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The Royal Commission on Criminal Justice and factual innocence: remedying wrongful convictions in the Court of Appeal

Stephanie Roberts

In an article linked with that which follows, Stephanie Roberts reports on research that she undertook in relation to the operation of the Court of Appeal in remedying wrongful convictions.

Introduction

Although the Court of Criminal Appeal was originally created¹ to remedy wrongful convictions, the general feeling has been that it has never fulfilled this function. The main difficulties associated with the Court have stemmed from its function in deciding appeals on factual grounds where, at its most simplistic level, the appellant is arguing the jury made a mistake and he or she was wrongly convicted. These grounds necessarily involve the Court to some extent trespassing on the role of the jury and the difficulty comes from determining how far the Court are allowed or should be allowed to do this.

These difficulties were acknowledged by the Royal Commission on Criminal Justice² (RCCJ) which was established on the day the Birmingham Six were freed with the aim of proposing reforms to the appeal process which would restore public confidence in the ability of the criminal justice system to identify and correct miscarriages of justice.³ A research study was undertaken on the RCCJ's behalf by Kate Malleon in 1991 which analysed the judgments of the Court to assess how, in practice, it interprets and applies its powers to review convictions.⁴ I replicated this study using judgments from 2002 to update Malleon's research in order to determine whether any significant changes had been brought about by the recommendations of the RCCJ which were enacted in the 1995 Criminal Appeal Act. The aims of this article are to use the empirical data to evaluate those grounds of appeal which raise factual issues, fresh evidence and lurking doubt appeals, to see if there are any noticeable improvements in the Court's ability to identify and correct miscarriages of justice.

Methodology

The methodology was identical to that adopted by Malleon except that the first 300 available⁵ appeals against conviction which the Court considered in 2002 were reviewed. These covered the period from January to May. Each judgment was analysed separately and

information gathered on the grounds of appeal; the approach of the Court to the case; and the result of the appeal. Where the Court commented on relevant issues such as fresh evidence, or the 'lurking doubt' principle, these were recorded in order to obtain both qualitative and quantitative information on the Court's powers and practices.

Lurking doubt appeals

The 'lurking doubt' ground of appeal was created by Lord Widgery in 1968 in *Cooper*⁶ and requires the Court to form its own subjective opinion about the correctness of the jury verdict, notwithstanding the fact that no criticism can be made of the trial, and there is no fresh evidence. In their 1989 report on miscarriages of justice,⁷ JUSTICE stated that in their experience of assisting with appeals against conviction, the lurking doubt power had made very little difference to the way in which the Court decided appeals. It was only able to find six reported cases since *Cooper* when the Court had quashed the conviction on the grounds that there is a lurking doubt because the conviction was against the weight of the evidence, and where nothing had arisen since the trial.⁸

Malleson's research revealed that the principle of lurking doubt was referred to directly or indirectly in 10 of the 281 appeals in her sample which were finally decided. This suggests that 'lurking doubt' cases do, indeed, constitute a relatively small proportion of appeals. Her conclusions were that:

*The Court appears to regard the principle as a last resort for those cases where no criticism can be made of the trial, yet concern about the justice of the conviction still lingers. Its reluctance to interfere with the jury's verdict undoubtedly inhibits the Court from expanding this category of appeal.*⁹

The RCCJ discussed the 'lurking doubt' ground and stated that they 'fully appreciate the reluctance felt by judges sitting in the Court of Appeal about quashing a jury's verdict' as 'the jury has seen all the witnesses and heard their evidence; the Court of Appeal has not.' Nevertheless, it recommended that:

*as part of the drafting of section 2, it be made clear that the Court of Appeal should quash a conviction, notwithstanding that the jury reached their verdict having regard to all the relevant evidence and without any error of law or material irregularity having occurred.*¹⁰

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The majority recommended that there should be a single ground of appeal which was whether a conviction 'is or maybe unsafe' but the Government rejected the words 'is or maybe' preferring the test to be simply 'is unsafe' which was enacted in the 1995 Criminal Appeal Act. In their response to the RCCJ, the Government stated that the concept of lurking doubt was incorporated into the unsafe ground.¹¹ However, in 1999 in *F*,¹² the Court appeared to suggest that lurking doubt was no longer a valid ground of appeal. Roch LJ stated:

The phrase 'lurking doubt' is not now, in our opinion, a proper approach. Parliament in section 2(1) of the Criminal Appeal Act 1968, as amended by the Criminal Appeal Act 1995, has laid down a simple test. In our view it is undesirable to place a gloss on the test formulated by Parliament which has the advantage of brevity and simplicity.

But in *R v Criminal Cases Review Commission ex p Pearson*,¹³ which was decided after *F*, Lord Bingham CJ stated that *Cooper* was incorporated into the safety test. Thus, empirical research was required to see if it did still apply and if so, to what extent.

