**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2019] HCJAC 59**
**HCA/2018/255/XC**

Lord Justice General
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

issued by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

THE APPLICATION TO AMEND A NOTE OF APPEAL

by

DAVID SCOTT

Applicant

against

HER MAJESTY'S ADVOCATE

Respondent

**Applicant: Gianni; Beaumont & Co**
**Respondent: A Prentice QC (sol adv) AD; the Crown Agent**

26 July 2019

**Procedural background**

[1] This is an application to amend a Note of Appeal, which was lodged on 1 April 2019, following the court's refusal to extend further the time in which to do so. The court's Statement of Reasons (HCA/2018/255/XC), which was issued on 22 March 2019, outlines the

history of the case since the applicant's conviction on 10 May 2018 for the murder of Euan Johnston on 15 November 2016. The Statement of Reasons is appended to this opinion.

[2] The existing Note of Appeal focuses, first (ground 1), on a lack of sufficiency of evidence linking the applicant to the crime. His DNA, which was inmixed with that of his girlfriend, was recovered from a Nike hoodie, a fragment of which was found in a burnt-out Audi Q5, which the murder suspects had used. Secondly, it alleges (grounds 2, 3 and 4) defective representation by: (i) failing to lodge, as instructed, a special defence of alibi; (ii) agreeing to a Joint Minute, which stated that the hoodies worn by two males shown in CCTV images could not be excluded from being a Nike hoodie and a Russell Athletic hoodie; replicas of which had been produced at the trial. The Joint Minute also stated that mass manufactured clothing may look identical unless distinguished by a unique feature; and (iii) failing to observe that the police officer, who had compiled a CCTV viewing log, had described the hoodie, which had been worn by one of the men, as "mid-thigh length", whereas the replica Nike hoodie was only waist length. Thirdly (ground 5), the Note refers to new evidence in the form of an expert report stating that the replica Nike hoodie produced was, for the same reason, not of the type worn by one of the suspects as shown in the CCTV images. There is a suggestion that the failure to investigate this was also defective representation.

[3] On 10 June 2019, following upon responses from the applicant's legal representatives at trial, notably a 24 page report from senior counsel, leave to appeal was refused at first sift. The sifting judge held, first, that the evidence had been sufficient. Secondly, the response from trial counsel and agents did not support the contention that an alibi had been instructed. Other material suggested that none existed. The alibi was that the applicant had been at his parents' home in Montford Avenue. The time of the murder was about 23.41.

The applicant's mother had given evidence, but not in support of any alibi. Her initial statement, which had been taken on 7 April 2017, contained no indication that an alibi could be provided. She had said that she could not recall the applicant being in the house on the evening of 15 November 2016 and did not know whether he had spent the night there. As the sifting judge comments, the distance between the applicant's house and the *locus* is only about 10 minutes by car.

[4] Whatever was visible on the CCTV images, the jury were aware of a connection between the suspects, who were in the Audi Q5, and the hoodies; fragments of two of which were found in the burnt-out car. The Nike hoodie had the applicant's DNA on it, inmixed with that of his girlfriend. The significance of whether the Nike hoodie could be seen on the CCTV images had been overestimated by the applicant. The defence representatives had managed to dilute the significance of this evidence by agreeing to the Joint Minute. Thirdly, the expert had focused only on one of the suspects relative to the Nike hoodie. There was no link at the trial between the Nike hoodie and what could be seen in the CCTV images. In any event, this evidence could have been made available at trial.

[5] No application has been made to the second sift. Such an application is out of time. The applicant now seeks to introduce additional grounds of appeal. These are lengthy and not always easy to understand.

