Ministry of Justice

The Right Honourable
Dominic Raab MP
Deputy Prime Minister
Lord Chancellor & Secretary of State for Justice

Andrew Selous MP
House of Commons
London
SW1A 0AA

MoJ ref: MC093351

8 April 2022

Dear Andrew,

CRIMINAL CASES REVIEW COMMISSION

Thank you for your further correspondence of 8 December regarding the case of Mark Alexander and the work of the Criminal Cases Review Commission (CCRC). You forwarded Mr Alexander's comments concerning reform to the law on appeals and two specific proposals from the Westminster Commission Report on Miscarriages of Justice. I apologise for the time it has taken to respond but wanted to look into these issues in detail before replying.

These two proposals recommend that the Law Commission should consider whether a change in law is needed to: allow the Court of Appeal to quash a conviction where it has serious doubt about the verdict, even without fresh evidence or legal argument; and ensure the Court of Appeal takes the widest view of the circumstances which have resulted in wrongful conviction, including reviewing the interpretation of previous evidence at trial and during any previous appeal.

The Court of Appeal may only quash a conviction where they consider it "unsafe". The CCRC can only refer a case, effectively granting leave to appeal, where it is satisfied there is a "real possibility" that the conviction would be quashed as "unsafe" or the sentence would be changed. Existing legislation allows for cases to be referred by the CCRC in "exceptional circumstances" where there is no fresh evidence, fresh legal argument or where the person has not exhausted appeal routes. However the CCRC still has to consider whether there is a real possibility that the Court of Appeal will consider it unsafe.

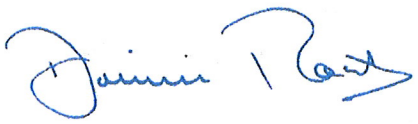
The Westminster Commission Report argues that the current test is too narrow and should be redrafted to enable the CCRC to refer any case where it finds that a miscarriage of justice may have occurred. I am not aware that anybody has suggested alternative tests that would work better. I do also have some concerns about this proposal.

The alternative of not having a 'real possibility' test implies that the CCRC would be referring cases where there was no real possibility of the Court of Appeal overturning them. "Real possibility" is already a far lower bar than exists, for example, when the Crown Prosecution Service has to make a decision about whether to charge someone (i.e., there has to be a reasonable prospect that a tribunal of fact, properly directed, would convict). If the CCRC were to adopt a lower bar and refer cases with no "real possibility" of success, they and other Criminal Justice partners would need to spend significant resources defending

cases that may be bound to fail. This would have a human cost for the appellant (raising false hope) and the victim of the original offence.

Before considering this further, I need more evidence of the need for change and how that might impact on the wider criminal justice system. The Law Commission is best placed to provide such evidence which is why I have asked them to consider including a review of the law in this area in their 14th work programme. They will have the final decision on whether it should be a priority for inclusion in that programme which commences later this year.

Yours sincerely



RT HON DOMINIC RAAB MP

Reforming the Court of Appeal 'Safety' Test

MOJ Ref: MC093351

Mark Alexander, LL.B. (Hons), LL.M. AKC

HMP Coldingley, Bisley, Woking, GU24 9EX

Dear Sirs,

3rd May 2022

I am extremely grateful to the Deputy Prime Minister for his thoughtful response. Whilst it is very encouraging to hear that he has now referred the criminal appeals test for overturning convictions – **s2(1) Criminal Appeal Act 1968** (as amended) – to the Law Commission for their consideration, I remain concerned that this may not be enough in practice to kickstart the necessary reforms. This is because the Law Commission have repeatedly ignored identical calls to do so from various organisations and organs of government since the 2015 Justice Select Committee. The Deputy Prime Minister's approach risks perpetuating injustice for those prisoners and their families affected by the Law Commission's choice not to prioritise this in any of their programmes for the past 7 years, and will only create further delays as we all await yet another review process confirming what practitioners and miscarriage of justice victims already know.

As such, I would like to ask the Deputy Prime Minister to reconsider his approach, and invite him to review the evidence already gathered by the Justice Committee and the Westminster Commission which I think tells its own story. I am not convinced that a Law Commission will add much to what has already been said, and believe that the Deputy Prime Minister can save us all the heartache of further uncertainty and delay by taking the lead on this issue himself. I would hope that tabling amendments to the Police, Crime, Sentencing and Courts Bill – or bringing forward a new Bill – which can then be subjected to healthy scrutiny and debate in the Commons and in the Lords, would be a propitious move.

In this letter I aim to summarise and perhaps simplify that evidence, which I hope will assist the Deputy Prime Minister and his department in that analysis. I must apologise in advance for what is necessarily a somewhat lengthy letter, but there has been much healthy discussion around the issue, going as far back as the Royal Commission on Criminal Justice – Chaired by Viscount Runciman of Doxford in 1993 – which recommended reframing the Court of Appeal's safety test in precisely the way now being sought.

I do hope that this overview proves to be helpful, and that the Deputy Prime Minister will be minded to press forward with the necessary reforms.

Gratefully yours,

Contents:

Evidence Attached:

Royal Commission	1993	(Chapter Ten: Pages 162, 168 – 171)
Justice Committee	2015	(Paragraphs 21 – 28, Pages 13 – 15)
Westminster Commission	2021	(Pages 40 – 43)

Author Bio

I was one of the many contributors to the Westminster Commission on Miscarriages of Justice. My written evidence is cited throughout their report. I make these submissions from the dual-perspective of a legal academic, and someone with lived experience of the criminal justice system. I attended Rugby School and King's College London prior to my imprisonment in 2010 at the age of 22. Whilst I received a life sentence at the time, I have always maintained my innocence and continue to seek out fresh evidence in order to clear my name.

I was honoured to receive the Longford Trust's Patrick Pakenham scholarship award for Law in 2016, the only scholar to ever receive the award whilst still in prison, and have since completed both undergraduate and postgraduate Law degrees with the University of London. I have been published in a number of academic journals whilst in prison, and am a member of the Prison Reform Trust's prisoner consultation initiative, the Prisoner Policy Network. I also Chair a democratically-elected Prisoner Council at HMP Coldingley, representing prisoner interests both collectively and individually. As part of this role I regularly conduct consultations with prisoners, hold focus groups, and engage in advocacy work on their behalf. I firmly believe in the importance of active citizenship, and hope that I can make a positive contribution to ongoing efforts to improve our criminal justice and penal systems.

Previous Calls for a Law Commission

On 25 March 2015, the House of Commons Justice Committee published its Report on the Criminal Cases Review Commission,[1] in which it said – at page 15 (paragraph 28):

> "We recommend that the Law Commission review the Court of Appeal's grounds for allowing appeals. This review should include consideration of the benefits and dangers of a statutory change to allow and encourage the Court of Appeal to quash a conviction where it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument."

