

# Miscarriages of Justice – Our Lamentable Failure?\*

*The Hon. Justice Michael Kirby\*\**

## **Falls the shadow**

It is the fate of the English to be lectured to by visitors from their former colonies. At the turn of the century two Irishmen (Wilde and Shaw) did it almost daily. Wilde paid an awful price, when retribution struck. Shaw continued his instruction for half a century and got away with it. At his most Irish, Shaw once said:<sup>1</sup>

“I will explain the English[man] to you. His watchword is always duty . . . He is never at a loss for an effective moral attitude . . . There is nothing so bad, or so good, that you will not find an Englishman doing it. But you will never find an Englishman in the wrong.”

As if in penance for the assurance which accompanied Empire, I have now been invited to demonstrate Shaw’s point. As I reflected on my assigned theme, I could not escape the recurring message of a poem of another foreign man of letters who made London his home. In the *Hollow Men*, T S Eliot wrote:

“Between the idea  
And the reality  
Between the motion  
And the act  
Falls the shadow.”

Between the idea of British justice and the reality; between the motion of our famous legal procedures and the act of criminal conviction, a shadow has fallen which is called miscarriage of justice. It casts its dark reflection to the four corners

\* A reference to B. Levin, “In Contempt, and with Reason”, *The Times*, 7 February 1991, p. 10.

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1. G. B. Shaw, cited by B. Tuchman, *Bible and the Sword: How the British Came to Palestine*, Macmillan (1982), p. 336.

of the world where the English language is spoken and where the procedures of justice fashioned in this city have been copied by a quarter of humanity.

British justice. The very words are redolent with confidence in a system, not perfect it is true, but thought to be as close to perfection as human frailty could achieve:

- Unarmed, friendly police, few in number and controlled by strict laws; just sufficient to keep the peace and bring suspects as quickly as possible to the independent judicial branch of government;
- Juries of common citizens sifting the facts to determine whether the Crown has proved its case beyond reasonable doubt so as to warrant the infliction of criminal punishment; and
- Independent judges, learned in the law, with functions to instruct the jury on the law and, more lately, to scrutinize the case on appeal. Noble assurances of the rectitude of the procedure and the safety of the conviction. Guardians against that most horrible thought: a wrongful conviction; an innocent dying at the gallows or more lately the slower death of years behind bars.

This is the idea. Like most brave ideas, it still has a great deal of reality about it. But the shadow which has fallen over it is persistent. It will not go away. It is not the mundane and tedious grind of criminal appeals which capture the imagination of our public. It is the notorious headline case which sticks in the memory, infecting community opinion: Adolph Beck;<sup>2</sup> Timothy Evans and the murders at 10 Rillington Place;<sup>3</sup> Virag and Dougherty;<sup>4</sup> the Confait Case;<sup>5</sup> the Maguire Case;<sup>6</sup> the Tottenham Three;<sup>7</sup> the Guildford Four;<sup>8</sup> the Birmingham Six,<sup>9</sup> each of them with 16½ years of wrongful imprisonment to complain about.

You in England are not alone in this problem. Every jurisdiction of the common law has similar controversial instances. In Australia, we have the Ratten Case;<sup>10</sup> the Peden Case;<sup>11</sup> the Ananda Marga Three;<sup>12</sup> the MacDermott Case;<sup>13</sup> the case of

2. The report of the Committee of Inquiry into the case of Mr. Adolph Beck, 1905 Cmnd. 2315.

3. L. Kennedy, *10 Rillington Place*, Granada (1971); R. Brandon and C. Davies, *Wrongful Imprisonment, Mistaken Convictions and Their Consequences*, Geo. Allen and Unwin (1973).

4. Report to the Secretary of State for the Home Department of the Departmental Committee on *Evidence of Identification in Criminal Cases* (Chairman, Lord Devlin), 1976.

5. Report of an Inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait, 1977.

6. B. Woffinden, *Miscarriages of Justice*, Hodder and Stoughton (1989), p. 457.

7. See *The Times*, 19 March 1991, p. 3.

8. Woffinden, *supra* n. 6, p. 345; *Law Soc. Gaz.* 88/3, 23 January 1991, p. 2.

9. Woffinden, *Ibid.*, p. 441 *et seq.*

10. See *Ratten v. The Queen* (1974) 131 C.L.R. 510 (H.C.A.); T. Molomby, *Ratten: the Webb of Circumstance*, Outback, Melbourne (1978).

11. T. Molomby, *Who Killed Hamah Jane?*, Potoroo, Sydney (1981).

12. Report of the Inquiry into the convictions of Timothy Edward Anderson, Paul Sean Alister and Ross Anthony Dunn (Wood J), Sydney, 1985 (3 vols.) (Ananda Marga Inquiry). Cf. *Alister v. The Queen* (1984) 154 C.L.R. 404 (H.C.A.).

13. T. Molomby, *The Shearers Tale*, Potoroo, Sydney (1987).

Edward Splatt;<sup>14</sup> the Varley Case.<sup>15</sup> And then there is the case of Lindy Chamberlain, convicted by a jury. She contended that her infant daughter, Azaria, had been taken by a dingo at Ayers Rock in the centre of Australia.<sup>16</sup> This was a case whose controversies divided families. A mountain of newsprint and endless video reels agitated the conscience of Australia. Now, a feature film, with Meryl Streep no less, has brought Lindy's story to countless millions. But is the point of the story that, by exceptional procedures of a Royal Commission, an anxious society ultimately vindicated justice? Or is it that the ordinary institutions of justice were shown to be fallible? The self-same question is posed in London by the recent Irish cases.<sup>17</sup>

### The highest and the lowest

Should we be engaged in public judicial flagellation because a few cases have been shown to result in apparent miscarriages of justice? I was thinking of this question at Eastertime in Sydney. It was difficult to escape it. Our media too were full of the reports of the Birmingham Six. Australia, which was originally peopled by convicts of the English courts, retains an endless fascination with their activities.

The discharge and release of the Six was also followed closely in Australia upon the apparent principle that the same defects which had been exposed by the Six were equally perilous for the administration of criminal justice in Australia itself. The reports on the case were succeeded by widespread coverage of an important new decision of the High Court of Australia concerning judicial warnings about disputed and uncorroborated police evidence of confessions.<sup>18</sup> I was sitting for the week before Easter in the Court of Criminal Appeal in Sydney. Dressed in horsehair wig and crimson robes, it was difficult not to feel part of the company of the legal profession on the far side of the world, coming under daily and sustained attack. Had we indeed, as Bernard Levin charged,<sup>19</sup> "lamentably failed again and again in [our] duty to see that such scandals do not take place"? Were we really, as he said, the instruments of a "hideous growth" in miscarriages of justice in recent years?

With these accusations fresh in my mind, I took myself to the quiet colonial cathedral of St John at Parramatta near Sydney. An accomplished choir sang the familiar themes of J. S. Bach's *St Matthew Passion*. My attention strayed to the symbols of Empire to be seen in every corner of this colonial church. The brass

14. Report of the Royal Commission of Inquiry into the Conviction of Edward Charles Splatt, Adelaide, 1984.

15. *Varley v. Attorney General for N.S.W.* (1987) 8 N.S.W.L.R. 30, 40 (N.S.W.C.A.).