**The proposed additional grounds**

[6] The first additional ground (proposed ground 6) is that there was defective representation relative to references, which were made by witnesses at the trial, to the applicant being in prison in 2016 and thus to his bad character. These came during cross-examination by the applicant's counsel of the applicant's mother and of the mother of his

child. The first was the mother's response to a question: "When did [the applicant] last live with you on a full-time basis?" She said: "…when he came out of Low Moss in 2016". The second followed a question, also to the mother: "What age was he when he left home?" The answer was "When he first went to prison…". The third was a statement made by the mother of the applicant's child that she had stopped taking their son "to prison". The contention is that, because the applicant was known to have previous convictions, there was a risk that the mother would make some reference to them. No motion to desert had been made. The applicant asserts that no counsel, acting reasonably, would have asked the questions posed. The use of leading questions would have averted the danger. Having elicited the answers, no counsel, acting reasonably, would have failed to make a motion to desert.

[7] The second (proposed ground 7) is again defective representation. This consists of a failure to cross-examine key witnesses "effectively" and to present evidence which undermined the Crown case and was supportive of the applicant's defence, including that of the alibi. The details of these are set out in no less than 34 sub-paragraphs. The first of these are enumerated as "(a) i – xv". This returns to the evidence of the alibi which, it is contended, the applicant's mother could have given. There is reference to a further statement of the mother, dated 10 April 2017, in which she said that she now recalled that the applicant had been in her house from about 17.00, along with a named friend. The two had left at about 21.00 or 22.00, with the intention of going to Kings Park Station. The applicant had returned alone at around 23.00. It is said that this alibi is supported by mobile phone data and analysis relative to a phone registered to the applicant's father and used generally as the applicant's parents' house phone. The data includes communication between the applicant's mother and his girlfriend at approximately 23.00. The analysis

showed connections to phone masts in the vicinity of Kings Park Station between 21.33 and 22.05. There is a connection to phone masts in the vicinity of the applicant's home at 22.19. This was when the applicant had sent a text message to his girlfriend.

[8] The second group are "(b) i – iv". These refer to the Audi Q5, which was linked to the shooting, crossing the Kingston Bridge southwards at 23.27; some 15 minutes before the shooting. The applicant's counsel is criticised for putting to a witness that the two individuals who had been charged with the murder may have had a connection to the north of Glasgow, a proposition with which she agreed. It is said that the applicant did not accept that he had a connection with the north of Glasgow, although his former co-accused did. This is said to be prejudicial.

[9] The third are "(c) i – vi". These relate to "disclosed evidence" which suggested that there was a lack of opportunity for the applicant to be involved in the offence. There was no evidence that the applicant had been in contact with the co-accused or any others which would have linked him to the crime. The applicant had no connection to the deceased or to the north of Glasgow, from where the Audi Q5 had travelled. The police had carried out extensive investigations with taxi firms to ascertain whether a taxi had been dispatched to the applicant's home. It is said that the applicant had no money or access to any vehicle. This was confirmed by his parents. The ground then refers again to the phone records and there being texts between phone numbers used by the applicant and his girlfriend between 21.33 and 22.19. The applicant was placed in his home at about 22.19, if he had been using his father's phone, yet the deceased did not enter the restaurant until about 22.46. The Audi Q5 was not on the Kingston Bridge until 23.27. There was limited time for the applicant to have made his way to the north of the city to liaise with those in the Audi. There was no evidence that he had left his home on foot, by public transport or other means.

[10] The fourth are "(d) i – v". This returns to the issue of the hoodies. It is said that the provenance of the CCTV images, which showed the Audi Q5 arriving near the locus, was not proved. There were corrected times used at the trial. For example, the Audi Q5, on one of the images, only arrived near the restaurant after the shooting had occurred.

[11] The fifth are "(e) i – iii". These refer to evidence being adduced that the applicant was the user of 11 phone numbers over the period 17 November 2016 to 27 February 2017. The numbers were of no evidential value and the intention was simply to create a prejudicial impression.