Sir Alan Beith MP, Chair of the Justice Committee, put it like this:

> "…In the most difficult cases [the CCRC] is dependent on the willingness of the Court of Appeal to revisit the verdict of a jury. The Court is understandably reluctant to do this unless there is new evidence or a clear fault in the original court process, and this leaves some verdicts over which serious doubt has arisen without any chance of reconsideration… We believe that the Law Commission needs to review it".[2]

The Government's response in July 2015 was simply, "we are considering this recommendation".[3]

The Criminal Cases Review Commission published formal responses to both inquiries, confirming:

> "The CCRC made clear to the Justice Select Committee in 2015, and again in its evidence to the Westminster Commission, that it supports there being an independent review of the statutory test for a referral. Although amending the legislation would ultimately be a matter for Parliament, the CCRC continues to support the idea of an independent review by the Law Commission".[4]

This – as you know – has since been reiterated by the Westminster Commission on Miscarriages of Justice (pages 43 and 68 of their Report):[5]

> "The Law Commission should review the Criminal Appeal Act 1968 with a view to recommending any changes it deems appropriate in the interests of justice. Specifically, we would invite the Law Commission to consider whether any of the following [five] statutory reforms ought to be recommended:

[1] '*Criminal Cases Review Commission'*, Twelfth Report of Session 2014 – 15, (Stationery Office Ltd., HC 850),
[2] Select Committee Announcement on New Report, 25 March 2015
[3] Government response to the Justice Select Committee's Twelfth Report of Session 2014-15, Cm 9119
[4] 'CCRC Response to Report of Westminster Commission on Miscarriages of Justice', 5 March 2021
[5] 'In the Interests of Justice: An inquiry into the Criminal Cases Review Commission', 5 March 2021

(i) as the Justice Committee suggested in 2015, changes to "allow and encourage the Court of Appeal to quash a conviction where it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument";

(ii) mandating and encouraging a cumulative review of issues;

(iii) amending the 28-day time limit for lodging an appeal […];

(iv) introducing the premature destruction of crucial evidence which could have undermined the safety of a conviction as a standalone ground of appeal;

(v) broadening the law on post-conviction disclosure to assist appellants in accessing evidence […]

The Arguments for Reform

I think the Deputy Prime Minister is absolutely right when he says that amending the CCRC's 'real possibility' test will achieve nothing unless the Court of Appeal's criteria for overturning convictions are amended first. Indeed, this was the CCRC's own conclusion in 2015:

> "…irrespective of the basis on which this Commission refers a case, only the Court of Appeal can quash a conviction. Accordingly, those who think that the basis on which the Court takes decisions in such cases is wrong need to address their concerns to the Court rather than to the Commission."

For the purposes of this proposed legislative reform, one must set aside thoughts of the CCRC or its 'real possibility' test, and focus squarely on the Court of Appeal. After all, if the Court of Appeal's criteria change, then the CCRC's 'real possibility' test will naturally move in step with those changes. In my view, it would not be necessary in those circumstances to subsequently amend the CCRC's test.

On this basis, the "evidence of the need for change and how that might impact on the wider criminal justice system" that the Deputy Prime Minister is understandably looking for can, I would suggest, be found in the existing analysis and research on the issue. I have provided a summary of the key findings and their sources below – but attach full copies with this letter. I hope the Deputy Prime Minister will find the time to read these extracts from the various inquiries, which explored the matters with great care and precision. I would reiterate that, whilst the CCRC is often mentioned in relation to the Court of Appeal, the CCRC is not itself the problem. The problem the CCRC faces is that it has to navigate an overly-rigid Court of Appeal threshold.

‘Lurking’ or ‘Serious Doubt’ and Jury Primacy:

Summary of Justice Committee 2015 – (taken from paragraphs 21 – 28, pages 13 – 15)

and Royal Commission 1993 – (taken from Chapter Ten: pages 162, 168 - 171)

> “The central complaint about the Court of Appeal is that it is overly reluctant to interfere with a properly delivered jury verdict, requiring appellants to show some material irregularity or fresh evidence, which creates a higher barrier for the CCRC to meet if a conviction is to have a ‘real possibility’ of being quashed…” (paragraph 21)
>
> “We are concerned that there may be some miscarriages of justice which are going uncorrected… as a result of the Court of Appeal’s approach. While it is important that the jury system is not undermined, properly-directed juries which have seen all of the evidence may occasionally make incorrect decisions. The Court’s jurisprudence in this area, including on ‘lurking doubt’, is difficult to interpret and it is concerning that there is no clear or formal mechanism to consider quashing convictions arising from decisions which have a strong appearance of being incorrect. Any change in this area would require a change to the Court of Appeals’ approach… We are aware that this would constitute a significant change to the system of criminal appeals in this country and that it would qualify to a limited extent the longstanding constitutional doctrine of the primacy of the jury. Neither of these things should be allowed to stand in the way of ensuring that innocent people are not falsely imprisoned”. (paragraph 27)

The Deputy Prime Minister notes that he is “not aware that anybody has suggested alternative tests that would work better”. The Justice Committee however, have previously referred to both the ‘**lurking doubt**’ doctrine which arose from *R v Cooper [1969] 1 QB 267*, but which has since fallen into disuse, and the notion of **‘serious doubt’** raised by the Runciman Royal Commission on Criminal Justice of July 1993. [6]

The change is necessary, in part, to resolve a particular category of cases which can be especially difficult to remedy when mistakes happen: circumstantial cases. In such instances, juries come to a decision on the basis of an accumulation of points. In any appeal stemming from such a case, a wrongly convicted appellant will need to neutralise each of these individual strands and then ask the Court to consider the impact on the case as whole. In practice however, this may not always be possible. Defining the point at which the rope can no longer sustain the weight of the prosecution case can be very difficult, and it is rarely clear how many threads of the metaphorical rope must be

[6] CM 2263

unwound for the rope to snap. I know this all too well from my own experience. This makes it harder to bring a successful application in these more speculative, circumstantial cases than it is to do so in the more clear-cut convictions based upon say, forensic evidence, eyewitness testimony, and so on.

As a result, many questionable convictions remain unresolved, particularly where little or no fresh evidence can be found. This is the problem that the Westminster Commission, and Justice Committee have recognised, and have sought to tackle. One obstacle in the way of this has been the notion of 'jury primacy' – stemming from the famous *Bushel's Case* of 1670, where an Old Bailey Judge imprisoned a jury for returning a verdict he disagreed with. Releasing the beleaguered group, the then Lord Chief Justice remarked that "the Judge may try to open the eyes of jurors, but not to lead them by the nose". As a result, the Court of Appeal has been very wary of straying into what remains sacrosanct territory, where it might be perceived to be interfering with a jury verdict. Yet things have rather moved on since *Bushel's Case*. It is doubtful whether holding unquestioningly to this principle in every case is strictly necessary, or even healthy, today. Juries can and indeed do make mistakes.

Forty years ago, The Justice and Home Affairs Select Committee seemed to agree, describing jury primacy as "a brick wall in the path of access to justice at the post-trial stage,"[7] while the Justice Committee recognised in 2015 that "the Bingham doctrine that the Court of Appeal should not go behind the jury, limits the grounds on which the CCRC can send cases to it with any prospect of success".[8] Professor Michael Zander, who was a member of the Royal Commission, "has been particularly critical of the Court of Appeal's reluctance in this area", according to the Justice Committee.