16. See *Chamberlain v. The Queen* [No. 2] (1984) 153 C.L.R. 521 (H.C.A.). See also Australia, Royal Commission of Inquiry into the Chamberlain Convictions, *Report of the Royal Commission* (Hon. Mr Justice T. R. Morling), N.T.G.P., 1987; N. H. Young, *Innocence Regained: The Fight to Free Lindy Chamberlain*, Federation, Sydney (1989).

17. The "Irish Cases" is a description used by Woffinden, *supra* n. 6, p. 295.

18. *McKinney v. The Queen* (1991) 171 C.L.R. 468 (H.C.A.).

19. B. Levin, *The Times*, 7 February 1991, p. 10.

plaque commemorating the mission of Samuel Marsden to the Aborigines and the Natives of New Zealand. The ragged, now decaying, ensign of a regiment which had fought for the Sovereign in the Boer War and at Flanders. The simple modesty of an Anglican Church: not too plain as to be austere; yet not overstated. A wall memorial to the first Public Defender of New South Wales who worshipped there. On and on the gigantic Passion moved to its well known *crescendo*.

As it reached the point where the chief priests and elders of the people had resolved that Jesus should be put to death my attention was arrested. For a fleeting moment, I could understand the dilemma of Pilate. He had the legal power to stop a great wrong being done. But he was caught in the system of government and law which appeared to him to necessitate a different conclusion:

“And the Governor said. Why, what evil has he done? But they cried out the more, saying let him be crucified.”

And later:

“When Pilate saw that he could prevail nothing, but that rather tumult was made, he took water and washed his hands before the multitude saying, I am innocent of the blood of this just person: see ye to it.”<sup>20</sup>

The vision of Jesus as the victim of a grave miscarriage of justice appears even more plainly in St Luke's *Gospel* where one of the two prisoners, hanging there with Jesus on the cross, railed against Him but the other rebuked him saying:<sup>21</sup>

“Doest thou fear God, seeing thou art in the same condemnation? And we indeed justly; for we receive the due reward of our deeds; but this man hath done nothing amiss.”

So from our very earliest consciousness, at least for us brought up in the Christian tradition, we are aware of how public processes can go terribly wrong. Of how something can be lawful, unquestionably so, yet profoundly unjust. Of how easy it is for public officials, busy with many tasks, to wash their hands, blaming others for the wrongs done which they merely sanction. In this, the first trial which most school students ever hear about, an appeal is rejected. The conviction is confirmed. And that in the face of the recognition by the person responsible that the confirmation will probably do an injustice.

Most of us who have been brought up with the message of that great miscarriage find that the unacceptable inevitability of it all sears into our consciousness. Even in an increasingly secular society, the message is culturally embedded. It is

20. St Matthew's *Gospel*, 27:23–24.

21. St Luke's *Gospel*, 23:40–41.

repeated every Eastertime in words and music. The lessons are clear. Lawfulness and power are not enough. Wrongs are done to the highest as to the lowest. A mechanistic fulfilment of public office and the power of review debases that office and the holder of it. With power inescapably goes moral, as well as legal, responsibility. A ritual performance of power does not suffice. Against the risk of injustice must be provided checks and real scrutiny of alleged injustice. To the extent that our law condones ritual and ignores substance it gives little better than the hearing Pilate gave. Solemn judicial reasons may look better. But unless they are actually focused every time upon preventing a possible miscarriage of justice, they are only a slight improvement on the mealy-mouthed utterances of Pilate, washing his hands and salving his conscience.

### **The size of the problem**

Ordinary people are increasingly aware of the danger of things going wrong in our courts. Their awareness has been enlivened by a succession of notorious cases. It has been sustained by an adamant media which does not now share the ethos of respect for the judiciary common in the legal circles in which the judiciary is typically immured. Some proportion of cases are bound to miscarry. Wrongs will be done which cannot be righted. So much is admitted even by the most vocal critics of the present system.<sup>22</sup> There must be finality in criminal, as in any other litigation. Cases cannot forever be relitigated. Nor should the jury system be undermined unnecessarily. Any human system of justice is bound to make a few mistakes. So much must be allowed.

But the point made by the critics of the present system is that the number of such miscarriages is far greater than those operating the system will acknowledge. And that the greatest injustice arises from the way in which operators of the present system at every level allow it to be manipulated, pre-trial, at trial and on appeal, with too much attention to rules and procedures and insufficient concern about the risk of injustice. It is lawyers' faults that we are accused of: attention to the familiar, comparatively simple rules and procedural requirements. Unconcern about the substantive issues of injustice and innocence that lie behind.

Given that some component of error must be tolerated as an inescapable attribute of our humanness, how large is the problem of miscarriage of justice against which the critics rail with increasing vociferousness? Woffinden in his book *Miscarriages of Justice* asks:<sup>23</sup>

“How many miscarriages occur? It is impossible to tell, especially since the field can hardly be adequately researched. Arthur Koestler made a

22. Woffinden, *supra* n. 6, p. 485. See also T. Molomby, “Miscarriages of Justice in Britain” in K. Carrington and Ors, *Travesty! Miscarriages of Justice*, Academics for Justice, Sydney (1991), ch. 2. Molomby says (*loc. cit.*) that “there could be one miscarriage of justice a year involving serious criminal cases in the whole of Australia.”

23. *Loc cit.*.

persuasive point in 1956 when he commented, *apropos* of the Evans Case, that 'it is not unreasonable to assume that the number of undetected errors may be greater than we believe'. Whenever a judicial error came to light, the temptation in those days was to regard it as exceptional. Wrong, argued Koestler. The correct inference to draw was not that the occurrence itself was exceptional; but that it required exceptional luck to be able to detect one."

Ludovic Kennedy in 1956 estimated that between 200 and 300 innocent people are to be found in British gaols at any one time.<sup>24</sup> E. D. Radin in 1964 suggested that there were 14,000 cases a year in the United States or a 5% error for people gaoled. A more recent study, involving some empirical research, by C. R. Huff and colleagues, concluded that there were one or two miscarriages for every 200 persons convicted of felonies, *i. e.*, a margin of 1%. A higher figure is supported by the notable research of Dr John Baldwin and Dr Michael McConville into cases before the Birmingham Crown Court in 1975-6. As a result of their research they concluded that at least 5% of defendants were convicted "in doubtful circumstances".<sup>25</sup> It is said that more up to date statistics are not available because further research by Baldwin and McConville was not permitted by the Lord Chancellor's Department.<sup>26</sup>

There are, of course, various apologists for these figures. What do they say? Some of the persons convicted would in fact be guilty, though not properly proved to be such. Some would surely be guilty of other offences (an excuse sometimes given by police who "verbal" prisoners or "load them with presents", *i. e.*, plant evidence on them). More thoughtful are the system's defenders who assert that a degree of error is built into the peculiar institutions we have accepted:

- The jury, which is an accident of history but which has constitutional and democratic attributes that outweigh the occasions on which it falls prey to prejudice, passion and emotion;<sup>27</sup>
- The accusatorial system of criminal trial, which disclaims a search for the truth and prefers, instead, to enhance liberty by imposing the duty on the Crown to prove its case beyond reasonable doubt.<sup>28</sup> This may lead to elements of artificiality in the contest. But it does so for the purpose, thought justifiable by many, of controlling and limiting the intrusions of the state in the life of the individual; and

24. L. Kennedy in N. Fellows, *Killing Time*, Sydney, Lion (1986), p. 3. See also P. R. Wilson, "When Justice Fails: A Preliminary Examination of Serious Criminal Cases in Australia", (1989) 24 *Aust. J. of Soc. Issues*, p. 3.