[12] There then follow another 28 paragraphs in relation to defective representation by reason of a failure to prepare the applicant's defence and to provide objective advice to him. The first of these, "(a)", is in general terms. The second, "(b) i – ix", is a rehearsal of the code of practice for criminal legal aid, which describes the standards to be expected of defence representatives. The third, "(c) i – xvi", sets out the extent of the alleged failures. These are that: (1) no precognitions were obtained from any witnesses; (2) no consultations were held with any of the Crown experts; (3) no expert reports were obtained; (4) a report comparing the CCTV images and the replica Nike hoodie should have been obtained; (5) there was a failure to obtain a report on phones; (6) there was a failure to enquire into the time required to travel by foot from Montfort Avenue to the *locus*; (7) there was a failure to examine the replica Nike hoodie; (8) there was a failure to scrutinise the CCTV images; (9) there was a failure to show the replica Nike hoodie to the applicant; (10) there was a failure to show the CCTV footage to the applicant; (11) there was a failure to peruse a report on the forensic examination of the phone, said to be used by the applicant; (12) there was a failure to download this material (150 pages); (13) there was a failure to obtain the "schedules of non-sensitive information"; (14) there was a failure to examine significant volumes of statements,

productions and labels which had been disclosed; (15) no meaningful record of disclosure being discussed, advice being tendered, instructions obtained or the outcomes of any perusals was made; and (16) the material disclosed had not been perused by the solicitors, notably the telephony records. All of this is said to demonstrate a lack of any follow-up enquiry in the preparation of the defence case.

**Decision**

[13] In *Singh* v *H M Advocate* 2013 SCCR 337, the Court set out the general approach which is taken in relation to applications to amend a Note of Appeal against a statutory scheme which provides generous time limits within which to lodge "a full statement of all the grounds of appeal (Criminal Procedure (Scotland) Act s 110(3)(b)). The Court said (LJC (Carloway) at para [6])

> "The court does not permit amendment as a matter of routine but requires cause to be shown for allowing such amendment (Act of Adjournal (Criminal Procedure Rules) 1996 para 15.15(1)). This involves a consideration not only of the reason why any additional ground is proffered late but also of the merits of that ground. It is not sufficient at this stage that the ground is regarded as arguable. That is the test for the grant of leave to appeal on a ground advanced timeously. The court requires to be satisfied that the ground has sufficient strength to merit invoking the amendment procedure, which will often involve remitting the ground to the trial judge, perhaps long after the trial, for a fresh report and returning the new ground to the scrutiny of the sift (Practice Note [(No 2 of 2010) Amended Grounds of Appeal] paras 6 and 7). The court will require more than mere arguability to justify such a course of action, given its disruptive effect on normal criminal procedure (see *Strachan* v *HM Advocate* [[2011] HCJAC 28] at paras [15-16]). As was said in *Toal* v *HM Advocate* [2012 SCCR 735] (Lord Carloway at para [117]) the court should not permit the addition of new grounds unless they have 'clear substantial merit'.

[14] There is no substantial merit in the proposed grounds of appeal concerning alleged defective representation. In *Grant* v *HM Advocate* 2006 JC 205, the Lord Justice Clerk (Gill) stressed (at para [21]) that:

> "… to succeed in an appeal based on allegations of defective representation, the appellant must establish that the conduct of the defence resulted in a miscarriage of justice… That can be said to have occurred only if the appellant's defence was not presented to the court, and he was therefore deprived of his right to a fair trial, because counsel either disregarded his instructions or conducted the defence in a way in which no counsel could reasonably have conducted it".

[15] The first ground (proposed ground 6) complains of the manner in which the applicant's counsel posed questions to the applicant's mother and because the mother of his child made reference to taking their son to the prison. The ground is not that a miscarriage of justice occurred because the statutory prohibition on revealing previous convictions (1995 Act, s 101) had, by implication (eg *Robertson* v *HM Advocate* 1995 SCCR 497), been breached. The ground rests on the allegation of defective representation. It must thus meet the test in *Grant* v *HM Advocate* (*supra*); that the applicant's defence was not presented to the court. Especially when an appellant has been represented by a highly experienced, specialist Queen's Counsel, this is a high barrier to surmount. It is nowhere near being crossed where counsel has simply asked the applicant's own mother questions about when the applicant had last lived with her and when had he first left home. Even if it were established that these questions could have been predicted to elicit responses about the applicant having been in prison, that is a far cry from demonstrating that the applicant's defence was not presented to the court. The fact that the mother of the applicant's child mentioned not taking the child to prison falls into a similar category, except that it is not suggested that the response could have been predicted.