The Royal Commission noted this problem as long ago as 1993 (page 162, paragraph 3):

> "In its approach to the consideration of appeals against conviction, the Court of Appeal seems to us to have been too heavily influenced by the role of the jury in Crown Court trials. Ever since 1907, commentators have detected a reluctance on the part of the Court of Appeal to consider whether a jury has reached a wrong decision… We are all of the opinion that the Court of Appeal should be readier to overturn jury verdicts than it has shown itself to be in the past… the Court should be more willing to consider arguments that indicate that a jury might have made a mistake"

[7] Penny Darbyshire (1991), 'The Lamp that shows the Freedom Lives – is it worth the candle?', Criminal Law Review, Oct, 740 – 752

[8] Sir Alan Beith, Justice Committee – Oral Evidence of the Lord Chief Justice's Report 2014, Question 4, (27 January 2015, HC 1018)

The Runciman Commission made it clear that it did "not think that quashing the jury's verdict where the Court believes it to be unsafe undermines the system of jury trial".[9] It recommended that where "the Court of Appeal has serious doubt about the verdict, it should exercise its power to quash" and that this should be made apparent in statute. As the Justice Committee noted in 2015, however:

> "That change was not implemented and use of the ['lurking doubt'] doctrine has been disapproved of for all but the 'most exceptional circumstances', especially if there is no new evidence".

As such, the Justice Committee effectively recommended in 2015 placing the 'lurking doubt' doctrine on a statutory footing. This is what I and others are asking the Deputy Prime Minister to consider doing today. The advantage of this approach is that the test is already a part of our common law, and has been carefully defined by the judiciary.

The 'lurking doubt' test was formulated by Lord Justice Widgery following the implementation of s2(1)(a) Criminal Appeal Act 1968, which broadened the statutory formula for quashing verdicts to those convictions deemed "unsafe or unsatisfactory" – '**the safety test**'. This change was recommended by the Donovan Committee in 1965, on the basis that the 1907 power to quash a jury's verdict which was "unreasonable or cannot be supported having regard to the evidence" was being interpreted too narrowly by the newly founded Court of Appeal.[10]

In *R v Cooper [1969] 1 QB 267*, Lord Justice Widgery took a broad view of what the new safety test meant. He put the question like this:

> "This is a case in which every issue was before the jury, and in which the jury was properly instructed, and – accordingly – a case in which this court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1968… it was almost unheard of for this court to interfere in such a case.
>
> However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means, that in cases of this kind, the court must in the end ask itself a subjective question,

[9] Royal Commission, page 171 – paragraph 46
[10] The Interdepartmental Committee on the Court of Criminal Appeal, London, HMSO Cmnd 2755

> whether we are content to let the matter stand as it is, or <u>whether there is not some '**lurking doubt**' in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be strictly based on the evidence as such. It is a reaction which can be produced by the general feel of the case as the court experiences it</u>"

Lord Widgery developed this view further in *R v Lake [1977] 64 Cr. App. R. 172 at 177* by saying that:

> "Once you have decided that the rules of procedure were followed and there remains only the residual question of <u>whether there is a lurking doubt in the mind of the Court</u>, such doubts are resolved not, as I say by rules of thumb, and not by arithmetic, but they are largely by the experience of the judges concerned and the feel which the case has for them".

The problem that would be addressed by the proposed reform to the Criminal Appeal Act 1968 today is the gradual disappearance of this doctrine from everyday use. As Kate Malleson identified in research conducted for the Runciman Commission, by 1990, only 6 out of 102 successful appeals even considered the principle.[11] Recently, Lord Judge seemed to confirm that the notion had fallen into desuetude when he said, in *R v Pope [2012] EWCA Crim 2241 at paragraph 14*:

> "As a matter of principle, in the administration of justice when there is trial by jury, the constitutional primacy and public responsibility for the verdict rests not with the Judge, nor indeed with this court, but with the jury. If therefore there is a case to answer, and after proper directions, the jury has convicted, it is not open to the Court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or may be unsafe.
>
> Where it arises for consideration at all, the application of the 'lurking doubt' concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe. It can therefore only be in the most exceptional circumstances that a conviction will be quashed on this ground alone, and even more exceptional if the attention of the court is confined to a re-examination of the material before the jury".

The Justice Committee and Westminster Commission have therefore called for the resurrection of the 'lurking doubt' principle in its original form, doing away with *R v Pope*, on the basis that Lord Widgery's formulation was correct – and that the 1907 wording should be interpreted as widely as possible. As former CCRC Commissioner Laurie Elks has argued – "It is the adjectives: 'inexorable

[1111] Royal Commission, page 171 – paragraph 43

conclusion' and 'most exceptional circumstances' which express the true intention [in *R v Pope*]. The process of reasoned analysis is the correct one, but the bar has been set impossibly high".[12]

Cumulative Reviews

The second proposed reform which the Deputy Prime Minister has referred to the Law Commission, 'mandating and encouraging a cumulative review of issues' (to "ensure the Court of Appeal takes the widest view of the circumstances which have resulted in wrongful conviction, including reviewing the interpretation of previous evidence at trial, and during any previous appeal"), would help to address another peculiarity about circumstantial convictions. Returning to the rope analogy I referred to earlier, it is important to consider each thread in relation – not only to the whole case – but to each other thread, in order to come to a conclusion as to when the prosecution's case can no longer be sustained. At present however, practitioners have observed that the Court of Appeal has a tendency to analyse the impact of each thread on the case individually, without taking a holistic view of the cumulative effect of those frayed threads taken together.

Laurie Elks describes the problem viscerally when she says:

> "The Court treats the verdicts of the trial jury… as somehow representing distilled wisdom on the case, picking away in the most disdainful way at the new matters raised by the referral, like an anorexic with a Sunday roast – and declining to carry out the holistic 'reasoned analysis' of the case a whole. I have described this elsewhere as the 'atomistic' approach, and this remains a formidable obstacle to the consideration of referrals where there is even a hint of 'lurking doubt' in the ether".[13]

In a similar way, Dr Stephen Heaton told the Justice Committee that:

> "the overall performance of the Court of Appeal is a significant obstacle to addressing miscarriages of justice". In his written evidence, he blamed in part "the Court's atomistic approach. That is to consider the fresh material in an isolated fashion rather than review the whole picture in a case". (paragraph 23)

[12] Laurie Elks, '*Court of Appeal in dereliction of duty over reluctance to review jury decisions?*', Justice Gap
[13] Laurie Elks (2010), '*Miscarriages of Justice: a challenging view*', Justice Journal 7:1

Former Lord Justice of Appeal Sir Anthony Hooper told BBC Panorama quite plainly in 2018 that:

> "It's become much more difficult for an appellant to succeed [at the Court of Appeal]".[14]

Summary of Westminster Commission 2021 – (taken from pages 40 – 43)

The Westminster Commission re-examined these issues in its own inquiry, finding that:

> "In practice, the Court's willingness to allow lurking doubt appeals was questionable. [Former CCRC Commissioner Laurie Elks] criticised 'the way the Court effectively sought to kill off cases based on 'lurking doubt'. In the early years, the Court of Appeal was ready to quash convictions which were slender or unsatisfactory, [but has] turned decisively against this".
>
> …In consequence the CCRC 'has never used' its theoretical power to refer on the basis of lurking doubt'. (page 42)

Henry Blaxland QC highlighted another example of how the bar for appellants has gradually crept higher and higher, when he explained to the Commission that:

> "a series of judgments has watered down the jury impact test recommended by the House of Lords in the 2001 case *of R v Pendleton [2002] 1 WLR 72*. Under *Pendleton* the test for determining whether new evidence renders a conviction unsafe should be 'whether the evidence, if given at trial, might reasonably have affected the decision of the trial jury to convict'". (page 41)

As Dr Dennis Eady, Lecturer at Cardiff University and co-founder of the Cardiff University Innocence Project, told the inquiry:

> "The Court of Appeal's bar has got higher and higher and higher… Juries are not infallible… We all know that juries make mistakes, will get it wrong. We all know that investigations go wrong. We all know that trial processes are adversarial. The jury doesn't hear all the evidence. It hears a sort of carefully choreographed two sets of 'the truth'. So, things will go wrong, and you won't always be able to find new evidence". (pages 40 and 41)

The Westminster Commission concluded that:

[14] '*Wrongly Imprisoned find it harder to appeal convictions*', BBC – 30 May 2018 (bbc.co.uk/news/uk-43660200)

> "the Court of Appeal's approach to cases may prevent some miscarriages of justice being corrected, and inhibits the CCRC's ability to raise alleged miscarriages of justice. This is particularly the case where there is little or no fresh evidence and argument, but where it appears that the initial verdict may nonetheless be flawed or perverse: the classic 'lurking doubt' cases". (page 42)

Conclusion

Sir Alan Beith has previously questioned the Lord Chief Justice, Lord Thomas, on the best mechanism for reforming the current safety test:

> "Would I be right in thinking that there would be only two different possible ways in which the test could be changed? One would be if the court came to the conclusion in a case, or series of cases, that there was scope for interpreting it differently. The other would be if Parliament framed the law differently?"[15]

The Lord Chief Justice explained (at paragraph 24) that whilst the Court of Appeal may no longer agree with the ruling in *R v Pope*, it cannot now overrule it without legislative intervention from Parliament. This is what I and others are appealing to the Deputy Prime Minister to now do:

> "We have to be quite careful about overruling previous decisions... If a decision of the court is made, because we do not have the doctrine of prospective overruling, it will affect the law right back, in circumstances where it may be very difficult to have retrials of cases, you might be going back 15 or 20 years. If we are changing the law, there is an awful lot to be said for Parliament doing it in many cases, particularly where the law has been established, as it has been on these issues, for some considerable time."

I hope that these submissions encourage the Deputy Prime Minister to make amendments to the Police, Crime, Sentencing and Courts Bill – or to bring forward a new Bill – rewording the safety test in the Criminal Appeals Act 1968 s2(1), so as to place Lord Widgery's 'lurking doubt' principle on a statutory footing, thereby enabling the Court of Appeal to ignore the ruling in *R v Pope* and quash a jury's verdict even without fresh evidence, an error of law, or some material irregularity.

I am extremely grateful to the Deputy Prime Minister, Andew Selous MP, and all those involved, for their continued interest, patience, and time in considering these important reforms to the Court of Appeal.

[15] Justice Committee (2015), Written evidence from the Lord Chief Justice, CCR 47 – Question 5

THE ROYAL COMMISSION ON CRIMINAL JUSTICE

Chairman: Viscount Runciman of Doxford CBE FBA

REPORT

Cm 2263

LONDON: HMSO

Chapter Ten: Court of Appeal

General

1. We are asked in our terms of reference to consider whether changes are needed in the role of the Court of Appeal in considering new evidence on appeal, including directing the investigation of allegations. We have not, however, confined our examination to these issues since they cannot readily be separated from the role of the Court of Appeal in hearing appeals against conviction in general. The performance of the Court of Appeal is crucial to the early correction of miscarriages of justice, whether these have resulted from the jury not having some relevant evidence before it, or having some false evidence called before it, or coming to what has to be accepted as the wrong verdict on the evidence it did hear. Appeals against sentence fall outside our terms of reference. Our recommendations are therefore confined to appeals against conviction.

2. The Court of Appeal was set up by statute in 1907 after decades of debate over whether it was right to provide any means (other than the Royal Prerogative of Mercy in extreme cases) of overturning the verdict of the jury. The present possible grounds of appeal are contained in section 2(1) of the Criminal Appeal Act 1968. We have found this subsection confusing if only because the grounds of appeal that it contains overlap with each other. In our view it needs redrafting. Some of us think that a redrafted subsection should provide for appeals to be determined on the basis of a single general test, such as whether the conviction "is or may be unsafe". Others of us believe that the grounds need specifically to reflect the different categories of appeals. We have not, however, thought it appropriate to redraft section 2 ourselves.

3. In its approach to the consideration of appeals against conviction, the Court of Appeal seems to us to have been too heavily influenced by the role of the jury in Crown Court trials. Ever since 1907, commentators have detected a reluctance on the part of the Court of Appeal to consider whether a jury has reached a wrong decision. This impression is underlined by research conducted on our behalf. This shows that most appeals are allowed on the basis of errors at the trial, usually in the judge's summing up. We are all of the opinion that the Court of Appeal should be readier to overturn jury verdicts than it has shown itself to be in the past. We accept that it has no means of putting itself in the place of the jury as far as seeing and hearing the witnesses is concerned. Nevertheless, we argue in this chapter that the court should be more willing to consider arguments that indicate that a jury might have made a mistake. We also believe that the court should be more prepared, where appropriate, to admit evidence that might favour the defendant's case even if it was, or could have been, available at the trial.

4. Most appeals against conviction are, as we have said, allowed because of errors at trial. While we accept that a conviction ought not to stand in cases where the error is such that it might well have affected the jury's verdict, that does not in our view mean that the appellant should automatically walk free. The Criminal Appeal Act 1968 as amended in 1988 now gives the court a very wide power to order retrials. We think that this should encourage the court in cases where a material error has occurred to overturn verdicts more readily and to order a retrial.

appeal if it considers that no miscarriage of justice has actually occurred. We refer to this power below as "the proviso".

28. It is not possible to tell from the published statistics how often each paragraph of subsection 2(1) is being used by the court nor the numbers of appeals which are dismissed after the proviso is applied. In almost half the cases studied by Malleson the court made no reference to which of the three grounds set out in subsection 2(1) it was applying. The presence of "a wrong decision of any question of law" or of "a material irregularity" was referred to in only some 10% of cases. The use of the term "unsafe and unsatisfactory" was applied to a wide variety of cases involving both law and fact, fresh evidence and technicalities. It appears from Malleson's research that in practice the court often uses paragraph 2(1)(a) even when paragraph 2(1)(b) or (c) might seem more in point.