25. J. Baldwin and M. McConville, *Jury Trials*, O.U.P., Clarendon Press (1979). See also Wilson, *op. cit.*, p. 4.

26. Woffinden, *supra* n. 6, p. 485.

27. P. Devlin, *The Judge*, O.U.P. (1979), p. 117.

28. Questioned by Lord Scarman, *The Times*, 5 March 1991, p. 10.

- Convictions which are recorded in an open trial and generally at the hands of a jury can only be set aside by a similarly open procedure on appeal. This rule not only diminishes the Executive Government's control over the criminal justice process.<sup>29</sup> It also maintains the openness and public character of our criminal justice system. It defends us from the secret trials of other lands.

Other systems have devised quite different institutions for administering the criminal law and controlling the coercive powers of the state over individuals in it. The examining magistrate of France and the *Prokuratura* of the Soviet Union<sup>30</sup> doubtless avoid, by their procedures, some convictions which may occur by ours. No doubt we can learn from the civil law system. In England, you have close at hand, in Scotland, an alternative procedure with which to stimulate the smouldering fires of legal imagination.<sup>31</sup> Your new association with Europe, and with its judicial institutions profoundly affected by the civil law, will undoubtedly, in time, affect your vision of the appropriate means of administering public and criminal law. But for the moment you are – as we in Australia are – heirs to a very special system which has grown, in large part, by accident. It is a system which has as an essential idea, a notion of the relationship between the individual and the state which I, for one, would want to preserve. Because, in Australia at least, it seems unlikely that there will be any fundamental change in that system in my lifetime, it is more appropriate for me to address attention to repairs of the current system that will help to reduce the risks of miscarriages of justice in it. Larger reforms, which will overthrow that system, can safely be left to bolder spirits.

The things to be done begin at the police station. They continue at the trial. They arise most urgently after conviction and on appeal. They continue while ever a wrongful conviction stands.

### Reforms of police procedures

Much of the recent debate about miscarriages of justice has focused on the appellate system and its alleged defects. Judges, especially senior judges, are very visible targets for anger, sometimes justifiable, about miscarriages. But a sensible system will strive to avoid injustices occurring in the first place. This is why much attention has also been given of late, in Britain, Australia and other jurisdictions of the common law, to reform of police investigation of offences and pre-trial

29. See Confait Report, *supra* n. 5, pp. 24–5; and cf. Lord Mackay of Clashfern, *The Child: A View Across the Tweed*, [1988] *Denning L.J.* 89.

30. See R. David and J. E. C. Brierley, *Major Legal Systems in the World Today*, Stevens and Sons (1978), p. 200.

31. There has been a widespread call in recent months for a search for “the truth” rather than “the winner”. See, e.g., L. Kennedy, “Lofty, Remote and Mistaken”, *The Independent*, 4 April 1991, p. 15; P. Marlow, “Our Judges in the Dock”, *Sunday Times Magazine*, 17 March 1991, p. 18; but contrast R. D’Sa, “Reforming the Right of Silence in Criminal Trials: A Commonwealth Perspective”, (1990) 2 *Revue Africaine de Droit International et Compare* 604 (in English).

treatment of suspects.<sup>32</sup>

Upon one view, it is the contradictory and apparently unattainable obligations cast upon police and other investigators which has led them into bending and twisting rules with consequent risks to the safety of convictions which follow. In 1978, the then Metropolitan Police Commissioner (Sir David Macnee) told the English Royal Commission on Criminal Procedure that the reason for abuse of police authority was the artificiality of some of the rules imposed upon police by the law. He blamed Parliament for failing to give police the power they needed:<sup>33</sup>

“[M]any police officers have, early in their careers, learned to use methods bordering on trickery or stealth in their investigations because they were deprived of proper powers by the legislature.”

Most frequently criticised is the denial of any right to arrest a person for interrogation<sup>34</sup> and the obligation imposed by law to take a suspect, reasonably suspected of having committed an offence, as soon as practicable before a justice.<sup>35</sup> How, police ask, can they perform their duties for society under such absurd constraints? Yet once an officer sworn to uphold the law, begins to twist and bend the law, cynicism and manipulation have set in which may pervert that officer's performance of other duties and undermine the integrity of his or her work.

That is why the Australian Law Reform Commission in a report of 1975 proposed a new statement of police procedures, improved training of police and a more realistic control of police activities, subject to more modern and appropriate checks and balances.<sup>36</sup> The police welcomed the *powers*. They opposed bitterly the *controls* and *checks*. Although Bills to implement the report<sup>37</sup> were twice introduced into the Australian Parliament, neither passed into law. As recently as April 1991 another Bill was enacted which is partly derived from the Law Reform

32. See Justice (British Section of the International Commission of Jurists), *Miscarriages of Justice*, 1989, p. 33. Also see reports and proposals summarised in Kirby, n. 33 *infra*.

33. See [1978] 128 *N.L.J.* 769. Note discussion in M. D. Kirby, “Controls Over Investigation of Offences and Pre-trial Treatment of Suspects; Criminal Investigation and the Rule of Law”, (1979) 53 *Aust. L.J.* 626, p. 627.

34. *Williams v. The Queen* (1986) 161 C.L.R. 278 (H.C.A.); *Dallison v. Caffery* [1965] 1 Q.B. 348, 367 (C.A.).

35. *Williams, ibid.*. See also Australian Law Reform Commission, *Criminal Investigation* (A.L.R.C. 2) (Interim), A.G.P.S. Canberra, 1975, p. 10 *et seq.*; New South Wales Law Reform Commission, *Police Powers of Detention and Investigation After Arrest* (L.R.C. 66), Sydney, 1990, p. 3 *et seq.*

36. A.L.R.C. 2, *ibid.*. See also South Australia, The Criminal Law and Penal Methods Reform Committee, Second Report, *Criminal Investigation*, Adelaide, 1974, p. 2.

37. Criminal Investigation Bill (1977) (lapsed); Criminal Investigation Bill (1981) (Cth.) (lapsed). *Cf.* Defence Force (Discipline) Act 1984 (Cth.).

Commission's report.<sup>38</sup> Public criticism of this new measure claims that the law makers have caved in entirely to the police objections.<sup>39</sup> Certainly, a number of old common law rules have been overthrown.

The desirability of clearly stating the rules governing police cannot be gainsaid. The high desirability of improving police selection, training and employment conditions cannot be denied, given the great power which they enjoy and responsibilities which they shoulder. United States studies have demonstrated, that while a medical practitioner receives some 11,000 hours of training, an embalmer 5,000 hours and a hairdresser 4,000 hours, the average policeman receives little more than 200 hours of sustained rigorous instruction.<sup>40</sup> Things are improving. But we make great demands upon police many of whom (at least until the recent past) were chosen for physical size and strength rather than for the skills really needed in an uncorrupt, modern, technological police service.<sup>41</sup>

Before it joined the graveyard of other reports on criminal procedure, the Australian report joined the others in urging the greater use of technology to enhance control over critical police decisions by the independent judicial branch of Government (as by search warrant and arrest warrant granted by telecommunications).<sup>42</sup> It also laid down, as one security for a new facility of time for police interrogation, the obligation to require sound recording of the interrogation.<sup>43</sup> It was this proposal especially that attracted calumny from the police. Their opposition was declared to be "unalterable" and "strenuous".<sup>44</sup> From the other side, civil libertarians criticised the provision for a four hour detention. They suggested that the balance struck by the common law, reinforced by the Judges Rules<sup>45</sup> had been endangered.