[16] There was no substantial basis upon which counsel could have advanced a motion for the court to desert the diet, based on what the witnesses had volunteered in cross examination. Such a motion could only have been made if it could have been said that the remarks had so compromised the prospects of a fair trial that desertion became an

imperative if the potential for a miscarriage of justice were to be avoided (*Jackson* v *HM Advocate* 2018 JC 86 LJG (Carloway), delivering the opinion of the court, at para [24] and following *Fraser* v *HM Advocate* 2014 JC 115). In the context of this murder trial, in which the evidence against the applicant consisted primarily of the scientific link between the applicant and the Nike hoodie, it would have been almost unstateable to submit that the oblique references to prison could have compromised the fairness of the trial. Thereafter, it was a matter for the discretion of the trial judge whether to direct the jury to disregard the remarks, and thus to draw the jury's attention to them, or to ignore them when directing the jury (*ibid*).

[17] The second ground (proposed ground 7) returns to the alleged failure to elicit testimony from the applicant's mother, and supported by the telephony data and analysis, about the alibi; *viz*. that the applicant was at his parents' home at the material time. There are several problems with this. The first stems from the Lord Justice Clerk's dicta in *Grant* v *HM Advocate* (*supra* at para [23]) that:

> "Many of the ever-increasing number of [defective representation] appeals are based on allegations of breach of instructions that rest only on the say-so of the appellant himself;… [T]his court should not countenance the granting of leave to appeal in such cases".

[18] Senior counsel, who conducted the trial, has explained, in some detail, the manner in which he consults with accused persons. At the initial consultation, he makes it clear that he will only consult with them if there is something to be discussed. He will not discuss the detail of every element of the material disclosed; that being the function of the accused's law agent. He will take instructions only on matters which he considers to be of importance and in respect of which the accused's input is required. He will normally do this as part of a two stage process; the first to identify what is of importance and the second to take instructions

once the accused has had an opportunity of discussing matters with his law agent. In this case, he had four consultations.

[19] Counsel explains that it became clear that the applicant's approach, which counsel regarded as a mature one, was that the defence should be one which was reactive to the Crown case. No positive line of inquiry was instructed. In particular, no alibi, was ultimately proffered, although that matter had been specifically discussed with the applicant in advance of the Preliminary Hearing. The applicant had considered advancing an alibi but counsel had advised that it would require to be spoken to in evidence by the applicant and/or any alibi witnesses. If the alibi was thereafter regarded as dishonest, this could have an adverse impact on the applicant's prospects of acquittal. The applicant had said that his alibi could have been that he was at home with his mother (no-one else). He had not been arrested until 20 July 2017. The murder had been on 15 November 2016. If it is assumed that the applicant was not involved in the murder, the certainty of his being at home at the time would be queried. For example, why did the witnesses remember what had happened on that particular date, when they had been asked to recall it many months after the murder?

[20] The applicant did not want to give evidence, as he did not think that he would come across well. The original statement by his mother, which was dated 7 April 2017, had made no mention of the applicant being at home at the material time. The applicant did not wish to involve his mother. He could not explain why, if he had been at home, the mobile attributed to him (which was in any event his father's) had connected with three different network masts between 21.33 and 22.19. The inherent dangers of advancing an alibi having been raised, the applicant opted not to lodge one in favour of the purely reactive defence.

[21] This instruction was repeated at various junctures during the trial, at which the applicant did not give evidence. The essence of all of this has been confirmed by junior counsel and the instructing agent. Standing the test in *Grant* v *HM Advocate* (*supra*), that allegations of breach of instructions that rest only on the say-so of the appellant should not be countenanced, that is an end of this avenue (as has also been decided at first sift).