29. Much of the difficulty in deciding which ground the Court of Appeal is applying under section 2(1) seems to us to be due to the confusing way in which the section is drafted. The court seems seldom to distinguish between "unsafe" and "unsatisfactory". For our part, we doubt whether there is any real difference between the two. It also seems to be the case that either of the grounds set out in paragraphs (b) and (c) of subsection 2(1), namely an error of law or a material irregularity in the course of the trial, may cause the court to think that the original conviction was unsafe or unsatisfactory. There is thus overlap between the three grounds of appeal set out in subsection 2(1). This is illustrated by the fact that, as Malleson found, almost all judgments of the Court of Appeal where the appeal is allowed end with a statement that for the reasons given the original conviction must be regarded as "unsafe and unsatisfactory". In most of the remainder, the court said that it was quashing the conviction on the grounds that it was "unsafe or unsatisfactory".

30. There is also potential confusion as to the scope of the proviso. Its use may be appropriate where there has been a material irregularity in the course of the trial (paragraph (c)). But the wording of the proviso seems difficult to reconcile with paragraph (a) or (b). If the court thinks that a conviction "should be set aside on the grounds that it is unsafe or unsatisfactory" (paragraph a) or "should be set aside on the grounds of a wrong decision of any question of law" (paragraph b), it is difficult to see how it can at the same time consider the proviso to be applicable. It seems from the decided cases, however, that the court does indeed consider whether the unsatisfactory nature of a conviction under either of those paragraphs is nevertheless outweighed by the consideration that no miscarriage of justice appears to have occurred.

31. It has also been argued that the proviso is redundant. It can hardly be applied if a conviction is unsafe. But if no miscarriage of justice has occurred, the proviso is unnecessary, since the conviction need not then be regarded as unsafe. When an error of law has occurred, the court can decide whether or not it is so serious that the conviction "should be set aside" without the existence of the proviso. Similarly, in paragraph (c), it has been argued that the words "material irregularity" make the proviso equally unnecessary, since if the irregularity is not material to the jury's verdict the court should dismiss the appeal while, if it is material, that should be sufficient grounds for allowing it[12].

32. We are therefore agreed that the section should be redrafted and so recommend. In the view of the majority of us, the present grounds of appeal should be replaced by a single broad ground which would give the court sufficient flexibility to consider all categories of appeal as is the case in Scotland. The majority therefore suggest that the correct approach is for the court to decide whether a conviction "is or may be unsafe". If the court is satisfied, on whatever grounds, that the conviction *is* unsafe, it should allow the appeal outright. If the court believes that the conviction *may* be unsafe, it should quash the conviction

[12] For a fuller account of the defects in the drafting of section 2, see R. Buxton, "Miscarriages of Justice and the Court of Appeal", Law Quarterly Review, January 1993.

but order a retrial unless there are reasons which make a retrial impracticable or undesirable. If the court considers neither that the conviction is unsafe nor that it may be unsafe, it should dismiss the appeal. The majority of us see no need in this approach for the proviso because if the court is not convinced that the conviction is or may be unsafe, it simply dismisses the appeal.

33. There are obvious attractions in the option of a retrial where the Court of Appeal thinks it possible but not certain that the jury would have acquitted the appellant had it known of the new considerations advanced in the course of the appeal. But retrials are not a panacea. Quite apart from the expense involved, there are bound to be cases where a retrial will be impracticable and even unjust. The conviction may, for example, be too long ago or the witnesses no longer available, or it would be unfair to a victim to be required to give his or her evidence again, or the appellant may already have been released from prison or, following the discharge of a first jury, already have been tried for a second time. We have, therefore, given careful consideration to what course the Court of Appeal should follow where a retrial is desirable in theory but not in practice. Where the ground of appeal is fresh evidence, then, as will become apparent below from our discussion of the House of Lords decision in *Stafford*, we think that the court should take on the jury's function itself. But where the ground of appeal is technical rather then evidential, there is a stronger argument for saying that if a retrial is impracticable or otherwise undesirable, the appellant should go free. On this, we have not been able to reach agreement; our differences are set out in paragraph 66 below.

34. Three of us, in any event, take the view that it is confusing to wrap all possible grounds of appeal in the one word "unsafe". This expression implies that there is something wrong with the jury's verdict, whether because it was unsupported by the evidence or affected by some irregularity or error. There might, however, be some irregularities or errors of law or procedure which did not necessarily affect the jury's verdict but were so serious that the conviction should not stand. Furthermore, the minority do not consider that an umbrella formula would give the Court of Appeal sufficient guidance towards adopting the less restrictive approach of which all of us are in favour. The minority consider that the grounds of appeal should be redrafted to take into account two separate categories of appeal, those claiming that the verdict has been arrived at through an erroneous view of the evidence by the jury (whether because it misinterpreted the evidence or because it had not heard all of it) and those alleging material irregularities or errors of law or procedure in or before the trial.

Error at trial

35. Malleson's research on appeals heard in 1989, 1990 and 1992 shows that by far the most common ground of appeal is some error at the trial. The error most commonly advanced both in appeals heard and in those which were allowed was alleged misdirection by the trial judge or some defect in the summing up, or a wrong decision to allow or to exclude evidence. In the 1990 sample errors of this and similar kinds were involved in 85 out of 102 successful appeal grounds (83%); in the 1992 sample they were involved in 84 out of 102 (82%). Appeals allowed on the ground of fresh evidence, by comparison, were 6 (6%) in the 1990 sample and 4 (4%) in the 1991 sample. Judicial and other error at the trial is therefore by far the most common ground of successful appeals.

36. Error at the trial can at present be dealt with in one of three ways. The first is to apply the proviso and dismiss the appeal if it is held that no miscarriage of justice has occurred. Malleson's research showed that the proviso was applied in 13 cases out of 118 dismissed appeals in the 1990 sample. The second way is to quash the conviction. As Malleson's research shows, this is what the court generally does. The great majority of successful appeals in both 1990 and 1991 were allowed as a result of errors at trial of one sort or another which led to the conviction being quashed. The third option is for the court to quash the conviction and then order a retrial.

37. We take slightly differing views on the approach which the court should take when considering appeals based on error at the trial. The minority of three

referred to in paragraph 34 consider that, where there was error at the trial which was sufficiently serious materially to affect the trial, but which did not render the conviction unsafe, the court should generally order a retrial rather than simply quash the conviction. It should only quash the conviction and not order a retrial where a retrial would not be practicable or appropriate.

38. The majority of us do not believe that a person who is clearly guilty should be accorded a retrial merely because there has been some error at the trial. They believe, as already stated in paragraph 32, that the court should consider what happened at the trial and then

(a) if it believes that the conviction is safe despite the error, it should dismiss the appeal;

(b) if it believes that the error has rendered the conviction unsafe, it should allow the appeal; or

(c) if it believes that the conviction may be unsafe as a result of the error it should quash the conviction and if possible order a retrial.

Under this scheme the proviso is redundant.

39. Whatever our differences about the circumstances in which a retrial should be ordered, we agree that appellants should not be able to exploit purely technical irregularities in the conduct of the trial. In particular, we should like to see the Court of Appeal make every effort to support judges who, in accordance with the recommendations made in our last chapter, intervene in the trial to protect witnesses, prevent procrastination, and assist the understanding of the jury. Unless the court believes that such interventions have of themselves caused the jury to come to a wrong verdict, it should dismiss the appeal, using the proviso if it is to be retained.