The 2002 sample of judgments revealed that the principle of lurking doubt was referred to directly or indirectly in seven of the 300 appeals, with one allowed and six dismissed or refused. In the one allowed, lurking doubt was not actually raised as a ground of appeal but the concept of lurking doubt was referred to by the judges when quashing the conviction:

*At the end of our reading, all three members of this Court have an uneasy feeling about the safety of these convictions and that unease must register in allowing this appeal against conviction.*¹⁴

Lurking doubt was directly referred to in five of the six appeals dismissed or refused:

*The third point raised is that this Court should have a lurking doubt about the safety of the convictionWe have come to the conclusion that there are no doubts about the safety of the conviction.*¹⁵

*In those circumstances we conclude....that we feel neither a lurking doubt nor reason for substantial unease about these findings of guilt.*¹⁶

*There is no possibility, in our judgment, of applying the lurking doubt exception. We are satisfied that the verdicts are not even arguably unsafe.*¹⁷

*We do not feel a lurking doubt about the verdicts.*¹⁸

*The final matter which we have considered is Mr Evans' submission that, when all the evidence is added up....should lead us, that is to say this Court, to what can be summarised as a lurking doubt in the Cooper sense. We are not left with such a doubt.*¹⁹

The sixth appeal merely argued that 'the convictions are unsafe' which was listed as a separate ground of appeal, amongst others, but was not referred to by the judges when refusing the application as it was a renewed application to appeal.²⁰

This research confirms that, despite the ruling in *F*, the concept of lurking doubt has been incorporated into the safety test and is still a valid ground of appeal. But similar conclusions can be drawn with *Malleson* that this ground of appeal tends to be thought of as a last resort, either by the appellant as a ground of appeal or by the judges as a mechanism for determining the appeal. It tends to be argued when all the other grounds have failed and very rarely provides a ground of appeal on its own.

Whilst the Court's reluctance to interfere with the jury's verdict does, undoubtedly, inhibit the Court from expanding this category of appeal, the RCCJ report highlighted the deficiencies of the Court's review process in locating lurking doubts. One of the main reasons for the Court showing such deference for the jury verdict is because an appeal is not a re-hearing. Accordingly, the jury, which has seen the witnesses, is supposed to be in a better position to draw inferences than the Court who generally just read a transcript of the judge's summing up at the leave stage and in preparation for the appeal. As the former Court of Appeal judge, Sir Frederick Lawton, has stated 'reading a transcript of the evidence is not conducive to raising a lurking doubt.'²¹ This explains why very few lurking doubt appeals manage to get passed the leave filter and why very few of those that do are successful.

Fresh evidence appeals

The Court was initially given very wide powers to adduce fresh evidence under s9 Criminal Appeal Act 1907 but it adopted its own restrictions largely because of its deference to the jury verdict and its reverence for the principle of finality. The restrictions the Court imposed were that the evidence had to be credible²² and relevant to the issue of guilt,²³ the evidence had to be admissible²⁴ and the evidence could not have been put before the jury.²⁵

The Donovan Committee was set up in 1965 to review the working practices of the Court and it heard evidence that the conditions the Court had imposed on the reception of fresh evidence were too narrow and the condition which had caused the most disquiet was the one which stated that additional evidence should not have been available at the original trial. The Committee recommended that additional evidence should be received if it was relevant and credible and there was a reasonable explanation for the failure to place it before the jury.²⁶

The Donovan Committee recommendations were a late amendment to the 1966 Criminal Appeal Act which then became s23 of the 1968 Criminal Appeal Act. S23(1) consisted of a general discretion for the Court to admit evidence 'if they think it necessary or expedient in the interests of justice.' In addition s23(2) set out a duty to admit evidence if the criteria of credibility, relevance, and an adequate explanation for not adducing it at the original trial were fulfilled.

But it would appear that the Court continued to adopt a restrictive approach. The RCCJ stated that it had been suggested in evidence to them that the Court took an excessively restrictive approach to whether the fresh evidence was available at the trial and whether there was a reasonable explanation for the failure to adduce it.²⁷ The Commission felt that the Court's powers under s23 were adequate but the question was whether the Court had construed them too narrowly. It had been suggested to the Commission that the test in s23(2) that the evidence had to be 'likely to be credible' was too high a test and they recommended that the test should be changed to 'capable of belief' as this would 'be a slightly wider formula giving the court greater scope for doing justice.'²⁸

The RCCJ's proposals were given legislative effect in s4 of the Criminal Appeal Act 1995 which amended s23 of the 1968 Act. There were two major alterations to s23. The rarely

used power to rehear the evidence presented at the trial was removed and the duty to admit fresh evidence as set out in s23(2) was abolished. The Court has a discretion to admit fresh evidence and has to have regard to similar factors which governed the duty to admit fresh evidence such as (a) whether the evidence appears to the Court to be 'capable of belief'; (b) whether the evidence may afford any ground for allowing the appeal'; (c) whether the evidence would have been admissible in the lower court on an issue which is the subject of the appeal and (d) whether there is a reasonable explanation for the failure to adduce the evidence.