There is a clear and urgent necessity to reform the law of criminal investigation both in Australia and Britain. It is here that unlawful and oppressive practices flourish; corruption and cynicism breed and miscarriages of justice inevitably result later in courtrooms.

There are other features of our system which can give rise to wrongs. They

38. Crimes (Investigation of Commonwealth Offences) Amendment Act 1991 (Cth.). The Act provides for a period of detention of 4 hours (2 hours in the case of Aboriginals and Torres Strait Islanders). It provides for various checks, including recording of confessions. It reaffirms the right to silence. It applies only to the investigation of Federal crimes - a small proportion of criminal conduct in Australia where most criminal law is governed by State law. Cf. S. Odgers, "Police Interrogation and the Right to Silence", (1985) 59 *Aust L. J.* 78.

39. R. Merrell, "Danger for All in a Bill for the Bill", *Sydney Morning Herald*, 11 April 1991, p. 12. See also *The Age*, 25 March 1991, p. 13 which especially criticised the provisions in the Act which permit police not to record confessions on tape or video if it is "impracticable".

40. Kirby, n. 33 *supra*, p. 633.

41. *Ibid.*

42. A.L.R.C. 2, *supra* n. 35, pp. 39, 95.

43. A.L.R.C. 2, p. 71 *et seq.*

44. Cf. *Driscoll v. The Queen* (1977) 137 C.L.R. 517 (H.C.A.).

45. As revised see [1964] 1 All E.R. 237. See Kirby, *supra* n. 33, p. 631 *et seq.* Cf. *R. v. Voisin* [1918] 1 K.B. 531 (C.C.A.); *R. v. May* (1952) 36 Cr. App. R. 91, 93; *R. v. Prager* (1972) 56 Cr. App. R 151 (C.A.).

include the decisions made to prosecute offenders or later to review their convictions. They also include the obligations we place on police to enforce “unenforceable laws” relating to gambling, pornography, sexual conduct and drug use. Likewise, they include inadequate or incompetent procedures for handling complaints against police and for punishing or removing police who wilfully occasion a wrongful conviction. This much, at least, of the Australian report was substantially implemented.<sup>46</sup> Both at a Federal and State level in Australia, improved systems for handling complaints against police, involving the Ombudsman, have been enacted.<sup>47</sup>

Judges for a century have voiced their suspicion about unconfirmed confessions by suspects to police, later disputed by the suspect. In 1893 Mr Justice Cave observed:<sup>48</sup>

“... I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner’s guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession; – a desire which vanishes as soon as he appears in a court of justice.”

This feature of criminal investigation had been remarked on earlier in India. But there the Imperial lawmakers did something very effective to deal with the problem. They prohibited the admission into evidence of confessions to police unless made before an independent magistrate.<sup>49</sup> That rule still obtains in many parts of the Commonwealth of Nations.<sup>50</sup> Questions are now asked as to why a rule, good enough for the colonies, was not good enough for England and, I should say, Australia. Seemingly, the greater perceived reliability of English and

46. Australian Law Reform Commission, *Complaints Against Police* (A.L.R.C. 1), A.G.P.S., Canberra (1975). See also A.L.R.C. 9.

47. See *Complaints (Australian Federal Police) Act 1981* (Cth.); *Police Regulation (Allegations of Misconduct) Act 1978* (N.S.W.); *Police Administration Act 1979* (N.T.). It is a constant complaint of the Irish prisoners, recently released in England, that police officers involved in their convictions have gone on to very high posts in the police service and remain unpunished for wrongdoing. See the expression of disappointment in *Police Complaints Authority (U.K.) Triennial Review 1988–91*, 1991, p. 7 (para. 1.7).

48. *The Queen v. Thompson* [1893] 2 Q.B. 12, at p. 18.

49. *Indian Evidence Act 1872*, Ceylon equivalent consd. in *Reg. v. Ramasamy* [1965] A.C. 1, pp. 14–15 (P.C.) and *Thambiah v. The Queen* [1966] A.C. 37 (P.C.). For history, see J. Stephen, *A History of the Criminal Law of England* (1883), p. 332 *et seq.* and discussion A.L.R.C. 2, p. 73.

50. See, e.g., T. Akinola Aguda, *Law and Practice Relating to Evidence in Nigeria*, London, Sweet & Maxwell (1980), pp. 72, 91 *et seq.*

Australian police at the turn of the century was thought to obviate the necessity.<sup>51</sup>

Sustained judicial experience of the kind which Mr Justice Cave voiced<sup>52</sup> has led to repeated complaints. In Australia, the demands for sound and later video recording began to be heard with increasing insistence after 1962, such was the judicial disquiet.<sup>53</sup> In the face of police opposition and legislative inertia, the courts of Australia resorted to a strengthened rule for the exclusion of evidence unlawfully or unfairly obtained.<sup>54</sup> In England at about the same time, an enhanced power for the exclusion of such evidence by judges was afforded by the *Police and Criminal Evidence Act*.<sup>55</sup> In some parts of Australia sound and video recording of confessions to police has been introduced pursuant to statute.<sup>56</sup> In other parts, the suggestion is still under study, thirty years and many injustices after it was first proposed. As I shall show, the point was reached in March 1991 when the High Court of Australia felt obliged to act.

### Reforms of the trial

*Identification evidence.* One of the chief reforms that can be adopted at the trial of a person accused of a criminal offence to reduce the risk of miscarriage is the strengthening of judicial warnings about the dangers that may attend conviction upon contested prosecution evidence.

Some of the most shocking cases of miscarriage of justice have occurred as a result of mistaken identity. It was the clear establishment of the innocence of Adolph Beck, despite his identification by numerous accusers, which triggered the moves that led to the establishment of the Court of Criminal Appeal in England and initiated similar courts and additional procedures in other common law countries, including my own.

The basic problem of identity evidence may be simply stated. Human memory is extremely fallible, particularly with the passage of time. People see what they want or expect to see. Unless procedures for identification are carried out with impeccable fairness, there is a significant risk of wrongful identification. All of this was reaffirmed in Lord Devlin's report of 1976.<sup>57</sup> The judgment of the Court of Appeal of England in *Turnbull* in 1977 required judicial warnings to be given.<sup>58</sup> This judgment has proved highly influential, beyond England. It has been applied in Australia.<sup>59</sup> Lately, still more rigorous and detailed standards have been insisted

51. See *supra*, n. 48.

52. Woffinden, *supra* n. 6, p. 487.

53. *R. v. Governor of Metropolitan Gaols, ex Parte Molinari* [1962] V.R. 156, 169; (S.C.V.).

54. See, e.g., *Bunning v. Cross* (1978) 141 C.L.R. 54, (H.C.A.); *Cleland v. The Queen* (1982) 151 C.L.R. 1, 5 (H.C.A.); *Van der Meer v. The Queen* (1988) 35 A. Crim. R. 232, 248 (H.C.A.).

55. 1964 (Eng.). See, e.g., *Reg. v. Delaney* (1988) 88 Cr. App. R. 338, 341 (C.A.).

56. See, e.g., Crimes Act 1958 (Vic.), s. 464H noted in *McKinney v. The Queen, supra* n. 18, esp. Toohy J at p. 497.

57. See Justice, *supra* n. 32, p. 26. See also Lord Devlin's report, *supra* n. 4.

58. [1977] Q.B. 224 (C.A.).

