demonstrated considerable courage in standing his ground and photographing these armed robbers at quite close quarters. He had made a witness statement on the day of the offence. He had not then seen his developed photographs. In it he had referred to four robbers in all, including the driver of the car. He had given descriptions in varying detail of those four men. He had not referred at all to the man in the flying helmet. He later attended the second batch of identification parades in July, with Grove, and there identified both Davis and Ishmail, attributing to Davis the role of the man in the flying helmet and saying that he recognised Ishmail having seen him only through the tinted visor of the motorcycle helmet. According to his evidence, he had not had sight of his photographs at all before doing so. The fact that he had identified Davis as the man in the flying helmet despite making no reference at all to that person in his statement made on the day of the offence was well known at trial. It was properly deployed on behalf of Davis before the jury, which was able to evaluate the strength of his identification in the light of it. However, under cross examination on this point, Appleton said that he had recollected, unaided, not long after the robbery that there had been a fifth man, wearing a flying helmet, and that, now stationed elsewhere, he had telephoned the information to the team handling the enquiry. If accurate, that removed most of the sting from the cross examination. Mr Moulder's subsequent investigations, however, established that there was the usual system for logging telephone messages to the incident room and no sign of any such call. Moreover, Detective Inspector Reynolds had no knowledge of any such additional revelation by Appleton, but said that if it had happened he would expect to have known of it, because it would have been of great importance. These latter pieces of information were not before the jury. They appreciably undermine the identification of Davis by Appleton, and further they raise the question whether his assertion to the jury about how he came to recollect the existence of the man in the flying helmet can have been frank.

#### PC Moore

32. Constable Moore was a traffic officer driving a police car. He was alerted to the escaping robbers in the Dodge car who were coming his way and saw it in the last stages of its escape. He had a brief sighting of it from ahead as it was travelling at some speed. He tracked it to the place where it was crashed into the lamppost near to Dr Barnado's (see paragraph 11 above), but did not have it in view throughout and nor did he see the crash. He saw two men running away from the crashed car. Whether there had been more in the car than the two he saw has been debated before us, but he had said in his deposition at the magistrates' court that there had appeared

to be a minimum of three. The two men he saw both ran into the grounds of Dr Barnados. His colleague PC Pickett pursued one. He followed in the direction taken by the other, but was then alerted by calls from Cranbrook Road to return there. He did not see the man, subsequently said to be Davis, commandeer the Ford Cortina containing the mother and children, but he did have sight of whoever it was at the wheel as it drove away. His account always was that this man appeared to be the one who had been chased by Mr Pickett and was not the man whom he (Moore) had briefly seen through the windscreen of the Dodge as it first came towards him.

33. PC Moore gave no identifying evidence at trial. He had attended the first set of identification parades on 17 May 1974 but made no identification. He had given a description of the man behind the wheel of the commandeered Ford Cortina, which did in a very general way fit Davis - thickset, about 25-30, dark bushy hair and medium height - but it could equally have been hundreds of other people; no one relied on this as implicating Davis and it was not referred to in the summing up.
34. It was the fact that PC Moore, as a local officer, knew Davis (and indeed Ishmail) by sight and by name. That was not referred to in his witness statement. That fact would, by itself, have been irrelevant to the jury unless he had had sufficient sight of the man who was said to have been Davis to have recognised him if it was him, and his evidence did not suggest that he had.
35. The CCRC has now interviewed PC Moore on three separate occasions in 2009 and 2010. In the third of those interviews he says this:

“I have been asked by the CCRC how confident I am that I would have been able to recognise Mr Davis if he was the man who stole the white Cortina car and whose face I momentarily saw. To some extent my view of the man would have been obscured by the natural reflection on the windscreen but I did momentarily see that man’s face which I do not recall being as rounded as Mr Davis’ face. While I cannot be certain my impression is that I am pretty sure it was not Mr Davis....I have always been convinced that had it been George Davis who drove away in the Cortina I would have recognised him.”

Mr Whitehouse submits that that evidence itself shows that the conviction is unsafe. He further submitted to us that there was considerable doubt about whether there were ever three, rather than two, men in the Dodge. We accept that if there were only two, the blood traces discovered found an argument assisting Davis, since there were two blood groups and neither of them was his.