Reconsideration of the jury's verdict where there is no fresh evidence

40. When the Court of Criminal Appeal was established in 1907 it was given the power to quash a jury's verdict which was "unreasonable or cannot be supported having regard to the evidence". The Court of Appeal has thus from its inception had the power to reject a jury's verdict. But in practice, it was only prepared to quash a jury's verdict when there was no evidence on which a reasonable jury properly directed could have convicted the defendant. The fact that the judges themselves were doubtful about the verdict was not of itself thought sufficient to justify quashing it.

41. In 1965 the Donovan Committee[13] criticised this approach as too narrow. It said that a large body of informed opinion considered that there was a need for a broader approach. It thought the solution to the problem was to change the statutory formula so that the court should quash a verdict which it found to be "unsafe or unsatisfactory". The Committee said: "The advantage to be gained from the provision we suggest is that the safeguards for an innocent person, wrongly identified and wrongly convicted, are sensibly increased". The formula "unsafe or unsatisfactory" was included in section 2(1)(a) of the Criminal Appeal Act 1968.

42. In 1968 the Court of Appeal in *Cooper*[14] held that the new formula meant that the court might quash a verdict where it only had a "lurking doubt". The relevant extract from the judgment is as follows:

> "This is a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the

[13] *The Interdepartmental Committee on the Court of Criminal Appeal*, London, HMSO Cmnd 2755.
[14] [1969] 1 Q.B.267.

material was before the jury and the summing up was impeccable, this court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966.... it was almost unheard of for this court to interfere in such a case. However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such: it is a reaction which can be produced by the general feel of the case as the court experiences it."

43. We have received conflicting evidence about the extent to which the "lurking doubt" test has been applied. Some contend that it has been applied infrequently. Research done by Kate Malleson for JUSTICE found only six cases in the period between 1968 and 1989 in which the test had been applied. In Malleson's 1989 sample of 114 appeals there was only one such case. More recently the test has been applied more often. In Malleson's 1990 sample of the first 102 successful appeals heard in the year, there were six successful appeals in which the court held that there was a lurking doubt. In her 1992 sample of the first 102 successful appeals in the year there were 14 cases in which the conviction was quashed because the court considered that the jury had reached the wrong conclusion although there was no fresh evidence and no criticism of the trial process. In nine of these the court said that the evidence was too weak or flawed to justify a conviction; in the other five cases the court referred to having a "lurking doubt".

44. In their evidence to us JUSTICE said that practitioners took the view that the court was reluctant to apply the "lurking doubt" test:

> "Time and again JUSTICE has read counsel's advice on appeal to the effect that where the summing up has been impeccable and there are no mistakes of law, the Court of Appeal will not substitute its own opinion for that of the jury, however much it may disagree with it."

45. However, it has also been suggested to us that the Court of Appeal has not infrequently allowed appeals on what has in truth been the "lurking doubt" principle, although no specific mention of this phrase has been made. We have been told that there have been appeals in which no specific error at trial or in law has been demonstrated, but nevertheless the combined experience of the three members of the court leads them to conclude that there may have been an injustice in the trial and in the jury's verdict. They consequently allow the appeal on the ground that at the least the verdict was unsatisfactory. There is no real difference between this approach and an application of the "lurking doubt" principle.

46. We fully appreciate the reluctance felt by judges sitting in the Court of Appeal about quashing a jury's verdict. The jury has seen the witnesses and heard their evidence; the Court of Appeal has not. Where, however, on reading the transcript and hearing argument the Court of Appeal has a serious doubt about the verdict, it should exercise its power to quash. We do not think that quashing the jury's verdict where the court believes it to be unsafe undermines the system of jury trial. We therefore recommend that, as part of the redrafting of section 2, it be made clear that the Court of Appeal should quash a conviction, notwithstanding that the jury reached their verdict having heard all the relevant evidence and without any error of law or material irregularity having occurred, if, after reviewing the case, the court concludes that the verdict is or may be unsafe.

House of Commons

Justice Committee

Criminal Cases Review Commission

Twelfth Report of Session 2014–15

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The Court of Appeal's grounds for quashing convictions

21. We have been told by some that criticisms of the CCRC and the 'real possibility' test, made by those who believe miscarriages of justice are not being rectified, would more properly be directed towards the Court of Appeal (Criminal Division) and its approach to cases. Since the 1995 Act the only ground on which the Court of Appeal can allow an appeal against a conviction is that "they think that the conviction is unsafe".[37] The central complaint about the Court of Appeal is that it is overly reluctant to interfere with a properly delivered jury verdict, requiring appellants to show some material irregularity or fresh evidence, which creates a high barrier for the CCRC to meet if a conviction is to have a 'real possibility' of being quashed. Lord Bingham laid out a comprehensive statement of this constitutional doctrine of the primacy of the jury in the 2002 case of *Pendleton*:

> The Court of Appeal is a court of review, not a court of trial. It may not usurp the role of the jury as the body charged by law to resolve issues of fact and determine guilt. […] Trial by jury does not mean trial by jury in the first instance and trial by Judges of the Court of Appeal in the second. The Court of Appeal is entrusted with a power of review to guard against the possibility of injustice but it is a power to be exercised with caution, mindful that the Court of Appeal is not privy to the jury's deliberations and must not intrude into territory which properly belongs to the jury.[38]

22. Historically this reluctance to go behind a jury verdict has not been an absolute rule. In 1968 the grounds for appeal, as they then were, were expanded in line with the recommendations of the Donovan Committee to broaden the Court's approach—arguably this was Parliament's first attempt to make the Court rethink its deference to juries. As a result the Court developed the 'lurking doubt' doctrine, with which it could quash a conviction if there was "some lurking doubt in [its] minds which [made it] wonder whether an injustice has been done", even without fresh evidence or a material irregularity in the trial process.[39] Despite this, by the time of the Royal Commission's Report the doctrine had fallen into sparse use, leading it to state that it appreciated the Court's reluctance but that it did not "believe that quashing the jury's verdict where the court believes it to be unsafe undermines the system of jury trial". It therefore recommended that where "the Court of Appeal has a serious doubt about the verdict, it should exercise its power to quash" and that this should be made apparent in statute.[40] That change was not implemented and use of the doctrine has since been disapproved of for all but the "most exceptional circumstances", especially if there is no new evidence.[41] This aspect of the Court of Appeal's jurisprudence is complex and understandably difficult to anticipate in the 'real possibility test'.

23. Professor Michael Zander, who was a member of the Royal Commission, has been particularly critical of the Court of Appeal's reluctance in this area. He stated in written

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[37] This differs slightly from the Royal Commission's recommendation that the ground be that "they think that the conviction is or may be unsafe [emphasis added]".

[38] [2001] UKHL 66

[39] *R v Cooper* [1969] 1 QB 267

[40] As part of the redrafting of the Court of Appeal Criminal Division's grounds for allowing appeals.