[22] The second problem is that, even if it had been possible to rely upon the applicant's mother confirming what she had said in the further statement of 10 April 2017, this has the applicant and his friend leaving the house at about 21.00 or 22.00, with the applicant returning alone at around 23.00. The telephone analysis showed connections to phone masts in the vicinity of Kings Park Station between 21.33 and 22.05. There is a connection to phone masts in the vicinity of the applicant's home at 22.19. There is the communication between the applicant's mother and his girlfriend at about 23.00. This is all said to be consistent with the existence of an alibi. However, it is difficult to see how that can be so. The deceased was shot at about 23.41. This is some time after the alibi evidence which is being advanced as relevant. There would be little difficulty, even if it were accepted that the applicant had been at his parents' house at as late as 22.19, in the applicant thereafter being in the Audi Q5 crossing the Kingston Bridge and/or at the scene of the murder a considerable time later.

[23] Another criticism relates to the applicant's counsel having elicited from the applicant's mother that the day of the murder was one of no particular meaning to her. This was a response to her evidence in chief that, on the day after the murder (16 November 2016), the applicant had seemed jittery and that there had been a change in his behaviour. The applicant's counsel did not refer the mother to her statement of 7 April 2017, that on the day following the murder, the applicant "didn't seem any different". It is not entirely clear what the applicant is now making of this, but it includes a contention that using the two

statements (of 7 and 10 April 2017) would have elicited different responses from the mother. This is followed by an assertion that the failure to use both statements and the telephony analysis represented a failure to put the applicant's defence to the court. Why that should be remains a mystery. The defence was to be one of reaction to the Crown case as it emerged at trial. Exactly how that might be done was, *par excellence*, "a strategic and tactical decision … within the scope of counsel's legitimate judgment" (*Grant* v *HM Advocate* (*supra*) LJC (Gill) at para [22]). There is nothing of substance in this criticism. Counsel's reaction to the mother's evidence, that there had been a change in the applicant's behaviour on the day after the murder, was to challenge it in the manner described.

[24] The second aspect of the evidence, which is founded upon as negativing the applicant's involvement, refers to evidence of the Audi Q5 crossing the Kingston Bridge southwards at 23.27, some 15 minutes before the shooting. The criticism is that the applicant's counsel had elicited from the witness that that "two individuals, charged with murder and awaiting indictment" (ie apparently the applicant and another) "may have had a connection to the north of Glasgow". It is asserted that the applicant did not have such a connection. This line is said to be prejudicial. Why that should be is uncertain. This matter seems to be one of no materiality. It certainly does not meet the test in *Grant* v *HM Advocate* (*supra*).

[25] The third aspect is a contention that the applicant had no opportunity to be involved in the murder. An assertion is made that the applicant could not, if he had been using the phone at his parent's home at 22.19, have been in the Audi Q5 on the Kingston Bridge at 23.27. There was no evidence that he had left his home on foot, by public transport or other means (although the grounds of appeal are to the effect that he did leave the house at least to go to the station). This is all predicated on the truth of the alibi, which was deliberately

not run by the applicant. It cannot be re-raised now because, on reflection, it might have succeeded where the applicant ultimately failed. There is in any event no alibi which would have prevented the applicant being in the Q5 on the Kingston Bridge at 23.27 and/or at the scene of the shooting 15 minutes later.

[26] The fourth aspect returns to the issue of the hoodies, but focuses on the provenance of the CCTV images. This ground is incomprehensible in the absence of a contention that the Audi Q5 was not involved in the murder, which, on the evidence, it patently was. The events shown in the CCTV images were spoken to in evidence. This presumably related to what streets could be shown in the images, what events were seen in them and when these events occurred. In the absence of a challenge, there was no need to prove any "provenance" beyond that. There was no basis upon which a challenge could have been mounted.

[27] The final criticism is about the failure to object to evidence of the applicant's use of multiple mobile phones. This ground, once again, does not meet the test for defective representation in *Grant* v *HM Advocate* (*supra*). It is not sufficient to mount a successful appeal simply to pick faults in isolated aspects of the applicant's representation. The fault requires to be one which has resulted in the defence not being presented to the court. This aspect of the proposed additional grounds does not come close to satisfying that test.