59. *Alexander v. The Queen* (1980) 145 C.L.R. 395, 402 (H.C.A.); *Allen v. R.* (1984) 16 A. Crim. R. 441, 445; *Finn v. R.* (1988) 34 A. Crim. R. 425 (N.S.W.C.A.). See also *Reid (Junior) v. The Queen* [1989] 3 W.L.R. 771 (P.C.).

upon.<sup>60</sup> But by adopting its guidelines, the Court of Appeal pre-empted legislation. This did not pass without criticism by Lord Devlin.<sup>61</sup>

*Disputed confessions.* Judicial warnings about confessional evidence have come much more slowly and this despite the century old warning of Sir Lewis Cave.

In Australia, the High Court expressly recognised in 1977 that an unsigned police record of interview might be fabricated.<sup>62</sup> The practical and forensic difficulties of challenging such statements were reiterated in 1988.<sup>63</sup> In that year, although the High Court refused to adopt a general rule requiring warnings by trial judges, it held that, in the circumstances of one case, a warning should have been given by the judge in express terms.<sup>64</sup> In a later case the Court, differently constituted, rejected an argument that a warning should have been given.

A chance to reconcile these apparently different decisions arose in March 1991 in *McKinney v. The Queen*.<sup>65</sup> All of the Justices of the High Court of Australia participated in this appeal. By majority<sup>66</sup> the Court laid down “for the future” a new and rigorous requirement of judicial warning to juries about the danger of convicting on disputed and uncorroborated confessions to police. The majority said:<sup>67</sup>

“Given the existence and increasing availability of reliable and accurate means of audiovisual recording and given that the decisions in *Carr* and *Duke* cannot be satisfactorily reconciled, we are of the view that it is incumbent upon the Court to reconsider the whole question. That reconsideration has led us to conclude that a rule of practice should be adopted for the future along the lines suggested . . . in *Carr*. Material presented in the course of argument in this case suggests that there has been significant progress in relation to the audiovisual recording of interviews since *Carr* was decided. . . . A rule of practice will operate to counter the relative disadvantage accruing to an accused person who is interviewed while in police custody at a place lacking recording facilities. And, as the means of recording become generally available, the absence of a recording will tend to bring the reliability of a confessional statement into issue, thus raising the question whether . . . a warning should be given.”

Explaining this new “rule of practice” – the more radical because it was expressed to apply in the future – the majority of the High Court of Australia said:<sup>68</sup>

60. See esp. *Finn* (*supra*) and *Dominican v. The Queen* (*No. 3*) (1990) 46 A. Crim. R. 428 (N.S.W. C.C.A.).

61. Devlin, *supra* n. 27, pp. 175, 186 *et seq.*. See also Justice, *supra* n. 32, p. 27.

62. *Burns v. The Queen* (1975) 132 C.L.R. 258, 265 (H.C.A.); *Driscoll v. The Queen* (1977) 137 C.L.R. 517, 542 (H.C.A.); *Wright v. The Queen* (1977) 15 A.L.R. 305 (H.C.A.).

63. *Carr v. The Queen* (1988) 165 C.L.R. 314 (H.C.A.).

64. *Ibid.*, pp. 337, 343.

65. (1991) 171 C.L.R. 468.

66. Mason CJ, Deane, Gaudron and McHugh JJ; Brennan, Dawson and Toohey JJ dissenting.

67. *Ibid.*, p. 473.

68. *Ibid.*, p. 475.

“The contest established by a challenge to police evidence of confessional statements allegedly made by an accused while in police custody is not one that is evenly balanced. A heavy practical burden is involved in raising a reasonable doubt as to the truthfulness of police evidence of confessional statements, for, in the circumstances which invariably attend that evidence, a reasonable doubt entails that there be a reasonable possibility that police witnesses perjured themselves and conspired to that end. . . . [T]he contest is one which may entail other forensic constraints or disadvantages. Thus, the jury should be informed that it is comparatively more difficult for an accused person held in police custody without access to legal advice or other means of corroboration to have evidence available to support a challenge to police evidence of confessional statements than it is for such police evidence to be fabricated, and, accordingly, it is necessary that they be instructed, . . . that they should give careful consideration as to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for finding that guilt has been established beyond reasonable doubt is a confessional statement allegedly made whilst in police custody, the making of which is not reliably corroborated. Within the context of this warning it will ordinarily be necessary to emphasise the need for careful scrutiny of the evidence and to direct attention to the fact that police witnesses are often practised witnesses and it is not an easy matter to determine whether a practised witness is telling the truth. And, of course, the trial judge’s duty to ensure that the defence case is fairly and accurately put will require that, within the same context, attention be drawn to those matters which bring the reliability of the confessional evidence into question. Equally, in the context of, and as part of, the warning, it will be proper for the trial judge to remind the jury, with appropriate comment, that persons who make confessions sometimes repudiate them.”

It is clear from a reading of this Australian decision, that a majority of the High Court of Australia had come to a conclusion that the time for general words of caution and judicial appeals for legislation or to the exclusionary rule had passed. Such was the perceived dimension of the problem and the risk of serious miscarriages of justice, that the Court felt obliged to take the stand it did. That stand is now the common law of Australia. It is a judicial stand designed to diminish the risks of miscarriage of justice based upon uncorroborated disputed confessions to police.

In terms unusually strong for Australia, the dissenting judgments of the three minority Justices criticised the perceived departure from the Court’s earlier authority and the prescription of a future practice derived from experience with police in New South Wales for application in all Australian jurisdictions. Fear was also expressed that the even-handedness of the criminal trial would be unbalanced by a judicial obligation to give a warning which may appear to place the judge on

one side of the contest on an issue of fact.<sup>69</sup> So much was said by Justice Brennan who reiterated his support for the proposals of the Australian Law Reform Commission report which he, as a Commissioner, had signed in 1975 urging the legislative introduction of electronic recording of police interviews of suspects.

This Australian decision is not the first time that the judges have taken a bold stand to assert control over the detail of police conduct by the weapon which judges have in court to exclude, or warn against the use of, the product of police actions. The Judges' Rules in 1912 and 1918 did more than this. Whatever may be the criticism of the departure from precedent and the invasion of the legislative realm by "judicial activism",<sup>70</sup> the nett result is surely an advance for the constant struggle against miscarriages caused by police "verbals" and unreliable confessions. Unless the obligation to give a warning is undone by valid and effective legislation, the new Australian rule will certainly expedite the installation and use of videotaping of confessions to police. If this, in turn, reduces the burden of disputes over this issue, with time-consuming committals, *voir dire* and other procedures, it will be a great blessing. And the result may be fewer wrongful convictions based upon contested confessions to police. Had such a rule been part of the law of England when the Birmingham Six were tried, it is quite possible that most of the Six would have been acquitted by the jury given the absence of satisfactory evidence against some of them, save for the confessions now said to have been extracted from them by oppression and force.<sup>71</sup>

*Scientific evidence.* The third area where particular care is needed relates to forensic scientific evidence. Two of the Birmingham Six were convicted upon scientific evidence now conceded to have been unreliable. Partisan expert evidence can do terrible wrongs in the forensic setting. The judge, as much as the jury, will often be ignorant of the realm of discourse engaged in by the forensic expert. The accused may not have equal access to the expertise in the possession of the Crown, simply because of the repeated experience from which the expertise derives. Such experts may be too close to the prosecution. They may lose their objectivity. Yet their very expertise may cloak them with the appearance of professional neutrality. They may be over-confident of their skills and of the "science" they apply. Dependent on those who call them, they may unconsciously take on their cause.<sup>72</sup> All of this has been said many times.