36. These arguments afford an excellent example of the inevitable unreliability of statements made over thirty years after the event by even the most honest and assiduous of witnesses. The CCRC interviews with Mr Moore began with the question of the number in the car, because it then appeared to the CCRC that the first suggestion that there had been three men had come when Moore was interviewed

after the trial by Mr Moulder; in those circumstances the Commission was understandably anxious to exclude the possibility that the number might have come from an assumption, or suggestion, made by the enquiry team. Moore was unsurprisingly unable to exclude this possibility from his unaided memory and so his confidence in his statements was to that extent undermined. As it turns out, there was no basis for the Commission's concern, because Moore, although he could not now remember it, had been quite clear about the number when giving evidence to the magistrates within six months of the robbery.

37. In that same deposition, Moore had said clearly that he had seen the man escaping in the Ford Cortina only momentarily from in front and then from behind. When Mr Moulder interviewed PC Moore he knew that Moore knew Davis by name and asked him directly whether, if it had been Davis whom he had seen on the day of the robbery, he thought that he would have recognised him. The answer he received, in December 1975 within about 21 months of the event, was

“...the nearest I came to any of the fleeing robbers at any time was at about 20 yards. I was certainly not in a position to see their faces and therefore had it been Ishmail or Davis I would not have been able to identify them. The general build of the second man I saw running was similar to that of Davis but I certainly could not have positively identified him and quite frankly it may or may not have been him and/or Ishmail at the scene at this time.”

He also said that he had only got a “good clear look” at one face in the Dodge, and that was not the man who subsequently commandeered the Cortina.

38. It is true that the context of the quoted answer seems from the last three words to focus on sightings of the man when on foot rather than when in the Cortina. But it is simply impossible that Moore, who everyone agrees was plainly doing his best to help at all stages, should have said what he did to Mr Moulder in 1975 if it was the case that he had had a sufficient view of the driver of the Cortina to know that it was not Davis. There was already by then a public campaign asserting the innocence of Davis and everyone knew that Mr Moulder was enquiring into his conviction. The passage of time may or may not have tinted Moore's recollection, or his answer to the Commission may have been affected by the assumption apparently contained in the question asked of him that he had a level of confidence that he would have recognised Davis if present, which he had not previously said to anyone. Whichever it is, attempts to reconstruct the memory over thirty years on are not a reliable basis on which a court can or should proceed in the face of his clear statement near the time.
39. For the same reasons there is nothing fresh in the evidence of Mr Moore to justify a doubt about the real possibility that there were three men in the Dodge car. Unless that possibility is excluded, the blood evidence is of no assistance to Davis. That makes it unnecessary to consider the extent to which it was in any event equivocal,

since no one knew the provenance of the blood found in the Dodge, nor whether it might have been transferred rather than shed in that vehicle.

#### The owner of the Cranbrook Road Cortina

40. It is unnecessary to name this lady, who all those years ago had the perfectly terrifying experience of having her car hi-jacked by a desperate robber who carried with him as he escaped not only herself but, more frighteningly for her, her two children, all forced into submission in a car careering dangerously away. She was entitled to think more than thirty years ago that her public role as a witness in this case doing her civic duty was over. She was seen not long after the trial by Mr Moulder's team. She had by then seen a photograph of Davis in a newspaper. Over the course of two statements separated by some months, she said, first, that the photograph was not like the man in her car and did not appear to be him, but she was not completely sure, and then, second, that she would have picked out the man if she had seen him on the parades and the photograph was not of him. The photograph in question was not a particularly good likeness of Davis; more importantly it was of a man in a suit and tie with an overall appearance unlikely to have been replicated by the desperate robber she had to cope with, whoever he was. Mr Moulder formed the clear view that she had been unsurprisingly traumatised by her experiences, and that they must have impacted on her ability to visualise the man, despite his proximity to her during the short time he was in her car. She said that at the time her priority was care for her young son who was screaming hysterically and whom she described as afterwards a changed child, and she described herself as in a blind panic, equally understandably. The jury knew that she had described the robber as having a mass of curly hair, which was not how Davis wore his hair, at least normally. We see no reason to doubt Mr Moulder's assessment. There had been, by the time of the Moulder enquiry, a prolonged and often inaccurate public campaign on Davis' behalf which was likely to affect witnesses. The CCRC did not regard this point as one justifying referral to the court. It does not seem to us that this evidence significantly impacts on the safety of the conviction.