[28] The relevance of the remaining parts of the grounds of appeal add little to the equation, but they do reflect a potential misunderstanding of the legitimate scope of criminal defence work. As was correctly stated in *Grant* v *HM Advocate* (*supra*, LJC (Gill) at para [24]):

> "Criminal defence work, if carried out conscientiously, is demanding and stressful".

It would be even more so if, as the remaining aspects of the proposed grounds of appeal suggest, it is an exercise of leaving no stone, however irrelevant to the instructed defence, unturned. The nature and the extent of defence preparations can vary widely from case to case, depending upon the position of the accused. The defence should not be prepared in abstract or constructed in a manner which ignores the accused's position. In any case, it is important to ascertain what that position is and to document it accordingly. Senior counsel has made it clear that the defence was to be a reactive one only; ie to see if the Crown could prove its case and to attempt to undermine it as opportunities to do so arose at trial.

[29] Gauging the level of preparation in a responsible manner is a skill based on an ability to predict the outcome of executed tactics and strategies which is gained by experience and learning. In this case, the applicant faced a Crown case based on a simple contention that his (and his girlfriend's) DNA was found on a Nike hoodie which was discovered in the burnt out remains of the Audi Q5. The Q5 was used in the assassination of the deceased. That is what the applicant was up against. It was a matter for him, as advised by his counsel and agents, to instruct the best way of meeting it.

[30] In these circumstances, there was no breach of the Code of Practice for Criminal Legal Assistance. There was no requirement to precognosce any witnesses in the absence of a clear issue arising from their disclosed statements. There was no need to consult with any of the Crown experts, or to obtain any defence expert reports in the absence, for example, of the applicant stating that his, and his girlfriend's, DNA could not have been on the Nike hoodie. In any event, for this ground to be at least stateable, there would now need to be evidence from an expert that the DNA did come from another source. Quite apart from the fact that the obtaining of expert reports, in the absence of there being a reason to do so, has the capacity to undermine an accused's position with his legal representation, once again,

the obtaining of the report now founded upon does not detract from the central point in the Crown case. This was that the applicant's DNA was on a Nike hoodie found in the Q5. Whether the CCTV images show that the hoodie worn by one of the persons seen in these images was not the same as the replica Nike hoodie produced at trial misses the point. In that context, showing the replica to the applicant or examining it would have served no purpose beyond establishing the obvious. In any event, the applicant would have seen the replica and the CCTV images during the course of the trial. Counsel has made it clear that he was aware of the telephony analysis and there was no reason to instruct another report in the absence of a contention by the applicant that the Crown analysis was defective. The time required to travel by foot from Montfort Avenue to the *locus* would have been well known, at least to the jury. The criticisms of the applicant in relation to the alleged failures of his defence team are without practical merit and hence substance.

[31] The application to amend the Note of Appeal is accordingly refused.

**APPENDIX**

**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**HCA/2018/255/XC**

Lord Justice General
Lord Brodie
Lord Boyd of Duncansby

STATEMENT OF REASONS

issued by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the

APPLICATION FOR EXTENSION OF TIME IN WHICH TO LODGE A NOTE OF APPEAL AGAINST CONVICTION

by

DAVID SCOTT

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HER MAJESTY'S ADVOCATE

Respondent

**Applicant: Allan QC, Gianni; Beaumont & Co**
**Respondent: Borthwick AD; the Crown Agent**

22 March 2019

[1] On 10 May 2018, after a trial at the High Court in Glasgow, the applicant was found guilty of the murder of Euan Johnston on 15 November 2016, at the junction of Shields Road and Scotland Street, Glasgow by shooting him. He was sentenced to life imprisonment, with a punishment part of 22 years.

[2] The evidence at trial, at which the applicant was represented by experienced senior and junior counsel, along with agents, was that the shooting had occurred after the deceased had left a restaurant and was driving his Audi RS4. The restaurant had been kept under surveillance by certain individuals, one of whom was identified at trial as wearing a Nike Windrunner zip top, who had been in an Audi Q5. After the deceased had left the restaurant, his car was followed by the Q5. As both cars came to be parallel at a junction, a person in the Q5 shot the deceased in the head.