The moves towards the use of highly scientific technical evidence is to be applauded, so far as it provides an assurance of proper convictions and a protection

69. *Ibid.*, p. 468 (*per* Brennan J).

70. *Ibid.*, p. 249 (*per* Dawson J).

71. *McIlkenny v. Chief Constable of the West Midlands and Another* [1980] 1 Q.B. 283 (C.A.). For criticism, see, e.g., T. Molomby, "Miscarriages of Justice in England", in M. K. Carrington & Ors (eds.), *Travesty: Miscarriages of Justice*, Sydney (1991), ch. 2.

72. Australian Law Reform Commission, *Evidence* (A.L.R.C. 26) (Interim) Vol. 1, p. 75 *et seq.* where the problem and case law are discussed.

against miscarriages.<sup>73</sup> However, a litany of cases now teach us the lesson that expert testimony will only be as reliable as the honesty and integrity of the experts; the soundness of the procedures they use and the accuracy of the knowledge they apply. Such warnings are voiced in the *Confait Report*, the report of the *Royal Commission into the Conviction of Mrs Chamberlain* and now by the release of the Birmingham Six. They direct our attention to the need for safeguards against wrongful conviction based upon the unreliable testimony of experts. Various options have been proposed to deal with this problem.<sup>74</sup> At the very least, judges should ensure that the raw data upon which the expert opinion is expressed, is faithfully preserved against the possibility of later challenge and the need for rescrutiny with the advance of further scientific knowledge.

Many other reforms are doubtless needed at the trial. The variable quality of legal representation is often mentioned as a significant source of wrongful convictions. Courts are now much more willing to set aside a conviction where the accused was incompetently represented by an inexperienced advocate.<sup>75</sup> They should resolutely do so if the transcript shows that the prisoner did not have a proper trial according to law because of incompetent representation. A jury trial largely depends for its success upon a contest between two roughly equal and experienced combatants. In such circumstances, the notion that an accused has no common law right to legal counsel for a defence against a serious charge is one which the judges should reject as wholly contrary to modern notions of basic rights and due process.<sup>76</sup> The notion that an experienced solicitor, trained in the law, cannot appear at a criminal trial (yet a junior barrister of no experience can) is one which challenges commonsense. In Australia, even in States with a separate Bar established by law, any legal practitioner, including a solicitor, has a right of audience to the highest courts. It has been so in most parts of Australia for a century. It has caused no difficulty whatsoever. We watch with bemusement, even astonishment, the passion of debates in England on this issue. I regret to say that such debates tend to confirm the stereotype of the English Bench and Bar as a club, nurtured in common schools, reinforced in common forensic experience and renewed in shared social life. In Australia it is not exactly the same.

73. I. Freckelton, "The Ultimate Identifiers: Fingerprinting and DNA Sampling", (1990) 15 *Leg. Serv. Bulletin* 172.

74. V. D. Plueckhahn and S. M. Cordner, *Ethics, Legal Medicine and Forensic Pathology* 2nd ed. (1991), forthcoming. See also note (1986) 60 *Aust L.J.* 543.

75. See Brennan J in *Jones v. Barnes* 77 L. Ed. 2d 987, 463 U.S. 745 1000 (U.S.S.C.): "If the quality of justice . . . really depended on nice gradations in lawyers' rhetorical skills, we could no longer call it justice." See also discussion in Woffinden, *supra* n. 6, p. 416; B. S. Ledewitz, "Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence", 24 *Crim. L. Bulletin* 379, at p. 416 (1988). As to Australian law, see *Giannarelli & Ors v. Wraith* (1988) 35 A. Crim. R. 1, (H.C.A.); *Re Knowles* [1984] V.R. 751, (V.C.C.A.); *R. v. Birks* (1990) 19 N.S.W.L.R. 677, (N.S.W.C.A.). *Cf. R. v. Ensor* [1989] 1 W.L.R. 497 (C.A.).

76. Contrast *McInnis v. The Queen* (1979) 143 C.L.R. 575 (H.C.A.) and *Gideon v. Wainwright* 372 U.S. 335 (1963) (U.S.S.C.). See also *R. v. Howes* [1964] 2 Q.B. 459, 466 (C.A.) and *Moore v. Skinner* (1990) 49 A. Crim. R. 1, 3.

## Reforms on appeal

And now I reach the tip of the iceberg: the Judges. At the trial the reduction of the judicial recapitulation of the facts is probably called for. Recent legislation in New South Wales has been designed to this end. In lengthy reviews of the facts lie the risks of misdirection and, sometimes, the display of a lack of neutrality. But it is in the Appeal Court that I see the problem. This has also been the target at which most of the media fire of recent months in England has been aimed. It is the appellate system which has borne the brunt of the principal criticism. It has been blamed for a "catastrophic decline in public confidence". It is the appellate judges who have "grievously missed the opportunities to correct wrongs which have resulted in injustice."<sup>77</sup> It is those judges who stand accused of playing out a paramount concern "in operating the system to conceal its valetudinarian condition."<sup>78</sup>

The repeated charge against the appellate judges is nothing less than of a cynical unconcern with innocence and an overriding imperative to defend the public confidence in the institutions in their charge at the tolerable cost of an occasional sacrifice. "I sit in this cell," writes a prisoner, "not because of evidence against me but because of the legal establishment's pretensions to infallibility."<sup>79</sup>

In a sense, these angry denunciations represent something of a back-handed compliment to the judiciary. Of the senior judges of our tradition, much is expected. They are the ultimate guardians of a semi-holy grail named "British Justice". When faith is lost and expectations disappointed, in one of the most precious and admired institutions of society, angry people, used to disappointment only in the other branches of government, lash out. Thus, there have been demands for the resignation of the Lord Chief Justice. There are calls for an earlier judicial retirement age.<sup>80</sup> If a "bare footed procession" of penitent judges from the Law Courts to St Paul's only just escapes the editorialist's approval, the major accusation is of a "mind set" which is "encrusted with forty year old ideas".<sup>81</sup> If the Judges are not just vain, proud, remote Establishment figures insensitive to injustice, they are loveable old men now "helplessly, inescapably, tragically" out of their depth.<sup>82</sup>

We, the Judges, can peremptorily dismiss such misguided accusations, if we will. Some judges have been so bold as to assert a duty to perform their functions as the law presently provides and been taken to task for doing so.<sup>83</sup> Others have left themselves open to criticism by the petulant way in which they have responded to

77. *The Times*, 19 March 1991 (Editorial).

78. Woffinden, *supra* n. 6, p. 489.

79. Quoted Woffinden, *ibid.*, 489 *et seq.*.

80. *The Times*, 19 March 1991, p. 7.

81. B Levin, *supra* n. 19.

82. *Ibid.*.

83. See, *e.g.*, the remarks of Lloyd LJ noted *The Times*, 4 March 1991, p. 3 and the criticism of Taylor LJ in Levin, *supra* n. 19.

the attacks on their *amour propre*. It is probably true to say that, at least the judges of the higher courts are quite unused to such serious, sustained and pointed criticism. In England, the campaign probably began with the "Spycatcher" cases and continues to this time, with vehemence.