It is questionable as to whether these changes would bring about a liberalising of the Court's attitude. Substituting a discretion for a duty would appear to be detrimental as it was because of the Court's restrictive use of its discretionary power in the 1907 Act that a duty had to be imposed in the 1968 Act. There have also been arguments that the 'capable of belief' amendment is merely a cosmetic change. Under the old legislation 'credible' was held to mean 'well capable of belief',²⁹ and therefore the former test was 'likely to be well capable of belief.' This is replaced by the words 'capable of belief' and JC Smith argued³⁰ 'how can likely to be capable of belief be a higher test than is capable of belief? It seems to be the other way round.' He argued that to lower the threshold, the section should have provided 'may possibly be capable of belief (or credible)'.³¹

It was against this background that the empirical research was conducted in order to determine whether the Court had adopted a more liberal approach to fresh evidence appeals under the Criminal Appeal Act 1995. In Malleon's sample in 1990, the total number of grounds from 300 appeals was 329 and of those, 23 were based on fresh evidence (seven per cent of the total grounds). In the 2002 sample, the total number of grounds from 300 appeals was 641 and of those, 37 were based on fresh evidence (six per cent of the total grounds).

Therefore, the rise in the number of fresh evidence grounds could be interpreted as the Court adopting a more liberal approach as arguably more fresh evidence appeals are getting through the leave filter. But the rise in fresh evidence grounds could also be explained by a rise in the number of grounds generally. Overall, the percentage of fresh evidence grounds in relation to all the grounds was lower - being six per cent in the 2002 sample and seven per cent in Malleon's. In Malleon's sample of 23 fresh evidence grounds, five were allowed, 15 were dismissed or refused and three were adjourned for a full hearing being renewed applications to appeal. Therefore of the total grounds, 35 per cent were successful (five

allowed and three adjourned) with 65 per cent unsuccessful. In the 2002 sample, of the 37 fresh evidence grounds, nine were allowed, 27 were dismissed or refused and one was adjourned for a full hearing. Therefore of the total grounds, 27 per cent were successful (nine allowed and one adjourned) with 73 per cent unsuccessful. Thus, although a more liberal approach may be illustrated by an increase in fresh evidence grounds being heard by the Court, the success rate of such appeals is lower in the 2002 sample which suggests that whilst more fresh evidence grounds are possibly getting through the leave filter, the success rate of such appeals has not increased.

Malleson's conclusions were that 'fresh evidence cases are rare and treated with great caution by the Court. Only in very limited circumstances will such evidence be admitted and if admitted, form the basis of a successful appeal.'³² The 2002 sample appears to confirm this despite the hopes of the RCCJ that the amendments to the Court's powers would give it 'greater scope for doing justice.' Once again Malleson stated that 'the problem of the Court impinging on the jury's role was apparent from the few fresh evidence and lurking doubt cases reviewed.'³³ But just as the Court's review function causes problems in lurking doubt appeals, it also causes problems for fresh evidence appeals, as illustrated by Lord Parker CJ in *Parks*:³⁴

It is only rarely that this court allows further evidence to be called, and it is quite clear that the principles upon which this court acts must be kept within narrow confines, otherwise in every case this court would in effect be asked to effect a new trial.

This explains why the Court is reluctant to allow fresh evidence on appeal: it would be presiding over a retrial, which is not its function. It also explains why the Court continues to adopt a restrictive approach even though its powers change with the aim of liberalising its approach.

Conclusion

The recommendations of the RCCJ, as enacted in the Criminal Appeal Act 1995, appear to have provided somewhat of a dichotomy. In the early 1990s, it was thought that the Court of Appeal was acting in accordance with *Cooper* and going through a liberal phase which was illustrated by the quashing of the convictions of the now notorious miscarriages of justice cases such as the Birmingham Six and the Guildford Four, though it was not clear whether these were the start of the liberal phase or the result of it. Therefore, it was the aim of Parliament to devise a form of words which would restate the existing practice of the Court of Appeal.³⁵ However, it is clear from the comments of the RCCJ on lurking doubt and fresh evidence appeals that it was its aim to liberalise the Court's approach and bring about some change, even though there were conflicting views as to whether this would actually happen.