[41] *R v Pope* [2012] EWCA Crim 2241

evidence to us his view, "If the Court of Appeal were readier to act on [the Royal Commission's] recommendation, many of the concerns raised by critics of the CCRC would be resolved."[42] Paul May supported this: "Much of the criticism levelled at the CCRC would in my view be better directed at the Court of Appeal which remains capable on occasions of quite breath-taking obduracy towards appellants claiming wrongful conviction."[43] Dr Stephen Heaton's research led him to a similar conclusion, "The overall performance of the Court of Appeal is a significant obstacle to addressing miscarriages of justice." In his written evidence he blamed in part "the Court's 'atomistic' approach. That is to consider the fresh material in an isolated fashion rather than review the whole picture in a case." He also raised the issue of inconsistencies in the Court's jurisprudence creating difficulties for the CCRC in predicting the Court's approach, "I see no evidence that the Court of Appeal has at any point recognised this aspect of responsibility."[44]

24. In his written submission to us in February 2014 Professor Richard Nobles put forward a proposal that the CCRC be able to refer a case based on 'lurking doubt', as he questioned "whether the referral power should simply anticipate the Court of Appeal's approach, given the tendency of the court to blow hot and cold in its willingness to reconsider jury verdicts."[45] The University of Warwick School of Law supported this approach in its written evidence.[46] Professor Zander put forward a similar idea, based on 'serious doubt',[47] although then amended his proposal to acknowledge that section 13(2) of the 1995 Act already allows the CCRC to do this, as in exceptional circumstances it may refer cases without fresh evidence or argument.[48] Professor Hoyle told us that the CCRC was reluctant to go ahead with such cases, "if it thinks the case does not meet the 'real possibility' test."[49] None of the propositions put to us include any formal change to the Court of Appeal's approach and so do not address how any such referrals would have a real possibility of success. While supporters of such a change, or increased use of section 13(2), may be hoping that the CCRC having such a power and using it would inherently change the Court's approach, the Lord Chief Justice indicated to us that a change in approach would be preferable through statute as the Court has to be "quite careful about overruling previous decisions."[50]

25. Professor Hoyle made the point that if the CCRC had a doubt about a case then it would pursue it with more tenacity and willingness to pursue all lines of investigation in order to gather enough evidence so that the case meets the test.[51] Richard Foster also later told us the same thing, "If we find that we have a concern, then we will find a way of

[42] Professor Michael Zander QC (CCR0002)

[43] Paul May (CCR0003) para 27

[44] Stephen Heaton (CCR0015)

[45] Professor Richard Nobles, Written evidence on the CCRC, February 2014, para 4

[46] University of Warwick School of Law (CCR0026) para 8

[47] Professor Michael Zander QC (CCR0048)

[48] Professor Michael Zander QC (CCR0051)

[49] Q 32

[50] Oral evidence taken by the Justice Committee on 27 January 2015, HC (2014–15) 1018, Q 5

[51] Q 32

referring it. I can give you particular examples where we have come at a case, time and time again, until we have found a ground on which we can get through the gateway".[52]

26. The judiciary was given an opportunity to respond to these criticisms, but declined to comment or provide evidence on anything more than factual matters. Towards the end of our inquiry we received a kind offer of assistance from the former Lord Chief Justice, Lord Judge, and then a submission from him. Lord Judge stated that he had discussed that submission with the present Lord Chief Justice, Lord Thomas, and that he had been authorised to say that Lord Thomas agreed with it. In his evidence Lord Judge pointed out that "if having examined the evidence, the court is left in doubt about the safety of the conviction it must and will be quashed."[53] In the short time available to us at the end of the inquiry we were unfortunately unable to explore how this statement could be reconciled with the judgment in *Pope*, which we were told by the Court of Appeal represents a "very clear indication of what will be this Court's approach" in relation to 'lurking doubt'.[54] In that case the Court stated that "the application of the 'lurking doubt' concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe [emphasis added]."[55] Lord Judge went on in his evidence to disagree with Professor Zander's proposal for adding to the CCRC's grounds for referral, "Just because the CCRC is a respected body, even if, on examination, the [Court of Appeal Criminal Division] disagreed with the CCRC and dismissed the appeal, public confidence in that verdict would never be restored. From the public point of view, whatever the true constitutional position might be, there would be two conflicting decisions by bodies with responsibility for considering the safety of a conviction."[56]

27. **We are concerned that there may be some miscarriages of justice which are going uncorrected because of the difficulty the CCRC faces in getting some such cases past the threshold of 'real possibility', as a result of the Court of Appeal's approach. While it is important that the jury system is not undermined, properly-directed juries which have seen all of the evidence may occasionally make incorrect decisions. The Court's jurisprudence in this area, including on 'lurking doubt', is difficult to interpret and it is concerning that there is no clear or formal mechanism to consider quashing convictions arising from decisions which have a strong appearance of being incorrect. Any change in this area would require a change to the Court of Appeal's approach, which would itself require a statutory amendment to the Court's grounds for allowing appeals. We are aware that this would constitute a significant change to the system of criminal appeals in this country and that it would qualify to a limited extent the longstanding constitutional doctrine of the primacy of the jury. Neither of these things should be allowed to stand in the way of ensuring that innocent people are not falsely imprisoned.**

28. ***We recommend that the Law Commission review the Court of Appeal's grounds for allowing appeals. This review should include consideration of the benefits and dangers of***

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[52] Q 115

[53] Lord Judge (CCR0057)

[54] Lord Chief Justice of England and Wales (CCR0047), on behalf of the Court of Appeal Criminal Division

[55] [2012] EWCA Crim 2241

[56] Lord Judge (CCR0057)

a statutory change to allow and encourage the Court of Appeal to quash a conviction where it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument. If any such change is made, it should be accompanied by a review of its effects on the CCRC and of the continuing appropriateness of the 'real possibility' test.

The Royal Prerogative of Mercy

29. One possible solution that has been put to us to the problems mentioned above is for the CCRC to utilise its power under section 16 of the 1995 Act to bypass the Court of Appeal and refer cases to the Secretary of State for application of the Royal Prerogative of Mercy. This has only been done once since the creation of the CCRC, in a sentence-only case.[57] Professor Zander told us that he thought it should be used as a last resort, in "desperation."[58] However, the Royal Commission recommended that the use of this power "should only be where the Court of Appeal is unlikely to be able to consider the case under the existing rules".[59] The Lord Chief Justice argued that this would raise "a serious question of constitutional propriety".[60] Lord Judge stated that this would lead to "precisely the problems which the [Royal Commission] successfully avoided."[61] **We do not think that the CCRC should change its approach to the Royal Prerogative. Greater use of the power under section 16 of the 1995 Act would bring the executive back into the process in precisely the manner that the creation of the CCRC was intended to avoid. In our view, increased use of the Royal Prerogative would be a wholly inadequate and inappropriate answer to the problems that have been raised, given that it does not lead to the quashing of the conviction or the correction of the miscarriage of justice but only commutes the sentence, and so does not provide complete justice for a falsely convicted person.**

[57] Professor Michael Zander QC (CCR0002)

[58] Q 64

[59] The Royal Commission on Criminal Justice, Report, Cm 2263, July 1993, p 184

[60] Lord Chief Justice of England and Wales (CCR0052)

[61] Lord Judge (CCR0057)

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all-party parliamentary group **on miscarriages of justice**

In the Interests of Justice

An inquiry into the Criminal Cases Review Commission

by

The Westminster Commission on Miscarriages of Justice

justice case being heard by the Court of Appeal. We also note that any referrals based upon due process failures, even in such circumstances, bring attention to flaws within the criminal justice system and can thus contribute to the prevention of future miscarriages of justice.