An easy response in these circumstances would be blame the media. It is certainly true that the modern media in a free society seeks targets and scapegoats. Nothing is immune. By convention the Judges cannot answer back in an effective way. But a free and vigorous media is an important attribute of an open society. And it should be acknowledged wholeheartedly that, in too many recent cases, it has been the media rather than the institutions of justice or the Judges, which have been vindicated. For example, it was the sustained attention to the case over many years (when most citizens had forgotten and when Judges had thrice rejected them) that saw Granada Television and the World in Action maintain alive the flame of justice which ultimately required the release of the Birmingham Six. Amidst all the extravagance of accusation there commonly lies a blinding, simple truth. Embarrassing as it is to say it, it must be stated. It was a band of loyal supporters who never lost faith in the prisoners, and a few discerning journalists who supported them, rather than the judicial institutions which actually led to the termination of that injustice. The errors of the earlier curial responses can, of course, be fully explained. They can even partly be justified on the basis of the material as it was then before the courts. Only in recent months did the final props of the prosecution case fall away. But the result is that a very large wrong appears to have been done. Rightly, the public want to know what can be done to ensure against repetition where there is no band of supporters, where there are no interested journalists and where the prisoner sits in a silent cell the victim of an exquisite system which has made a mistake.

This is not the occasion to recount once again the unfortunate tale by which the powers of the English Court of Appeal, and its predecessor came to be circumscribed. Almost certainly, as Lord Devlin majesterially showed,<sup>84</sup> the powers of the Court of Appeal were confined by the Judges in a way that Parliament never intended.<sup>85</sup> Later attempts to revise that understanding of the function of the Court in England have defied curial applications. They have ignored thoughtful commentary and criticism.<sup>86</sup> They have resisted the manifest need for a wider charter.

The result has been a derogation from the function of the jury. Instead of following the old *Stirland* formula, so that if relevant fresh evidence were admitted a new trial before a *jury* would be ordered unless the Court was satisfied that the jury would inevitably convict, an imperfect retrial by three *judges* has prevailed. In the result, a fiction has been accepted that the appeal judges can get the "feel" of

84. P. Devlin, *supra* n. 27, p. 157.

85. *Stafford v. Director of Public Prosecutions* [1974] A.C. 878 (H.L.).

86. See, e.g., Justice, *supra* n. 32 and materials there cited. See also Devlin, *supra* n. 27.

the case.<sup>87</sup> They themselves can then judge, with the benefit of any new evidence, what the jury (which gave no reasons) would have regarded as a safe or satisfactory conviction. Lord Devlin compares the result of this approach with the legend of the judge who, at the end of his judgment said:<sup>88</sup>

“My brother Snodgrass, before he went off to sleep during the last half of the argument, authorised me to say that he fully agrees with what I have just said.”

There is thus an appellate retrial, but one “at a disadvantage”.<sup>89</sup> The disadvantage is that the appellate judges will rarely, if ever, have the time or the opportunity to recapture in its entirety and in sequence the whole of the evidence, mood and atmosphere of the trial. Yet that is what they are authorised and required to do. Three judges second-guess the silent jury; but without the constitutional authority or forensic advantages which that jury enjoys.

It is natural that appellate judges will approach a challenge to a jury’s verdict, even on the basis for fresh evidence, with a degree of distaste. Common experience tells them that most jury verdicts are sound. If there has been error of direction, the verdict can readily be quashed. But quashing a verdict may require a retrial. It is a retrial which must be had at very considerable public cost. Quite apart from the private and public legal costs, there are the opportunity costs of police witnesses and other citizens who must stand idly by whilst, once again, they wait to give evidence – frequently in a trial extended by painful comparisons with earlier testimony. The appellate judges will have seen the remarks on sentence. They will know (as often is the case) that the accused has an anti-social past. They cannot approach the case in quite the same way as a jury, which knows nothing of these things. Nor do they have the time, typically, all of them, to read the entirety of the transcript of what may have been a trial lasting many days or even weeks. They visit the evidence, on the invitation of competing counsel, skipping from one

87. *R. v. Cooper (Sean)* [1969] 1 Q.B. 267, 271 (C.A.) (“Some lurking doubt in our minds”).

88. Devlin, *supra* n. 27, p. 159. At p. 171 *ibid.*, Lord Devlin said:

“It seems to me that even those judges who are in favour of extending the domain of judges over the facts must accept that the position which has now been reached is not a satisfactory one. Instead of the retrial by jury for which Parliament provided in 1964, there is an imperfect retrial by judges, in which the normal appellate review has been swallowed up. This has happened because the House of Lords, sitting judicially, is not, as it has often itself emphasised, the right body to effect reforms of this magnitude; they need more detailed planning than can be given in speeches whose function it is to state the reasons for a decision in a particular case.”

89. Noted by Lord Dilhorne [1974] A.C. 878, at p. 894 (H.L.). Note the position in Canada in *Yebeast v. The Queen* (1988) L.R.C. Crim. 260. There the Supreme Court of Canada held that a Court of Appeal’s function under s. 613(a)(i) of the Criminal Code R.S.C. 1970 (C-34) went beyond merely establishing whether or not there was evidence to support a conviction. The correct test was for it to determine, by re-examining and to some extent reweighing and considering the effect of the whole evidence, direct or circumstantial, whether the verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered. See also *Corbett v. The Queen* [1975] 2 S.C.R. 275, 282 (S.C.C.).

passage to another. Rarely do they capture the subtle atmosphere of the trial. For such things do not readily emerge from cold pages. These are the reasons why, in civil trials, so much deference is paid to the advantages of the trial judge or jury, who see the evidence unfold in sequence and observe the witnesses giving their testimony.<sup>90</sup>

We should follow Lord Devlin's warning. We should confine the function of Courts of Criminal Appeal to considering whether credible and relevant fresh testimony is available. If it is, then, save in cases where such evidence could not possibly have altered the jury's verdict, it should be the duty of the Court of Appeal to order a retrial. This was the position previously. It safeguards the constitutional function of the jury. It avoids undue speculation by the Court of Appeal on what led the jury to its verdict. It minimises the risk of a retrial but by a court of judges, operating under a severe disadvantage. It conforms to international human rights law which requires that a person should be convicted only upon evidence brought against that person at a trial. As the additional evidence was not at the trial, the conviction cannot logically rest upon it. The expense and inconvenience involved in restoring this approach will be a small price to pay if miscarriages are thereby diminished and the confidence of the community is recovered.

It is out of recognition of these considerations that demands are now made for change in the appellate rules. In the United States of America, where the Constitution builds protections for due process into the earlier phase of criminal investigation, appellate review of criminal convictions has, until lately, been limited.<sup>91</sup> Only in recent years has it begun to approach even the imperfect standards which we have taken for granted.<sup>92</sup> In Australia, celebrated cases have attracted the necessity of Royal Commissions and other judicial inquiries. In my own State, a particularly useful procedure of judicial inquiry and report, frequently utilised, is provided under the Crimes Act. Section 475 provides:

“Whenever, after the conviction of any person any doubt or question arises as to his guilt . . . or any mitigating circumstance in the case, or any portion of the evidence therein, the Governor on the petition of the person convicted, or some other person on his behalf, representing such doubt or question, or the Supreme Court of its own motion, may direct any Justice to . . . summon and examine on oath all persons likely to give material information on the matter suggested.”

90. See, e.g., the recent line of authority in the High Court of Australia: *Jones v. Hyde* (1989) 63 A.L.J.R. 439, 351; *Abalos v. Australian Postal Commission* (1991) 171 C.L.R. 167, 178. Cf. *Winter & Anor. v. Boynton & Anor.*, unreported, C.A., 1 February 1991, *The Times* 6 February 1991.