The empirical evidence is conflicting as to whether this has happened or not. With regard to lurking doubt appeals, the fact that these grounds are being argued shows this is still a valid ground of appeal and has been incorporated into 'unsafe'. However, there are fewer of these in the 2002 sample than there were in Malleon's sample which arguably shows that the Court is not taking a more liberal approach to these appeals. It is difficult to know whether the low number is caused by this ground not being argued too often because appellants and their lawyers know this is rarely successful, or whether the appeals are being brought but they are being filtered out at the leave stage. What is clear is that neither the leave procedure nor the process of review are conducive to locating lurking doubts as reading a transcript of evidence may provide the answer as to whether an irregularity has occurred but it rarely provides the answer whether someone has been wrongfully convicted.

With regard to fresh evidence appeals, there were more fresh evidence grounds raised in the 2002 sample which shows that either more fresh evidence appeals are being brought to the Court or that more appeals are being heard by the Court. But this could be explained by the much larger number of grounds generally in the 2002 sample being nearly double the 1990 sample. A key factor is the success rate which shows that in Malleon's sample 35 per cent were successful as opposed to 27 per cent in 2002. This shows that although more fresh evidence grounds might be brought to the Court or getting through the leave filter, the chances of success were higher before the 1995 Criminal Appeal Act than they are now after the changes have been made.

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Both lurking doubt and fresh evidence grounds illustrate the difficulties the Court's review function causes the Court in deciding appeals on factual grounds and identifying and remedying miscarriages of justice. If this fundamental issue is not addressed, then consequent amendments to legislation to liberalise the Court's approach will prove to be as ineffective as they have done in the past. It may now be time to address the role of the Court rather than just amending its powers after high profile miscarriages of justice.

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¹ Criminal Appeal Act 1907. The Court of Criminal Appeal became the criminal division of the Court of Appeal in 1966 (Criminal Appeal Act 1966, s 1).

² The Runciman Royal Commission on Criminal Justice (Report, cmd 2263, London: HMSO, 1993).

³ The term 'miscarriage of justice' in this article is used to describe those cases where a factually innocent person has been wrongfully convicted.

⁴ K. Maleson, Review of the Appeal Process, RCCJ Research Study No 17 (London: HMSO, 1993) 1.

⁵ The transcripts were obtained from the Casetrack website and some of the judgments were not available because of reporting restrictions. Maleson's transcripts were examined in the Supreme Court library.

⁶ 53 Cr App R 82. Lord Widgery stated: '...in cases of this kind the Court must 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.' In later cases the concept of lurking doubt has remained but different wording has been used. In *Wellington* (1991) Crim LR 543, the Court referred to a 'reasoned or substantial unease.'

⁷ Justice, Miscarriages of Justice (London: Justice, 1989).

⁸ *Pattinson and Laws* 58 Cr App R 417; *Thome and Others* 66 Cr App R 6; *Lamb* 71 Cr App R 198; *Thompson* 74 Cr App R 315; *Pope* 85 Cr App R 201; *O'Leary* (1988) Crim L.R. 827.

⁹ See n 4 above, 12.

¹⁰ See n 2 above, ch 10, para 46.

¹¹ Royal Commission on Criminal Justice: Final Government Response (London: Home Office Communication Directorate, 1996).

¹² (1999) Crim LR 306.

¹³ [1999] 3 All ER 247.

¹⁴ *Marsh* [2002] EWCA Crim 1497.

¹⁵ *Morris* [2002] EWCA Crim 158

¹⁶ *McGuirk* [2002] EWCA Crim 861

¹⁷ *Baig* [2002] EWCA Crim 823

¹⁸ *Martin* [2002] EWCA Crim 1214

¹⁹ *Graham* [2002] EWCA Crim 1296

²⁰ *Brownlie/Heemskerk* [2002] EWCA Crim 921.

²¹ *The Times*, 23 October 1990, 38.

²² *Flower* 50 Cr App R 22

²³ *Dunton* 1 Cr App R 165

²⁴ *Tellett* 15 Cr App R 159

²⁵ *Jones* 2 Cr App R 27

²⁶ Donovan Committee, Report of the Interdepartmental Committee on the Court of Criminal Appeal (cmd 2755, London: HMSO, 1965) para 136.

²⁷ See n 2 above, ch 10, para 55.

²⁸ *ibid* para 60.

²⁹ *Beresford* 56 Cr App R 143.

³⁰ JC Smith, 'Criminal Appeals and the CCRC 2' (1995) NLJ 572.

³¹ JC Smith, 'The Criminal Appeal Act 1995' (1995) Crim LR 920, 928.

³² See n 4 above, 11.

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³³ *ibid* 16.

³⁴ 46 Cr App R 29

³⁵ See Michael Howard, HC Debs, 6 March 1995, col. 24.