[3] The Q5 was found in a burnt-out condition. It was linked to the crime as a cartridge case found in it had been fired from the same gun as another found at the *locus*. The applicant was linked to the Q5 by a Nike Windrunner top, which was found in a burnt-out condition in the car. This, according to the evidence at the trial, had the applicant's DNA on it.

[4] On 25 July 2018, the procedural judge granted an extension of time in which to lodge a Note of Appeal until 17 September 2018. The reasons given for the application were that there had been a change of agency and a significant amount of preparation was now required. New senior and junior counsel had been introduced to the case, because it was thought that defective representation grounds would be needed.

[5] On 28 September 2018, a further extension was granted by the procedural judge, this time until 17 March 2019. The grounds in the application were in identical terms, but additional specification was provided in an opinion from senior counsel. This identified a number of potential areas which the applicant intended to explore. These essentially amounted to a complete review of not only the evidence at trial but also the materials which were, or might have been made, available before trial.

[6] An application for a further extension was then made. This time it became even clearer that the applicant's intention was to review the whole pre-trial proceedings, including 6,000 pages of statements, 5,400 pages of productions, telephony reports and other materials. The DNA evidence, and the CCTV footage identifying the Nike Windrunner, were also to be looked at. Although it was anticipated that one of the grounds of appeal would be insufficiency of evidence and the availability of new evidence, there would be defective representation grounds relative to the failure of the applicant's representatives to lodge an alibi and to obtain and consider the available statements and productions.

[7] The procedural judge refused the new application. He noted that most of the enquiries now proposed had not been mentioned in the earlier applications. There was no explanation for the purpose of these enquiries by way of correlation with the instructions which it was maintained that the applicant had given to his previous legal team. Proposed grounds of appeal, including grounds based on defective representation, had been drafted. These were not underpinned by an account of the applicant's instructions at the material time. The procedural judge observed:

> "The impression which is conveyed is that the current agents are engaged in a wholesale re-examination of the case against the appellant rather than conducting a specific enquiry based upon a focused claim that his right to a fair trial was denied."

The judge noted that if the grounds of appeal were to be presented, then the trial judge required to provide a report. Former agents and counsel will also require an opportunity to respond to any complaints raised about their representation. All of this would have to be undertaken before a decision on leave to appeal could be considered. The more time which passed between the trial and the ingathering of this material, the more difficult it would be for those concerned to provide appropriate, detailed and accurate accounts. The judge reached the view that he was not persuaded that a further lengthy extension of time ought

to be granted. Accordingly, the proposed grounds of appeal, supported if appropriate by an affidavit from the applicant, would now require to be finalised and lodged. If further matters came to light, then it would remain open for the applicant to apply to the court for permission to amend his grounds of appeal. The time limit was extended until the end of March for this purpose.

[8] The test for this court is whether the procedural judge has erred in the exercise of his discretion to allow a further extension of time. No such error has been identified. It is of considerable concern that almost a year has expired since the conclusion of the trial. In normal circumstances, any appeal process, relative to this case, ought to have been concluded. What is being engaged in here is, as the procedural judge noted, not an appeal in respect of the trial process, but a review of the whole trial and the earlier procedure, in the hope of obtaining material which might in due course found a ground for a successful appeal. All of this is being done against a background of not knowing at present what the position of the former counsel and agents was.

[9] The applicant has until the end of this month to lodge his grounds of appeal. There is no reason why those cannot proceed, particularly in relation to insufficiency of evidence and defective representation so far as the failure to lodge an alibi is concerned. These matters can be processed at sift. If it transpires, during the course of this process, that there is force in other grounds, then it is open to the applicant to attempt to amend his grounds of appeal. The court will require to consider the strength of these grounds before allowing any amendment, but, in a case of this nature, that would seem entirely appropriate.

[10] Accordingly the application is refused.