#### Mrs Bone

41. This lady, now deceased, gave identification evidence in unusual circumstances at the trial. No doubt her evidence was admitted principally because it was relied upon by one of the co-accused. We should record that the proper analysis of her identification was considered at length by this court, presided over by the then Lord Chief Justice, in 1975. As the court held, what had happened was not, correctly analysed, what is sometimes referred to as a "dock identification". Mrs Bone was not recognising Davis for the first time in the dock, an exercise which always suffers from the risk that the recognition may be conditioned by the fact that it is known that the person is the accused. She was saying that she had recognised him at the parade. She actually recognised him in court without knowing that he was one of the accused or that where he was sitting was in the dock.

42. She was clearly a forthright and determined witness. Four matters are now urged upon us as new material affecting the reliability of her identification of Davis.
- i) Whilst she told the trial that she had been sure of her recognition of Davis at the parade, and had said as much to a police officer afterwards, she said that this was not the police officer who took her home. But she later told Mr Moulder that she had had a long conversation about the parade with the man who took her home. She also told him that she had said to this officer that she was sure of her recognition of someone on the parade; he, however, remembered that she had, by contrast, said that she was unsure. The latter seems the more probable, since he made no report of having a witness who was sure of recognition but who had feared to make it publicly at the parade.
  - ii) She told the trial that it was on the second identification parade that she had seen Davis. It was in fact on the third. That by itself would be insignificant. She was corrected in the course of cross examination and responded, as many would, "I am sorry; I do not know." What is not so insignificant is that when seen at some length by Mr Moulder, after this correction, she gave a detailed blow by blow account of the parades which included the professed certainty that it was the second parade.
  - iii) Although she had made no reference to it previously, when she came to give evidence at the retrial of Ishmail, she told the court that she had seen a second man in the grounds, injured and bleeding. At the first trial when asked, by way of leading question (perfectly legitimate in the circumstances) to confirm that she had seen just the one man, she had assented.
  - iv) Another potential witness who had attended the parades told Mr Moulder that at one stage Mrs Bone had been sufficiently interested in what was happening outside the waiting room to have climbed on a chair to look out of the window into the police yard outside. This was, however, about an hour and a half before the parade and there is no evidence that she saw any potential participant, still less was able to discern his role.
43. We can see little room for doubt that Mrs Bone must, at the trial, have remembered seeing Davis at one of the parades, because she was able accurately to say where he had been standing. She must also, therefore, have had her attention focussed on him at the parade, although there was evidence that he to an extent drew attention to himself by sweating profusely. She was also correct in saying later that there was a second man in the grounds of Dr Barnados and that he was bleeding; there was independent evidence of that. The curiosity which led her to look out of the window during what seems to have been a long wait does not seem to us to occasion doubt about her evidence. Nor does it matter, of itself, which parade it was on which she saw Davis. What is perhaps more significant is that she was clearly the kind of witness who became convinced that she was right, and expressed herself in no uncertain terms, even when she was in fact wrong, as she seems to have been as to the

question of which parade and her post-parade conversations with a policeman. The latter misrecollection may suggest that her opinion about Davis became the firmer as time passed, as it did in relation to which parade it was. As the judge reminded the jury, mistaken certainty is the paradigm risk attaching to a bona fide identifying witness; those examples of it might have been of assistance to the jury in evaluating her evidence, particularly given the unusual circumstances in which it came to be given.