Recommendation

- section 13 of the Criminal Appeal Act 1995 should be amended to provide that any cases which the CCRC deems meet the referral criteria should be sent to the appeal courts.

The Court of Appeal's legal framework

Much of the evidence we heard suggested that reform of the CCRC is not enough. Dr Ann Priston and Louise Shorter of Inside Justice said that "blame" for the difficulties faced by the wrongly convicted in accessing justice "does not rest squarely at the door of the CCRC",[174] while journalist Jon Robins told us the "whole appeals system isn't working".[175] Witnesses told us that tackling miscarriages of justice required that the Court of Appeal itself be subject to scrutiny and reform.

In 2018, former Lord Justice of Appeal Sir Anthony Hooper told BBC Panorama that: "It's become much more difficult for an appellant to succeed" at the Court of Appeal.[176] Dr Dennis Eady agreed, saying "the Court of Appeal's bar has got higher and higher and higher. And the CCRC is stuck between the rock and the hard place, there."[177]

Some suggested there was reluctance amongst appeal judges to address miscarriages of justice. Dr Hannah Quirk wrote: "The judiciary has never reflected upon or acknowledged its role in wrongful convictions."[178] Henry Blaxland, an experienced appeals QC, told us "you get the impression, sometimes, that the Court of Appeal's main preoccupation is keeping down the work that they have to deal with".[179]

A common complaint was that the Court of Appeal is too reluctant to quash convictions on the basis that the evidence being presented to it was not 'fresh'. Cardiff University Innocence Project told us:

> The refusal of the [Court of Appeal] and CCRC to revisit evidence available at trial (even if not heard) is based on unfair assumptions about a defendant's ability to run a thorough defence at trial. Following cuts to legal aid, the defence do not have the resources to thoroughly

> investigate the evidence and often focus on undermining the prosecution case in court, rather than gathering independent evidence.[180]

Professor Carolyn Hoyle commented on the knock-on effect the Court's approach has on the CCRC:

> I've seen, so often, Commissioners at committee meetings that I've sat in on pulling their hair out in frustration because they can't get past the fresh evidence requirement, especially when a case has been to the Court of Appeal before and they've used their best shot, and now they can't use that again, because of the requirement to present fresh evidence. And that's hugely frustrating.[181]

Dr Michael Naughton said: "A fairer interpretation of the fresh evidence criteria needs to be adopted so that victims of miscarriages of justice are not procedurally barred from having their convictions overturned."[182]

Progressing Prisoners Maintaining Innocence (PPMI) point out that obtaining fresh evidence "is often very difficult in historic cases that are alleged to have happened decades ago."[183]

Even when the Court of Appeal does accept that evidence is fresh, Henry Blaxland QC explained to us that a series of judgments has watered down the jury impact test recommended by the House of Lords in the 2001 case of Pendleton.[184] Under Pendleton, the test for determining whether new evidence renders a conviction unsafe should be "whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict."[185]

In theory, the Court of Appeal is able to quash a conviction as unsafe, even if there is no new evidence or argument. These are known as 'lurking doubt' cases. In 2015, the former Lord Chief Justice Lord Judge assured the Justice Committee that "if having examined the evidence, the court is left in doubt about the safety of the conviction it must and will be quashed".[186]

Professor Michael Zander, a member of the Runciman Commission, pointed out to the Justice Committee that the exceptional circumstances test (section 13(2)) was "introduced with the specific conscious and articulated objective of giving permission exceptionally for a referral even though there is nothing new where there are compelling reasons sufficient to create a real possibility of the appeal succeeding".[187]

However, we heard that, in practice, the Court's willingness to allow lurking doubt appeals was questionable. One ex-CCRC Commissioner criticised "the way the Court effectively sought to kill off cases based on 'lurking doubt'. In the early years, the [Court of Appeal] was ready to quash convictions which were slender or unsatisfactory … The [Court of Appeal] turned decisively against this …"[188]

Hoyle and Sato state that, in consequence, the Commission "has never used" its theoretical power to refer on the basis of 'lurking doubt'.[189]

Dr Eady argued that the Court of Appeal needed to be more open to the possibility that jury had simply made the wrong decision when considering cases:

> Juries are not infallible. It's an absurd act of doublethink we have. We all know that juries make mistakes, will get it wrong. We all know that investigations go wrong. We all know that trial processes are adversarial. The jury doesn't hear all the evidence, it hears a sort of carefully choreographed two sets of 'the truth'. So, things will go wrong, and you won't always be able to find new evidence.[190]

Some witnesses went even further. Cardiff University Innocence Project, False Allegations Support Organisation and SAFARI suggested the CCRC could be given the power to quash convictions itself.[191] Dr Eady said at present the Court of Appeal was "effectively unaccountable even for the most perverse judgments".[192] He proposed "easier access to the Supreme Court as a kind of appeal from the Court of Appeal."[193] At present, the Supreme Court can only hear criminal appeals in which there is a point of law of general public importance".[194]

Conclusions

The evidence we heard suggests that the Court of Appeal's approach to cases may prevent some miscarriages of justice being corrected, and inhibit the CCRC's ability to raise alleged miscarriages of justice. This is particularly the case where there is little or no fresh evidence and argument, but where it appears that the initial verdict may nonetheless be flawed or perverse: the classic 'lurking doubt' cases.

We do not, however, believe that the CCRC should itself have the power to quash convictions. It is not, and is not intended to be, a judicial body. The aim must be to ensure that the CCRC has the resources, approach and powers it needs to carry out its function as an investigative and reviewing body, as we recommend elsewhere in this report. Nor do we believe that the Supreme Court can or should become a second-tier appellate authority. We do believe that the 1968 Criminal Appeal Act

should be reviewed to ensure that the Court of Appeal can take the widest view of the circumstances which may have resulted in a wrongful conviction.

Recommendation

The Law Commission should review the Criminal Appeal Act 1968 with a view to recommending any changes it deems appropriate in the interests of justice. Specifically, we would invite the Law Commission to consider whether any of the following statutory reforms ought to be recommended:

a. As the Justice Committee suggested in 2015, changes to "allow and encourage the Court of Appeal to quash a conviction where it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument";[195]
b. Mandating and encouraging a cumulative review of issues;
c. Introducing the premature destruction of crucial evidence which could have undermined the safety of a conviction as a standalone ground of appeal;
d. Broadening the law on post-conviction disclosure to assist appellants in accessing evidence to make applications for leave to appeal.[x]

[x] Chapter 5 deals with disclosure issues in further detail.