91. K. Hegge, “Attorney Error: The Martinez Miscarriage of Justice Solution”, 17 *Pacific L.J.* 213, 230 (1985) discussing *People v. Martinez* 36 Cal. 3d 816, 826 (1984) (S.C. Cal.).

92. See *Varley*, *supra* n. 15.

In practice, such investigations are usually initiated by a petition to the Supreme Court. A judge of the Supreme Court is appointed to conduct the inquiry if, administratively, the Court considers that course justified. If doubt about the conviction is reported to the Governor, the Executive Government invariably recommends a pardon. This procedure, which is outside the ordinary criminal appeal, respects the constitutional role of the courts by the convention that the investigation is done by a judge of the Court. At this very time, an investigation by a judge is under way into a petition complaining about the alleged unsafety of a conviction in 1965 based upon forensic evidence. It is the second such investigation of the same case.<sup>93</sup>

The controversy posed by recent experience in England relates to the institutional arrangements which should replace review by the Court of Appeal, whether on the appeal of the prisoner or reference of the Home Secretary. The suggestions put forward include the enhancement of the procedures of the appellate court; the creation of a new appellate court; or the creation of an entirely different tribunal to include persons other than judges.<sup>94</sup>

Whilst I understand those who defend the constitutional propriety of review by courts, honesty requires me to say that the strongest argument for a separate tribunal is the extreme difficulty which appellate judges face in finding the time to reconsider all, and I mean all, of the evidence at the trial in order to decide whether a conviction can safely stand or must be set aside and a new trial ordered. On the other hand, I can also understand the fear of a non-judicial tribunal, serviced by officials, standing outside the independent judicial branch of government, empowered to set aside jury verdicts and to put at nought the sentences publicly pronounced by judges.

A compromise which respects the jury, upholds the public trials, maintains the openness of criminal procedure yet deals more resolutely and effectively with suggested miscarriages is what is needed. Statutory provisions which make clear the warrant of the Court of Appeal to set aside a risky verdict, requiring a retrial by jury on all available evidence, is to be preferred.<sup>95</sup> A supplementary procedure for extra curial but judicial investigation originally existed under your statute but was repealed for lack of use. In the light of experience elsewhere it may be a procedure

93. An Inquiry into the Conviction of Alexander McLeod-Lindsay now before Loveday J, (previously before Lee J).

94. See proposal by D. Jeffreys at Third Annual Bar Conference 1988, London noted (1988) 14 *Cwlth. L. Bulletin* 1400, 1404 *et seq.*; discussion by Lord Scarman, n. 28 *supra* and by Justice, n. 32 *supra*. Note P. O'Connor, "The Court of Appeal: Re-trials and Tribulations", [1990] *Crim. L.R.* 615, p. 625; "Appeals System Criticised", (1990) 5 *Constitutional Reform No.* 3, p. 2.

95. *Cf. P. Drummond v. R. (No. 2)* (1990) 46 A. Crim. R. 404 (N.S.W.C.C.A.). The Australian authorities are to be found in *Mickelberg v. The Queen* (1989) 167 C.L.R. 259; 43 A. Crim. R. 182; *Gallagher v. The Queen* (1986) 160 C.L.R. 392; 20 A. Crim. R. 244; *Chamberlain [No. 2] v. The Queen*, *supra* n. 16, at pp. 532, 604; *Morris v. The Queen* (1987) 163 C.L.R. 544, 561 and *Neil Chidiac v. The Queen* (1991) 65 A.L.J.R. 207, p. 210 *et seq.* where the obligation on the Court of Criminal Appeal to conduct its own independent investigation is repeatedly emphasised. See also G. Robertson, *Freedom, the Individual and the Law* 6th Ed., Penguin (1989), pp. 303-313.

which should be revived. It has the advantage of maintaining judicial review but conserving such cases to a single judge, who will typically have more time to devote to the inquiry whilst the appellate judges get on with their often mundane and tedious, but necessary work, where judicial skills are unchallengeable, of reviewing convictions for error of law or in directions given to the jury.

### **A passion for justice**

Reviewing the feature film on the *Chamberlain Case*, the *Guardian* newspaper in England declared:<sup>96</sup>

“One comes away from the film feeling that a society with such a capacity for self-criticism must possess a good deal of inner strength.”

I can now repay that compliment. *The Age* newspaper in Melbourne, commenting on the release of the Birmingham Six, recently declared:<sup>97</sup>

“There is something positive to be said for a system that, standing condemned, is able to find itself guilty.”

What first takes us into the law? For some of us, it may be a family tradition. For a few, it may be the hope of high salaries or rapid advancement to positions of power. Civil honours, decorations, a life dramatic in youth and honoured in old age. Well, that is not enough. Delivering his Holdsworth Lecture on “The Lawyer and Justice”, Lord Cross of Chelsea declared:<sup>98</sup>

“Our Law Schools [too] turn out men and women who, as well as becoming competent practitioners, take a keen interest in the quality of our substantive law and the efficiency of our legal system and intend to do what they can in the course of their professional lives to improve them.”

He went on:<sup>99</sup>

“When my obituary comes to be written I do not suppose that it will be said of me that as a Judge I always strove to do justice. But if it is said – and in my then place of residence I am permitted to read *The Times* – I shall not regard it as an unqualified compliment.”

Yet that is what most of us would wish to have said. That we strove for justice.

96. Cited by the author in his *Afterword* to Young, *supra* n. 16, p. 290.

97. *The Age*, 16 March 1991.

98. Holdsworth Lecture, 1973, in P. W. Harvey (ed.), *The Lawyer and Justice*, Sweet and Maxwell (1978), p. 117 *et seq.*

99. *Ibid.*, p. 110.

That never like Pilate did we wash our hands. That we were ever alert to the risk that we might become instruments of wrongdoing and of injustice to a fellow human being. We should never be content with the *forms* of justice. As judges, above all, but as lawyers of every rank, we should daily renew our commitment to justice according to law. And the first obligation of that commitment is to strive for justice.

Nowhere is that mission more vital than in criminal investigation, at criminal trials and in criminal appeals. Here is where our system is most accurately tested. It is here that its fairness matters most.

And now we wander out into the streets of this famous city. Not far from here the precious legacy of English law was nurtured; on the fragile ships, down the Thames, that law travelled to every continent, including my own. Even as I speak, courts in far away lands are applying the wisdom of judges carefully written down and recorded in years gone by in this metropolis. It is a mighty legacy. It ranks with the English language, English literature, English ideas of freedom, English sports and English commitment to commerce and science. These are the abiding gifts of the English. It is imperative that this generation should prove itself worthy to receive, and capable to enhance, this most remarkable legacy.

In his *Four Quartets*, T. S. Eliot declares that:<sup>1</sup>

“Right action is freedom  
We  
. . . are only undefeated  
Because we have gone on trying.”

We, the judges and lawyers, must go on trying to improve the system of criminal justice. Without arrogance or self-satisfaction we must learn from the lessons which miscarriages of justice teach us. We must have the humility to acknowledge error. We must have a sense of urgency to ensure improvements in our institutions. And we must never rest content with institutional injustice which we have failed to repair when it was in our province to do so. Doubtless these are most exacting standards. But it is the highest tribute to our judicial forebears that they are the standards which our communities expect of us today. We must not fail.

1. T. S. Eliot, *The Dry Salvages* in *Four Quartets*.