### Unused statements

44. There was, as is common in the case of any large enquiry, a significant number of witness statements which were unused. The rules for disclosure of unused material were very different in 1974 from what they have subsequently become; this trial took place nearly twenty years before the landmark decision in Judith Ward (1993). We have looked, at Mr Whitehouse's request, at a number of the statements, remembering that the defence did not have them at the time of the trial, and that nowadays they would. We have concluded that they do not, either alone or in combination with each other, cause us significant anxiety about the safety of the conviction. Several go to the question whether there might have been three men in the Dodge; on this we need add little to the conclusion stated at paragraphs 36 and 39 above. Some witnesses spoke of seeing two men running away from it. But this is exactly the kind of difference of recollection and viewpoint which is typical of any collation of eye-witness accounts. Others said that there was only one person in the Dodge, which cannot have been right. The jury already had the evidence of Mr Moore that he saw only two running away; that others saw the same two would not significantly have improved the case for Davis; it left open the question whether or not a third had gone in a different direction. Evidence of persons who presented themselves to the hospitals of London with head injuries for which the explanations were less than wholly satisfactory seems to us to take the matter nowhere. It would be surprising if such were not true on most days of most weeks. To say that it always helps a defendant to raise a collective doubt in the jury's mind is to misunderstand the test applied at this stage by this court and is a good example of why the so-called jury impact test cannot be the simple criterion on appeal. The question is not whether a jury might be misled by the significance of such diversionary evidence but whether this court is in doubt as to the safety of the conviction: see Burridge [2010] EWCA Crim 2847 (especially at paragraphs 99 – 101). That said, there are two statements which might, we think, have turned out to be of some significance. One was from a witness who described the man who almost immediately after his sighting commandeered the Ford Cortina as being of fair hair – Davis was definitely dark. Another was a policeman at Woodford Avenue who had made an identification from police photographs of the person he said had been wearing the flying helmet. We cannot now evaluate for ourselves the force of this evidence, had it been given.

### The job book, exhibit LG1

45. In support of his alibi Davis put forward this job book, which it was said was maintained by the minicab company for which he said he had been driving. It

contained entries, apparently made at different times and in different hands, of bookings or job allocations. There were four for the morning in question, of which two were said to be particularly relevant, one a 'fish run' to Holborn entered for 0940 and the other the carriage of Mr Murphy to Ilford Golf Club entered for 1045.

46. Police officers engaged in the enquiry into this robbery had interviewed Davis first on 24 April. He had initially said that he was not sure where he had been at the time of the robbery, but later that he thought he had been driving the cab. The officers had gone to the cab office and had seen a number of books and records. At the trial some gave evidence that they did not think that LG1 was the same book that they had seen. There was however some equivocation about the Crown case, as to whether it was that the book was a forgery or that the chief relevant entry (1045) was false. The judge summed up on the basis that it was the latter possibility which the jury was really being asked to consider.
47. Mr Whitehouse's grounds of appeal originally contended that the Crown had failed to disclose a report by a forensic document examiner, Mr Ansell, which contained nothing to support the contention that the entire book was forged. That turns out to have been a mistake. The reports of Mr Ansell had in fact been disclosed. They were entirely neutral and it is not surprising that neither side relied on them, but the defence had them available.
48. Subsequently Mr Moulder's team conducted a root and branch re-investigation of Davis' alibi. That was in part because the Davis campaign, as well as impugning the bona fides of the investigating officers, also complained that his solicitors had let him down. The re-investigation included obtaining a further report from Mr Ellen, an experienced forensic document examiner. This report post-dated the trial, and although Mr Moulder had it by the time of the first appeal in 1975, the Crown did not, so it was not disclosed to the defence at that stage. We have, however, now seen it. It adds nothing of any significance. Certainly it concludes that there was nothing to show that the various entries had not been made in the ordinary course of business, but that, like Mr Ansell's report, was simply neutral. It said nothing about whether the entries were truthful, nor about when they were made.
49. Quite apart from that, the investigations made by Superintendent Moulder's team substantially weakened the Davis alibi. It had been known at the trial that Mr Murphy, who gave evidence supporting the contention that Davis had driven him to the golf club, was a longstanding friend of the defendant and had a conviction for passing counterfeit currency, and that Mr Chappell, who also supported the alibi, had several convictions for dishonesty. Mr Moulder additionally established:
  - i) that the golf club green fee book, although not rigorously kept, cast considerable doubt on Mr Murphy's evidence that he had played on Thursday 4<sup>th</sup> April, rather than earlier in the week, and with Mr Wright, whom he said he had partnered but who was not called at the trial, rather than with his regular partner a Mr Dainty; further the book showed that he could not have teed off



after midday on 4 April but the evidence at trial was that the cab did not get to the club until 1150;

- ii) that the chef at the destination restaurant for the fish run had been shown by Mrs Davis a photograph of her husband and was sure that that person had never made a fish delivery, whilst the manager had also been unable to recognise his photograph;
- iii) that the solicitor had also investigated the cab customers involved in the first and fourth entries in the job book and these were unable to give any evidence supporting Davis' assertion that he had been the driver;

Additionally Mr Moulder was told that, according to a close associate of the co-accused Hole, Hole and Davis had discussed alibi witnesses and the decision had been made that a particular witness should alibi Hole rather than Davis; it is impossible to know whether this was true or not.

50. In those circumstances, we are satisfied that there is nothing in any ground of appeal relating to the job book or otherwise to the alibi. There is strong support for what must have been the jury's rejection of the alibi. That Davis should have advanced a false alibi is, however, of very limited assistance on the question whether he was guilty or not. An habitual criminal (and indeed others) may well do so even if not in fact guilty.

#### Other material

51. Mr Moulder was told by some witnesses who attended that those ferried on a coach to the second set of identification parades had had the photofit pictures passed around. That did not, on the evidence, result in identifications which could be impugned, but it was, if it happened, certainly an indication of an improper approach to identification and the assembly of evidence.
52. Several years afterwards, one of the co-ordinating officers was the subject of a prosecution for perverting the course of justice, albeit unconnected with any criminal investigation which he was himself undertaking. It did not proceed to trial, apparently because he was too ill. Accordingly the allegation has never been proved and for that reason we do not identify him. An unproved allegation could not be admissible unless the facts underlying it could be proved. Whether this is so we do not know.

#### Conclusion

53. We conclude that there is nothing in the grounds relating to (i) PC Moore, (ii) the owner of the Cranbrook Road Cortina or (iii) the alibi which occasions any anxiety

for the safety of this conviction. But the new material affecting the identifications of the two policemen at the scene of the robbery is of considerable significance. We bear in mind that both behaved with exemplary courage and that the attack under which they personally came will have made it very difficult for them to have made dispassionate observations. However, we have no doubt that for the reasons which we have given, neither identification can safely be relied upon.

54. We are acutely conscious of the fact that the jury also had the identifications of Davis by the three Woodford Avenue officers and by Mrs Bone, and that the other defendants were not so identified. It is therefore possible that the jury discounted in any event the scene of the robbery identifications and relied on the Woodford Avenue ones; this *might* be the explanation for the decision to convict Davis and not the other defendants. The question of safety is for this court. It is not, for the reasons given, answered simply by asking whether the fresh information now available might have affected the jury's deliberations. We take the view, however, that it is simply impossible for this court, at the remove of over thirty years, to weigh the evidence as it would be necessary to do to resolve that the conviction is soundly based. Mrs Bone's evidence may have exhibited the danger of genuine but mistaken certainty. As to the Woodford Avenue officers, the fact that one of them, DC Newell, knew Ishmail and England as active criminals and recognised them on the parades, but yet they were not identified, suggests that this group of officers could not be accused of any impropriety in identification. On the other hand, their identifications were certainly made after comparatively fleeting sighting and not in easy circumstances. The references to a man with a heavy stomach may tend to weaken them. We conclude that we have no means of knowing how persuasive of guilt the Woodford Avenue evidence, taken alone, was, nor what part the now unreliable identifications played. Moreover, although there has been no information which impugns the evidence of the Woodford Avenue officers, it is plain that if the material relating to Grove in particular were available to put into the overall assessment of the case it might have the effect of casting doubt on the integrity of the handling by the police of the identification evidence generally. Some support would be given to that approach by the evidence relating to the circulation of photofit pictures.
55. Our conclusion is that whilst the evidence in this case was mixed, it had necessarily to be assessed by a single court of trial able to evaluate its overall effect. This court does not re-try the defendant and cannot do so, because it does not hear the whole case. Ordinarily it hears no evidence at all, and when it does examine it, as here, it is limited to fresh material. This court is not, therefore, in a position to substitute itself for the jury; rather it examines the evidence presented to the jury and any new light cast upon it by the fresh material. The fresh material relating to the identifications made by those at the scene of the robbery, together with the limited new evidence affecting the other very positive identification of Mrs Bone, so far undermines the case that it is impossible to be satisfied that this conviction is safe. We do not know whether Davis was guilty or not, but his conviction cannot be said to be safe. As we have made clear, the fact that he was an active and known criminal does not affect this question, nor does it make it any the less important that his conviction should not be upheld unless it is clear that it is safe.

56. The consequence is that the conviction must be quashed. There can of course be no question of retrial at this remove of time.