

**WestminsterResearch**

<http://www.westminster.ac.uk/westminsterresearch>

**Fresh Evidence and Factual Innocence in the Criminal Division of  
the Court of Appeal**

**Roberts, S.**

This is a copy of the accepted author manuscript of the following article: Roberts, S. (2017) Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal. *Journal of Criminal Law*, 81 (4), pp. 303-327. The final definitive version is available from the publisher Sage at:

<https://dx.doi.org/10.1177/0022018317713567>

© The Author(s) 2017

---

The WestminsterResearch online digital archive at the University of Westminster aims to make the research output of the University available to a wider audience. Copyright and Moral Rights remain with the authors and/or copyright owners.

---

Whilst further distribution of specific materials from within this archive is forbidden, you may freely distribute the URL of WestminsterResearch: (<http://westminsterresearch.wmin.ac.uk/>).

In case of abuse or copyright appearing without permission e-mail [repository@westminster.ac.uk](mailto:repository@westminster.ac.uk)

***Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal***

**Stephanie Roberts\***

**Abstract**

One of the main criticisms of the criminal division of the Court of Appeal has been that it is deficient at identifying and correcting the wrongful convictions of the factually innocent. These criticisms stem from the Court's perceived difficulties in relation to appeals based on factual error. The main ground of appeal for errors of fact is fresh evidence and these appeals are particularly problematic because they require the Court to trespass on the role of the jury somewhat in assessing new evidence on appeal against the evidence at trial in order to determine whether the conviction is unsafe. The broad consensus is that the Court's difficulties are caused by three main issues: its deference to the jury verdict; its reverence for the principle of finality; and the lack of resources to deal with huge numbers appealing. There is less agreement in identifying the source of the problems because it is not clear whether they derive from legislative powers or the interpretation of those powers by the judiciary. This article uses both qualitative and quantitative empirical research in order to try to determine what the Court's approach is in fresh evidence appeals and, if there are problems, whether it is the law or the interpretation of the law by the judiciary which is to blame. It also proposes reforms designed to make it easier for the Court to rectify miscarriages of justice.

**Keywords:** Fresh evidence, criminal appeals, miscarriages of justice, factual innocence

**Introduction**

One of the consistent criticisms of the criminal division of the Court of Appeal has been that it is deficient at rectifying the wrongful convictions of the factually innocent.<sup>1</sup> The role of the

---

\*Senior Lecturer in Criminal Law at the University of Westminster; e-mail S.Roberts02@westminster.ac.uk. I am very grateful to Dr Hannah Quirk for her very helpful comments on earlier drafts of this article.

<sup>1</sup> See, for example, R. Pattenden, *English Criminal Appeals 1844 – 1994* (Oxford University Press: Oxford, 1999) 77; R. Nobles and D. Schiff, *Understanding Miscarriages of Justice* (Oxford University Press: Oxford, 2000) 83; K. Malleon, 'Appeals Against Conviction and the Principle of Finality' (1994) *Journal of Law and Society* 15 at 163; K. Malleon, 'Miscarriages of Justice and the Court of Appeal' (1993) 109 *LQR* 66; R. Nobles, D. Schiff and N. Shaldon, 'The Inevitability of Crisis in Criminal Appeals' (1993) *The International Journal of the Sociology of Law* 1; JUSTICE, *Miscarriages of Justice* (London: Justice, 1989) para 4.21; M. Knight, *Criminal Appeals* (Stevens and Sons, London, 1970) 1; M. Knight (1975) *Criminal Appeals Supplement 1969-1973* (Stevens and Sons: London, 1975); G. Williams, *Proof of Guilt*, 3<sup>rd</sup> edn (Stevens and Sons: London,

Court of Appeal is not to declare people innocent as the Criminal Appeal Act 1995 (amending the Criminal Appeal Act 1968) gives the Court of Appeal the power to quash a conviction if it thinks it is 'unsafe.'<sup>2</sup> There are two interpretations of 'unsafe,' and one interpretation has applied to a factually innocent person who has been, or may be, wrongfully convicted.<sup>3</sup> There are various judgments where the Court has expressed a view that it felt that an innocent person had been wrongly convicted, or at the very least that an injustice had occurred,<sup>4</sup> but as this is not part of its legally defined role these pronouncements are rare. There is a presumption of innocence in the English and Welsh legal system,<sup>5</sup> but this is a technical term which requires the prosecution to prove its case beyond reasonable doubt; if the prosecution case fails, the defendant is legally but not necessarily factually innocent.<sup>6</sup>

The main criticisms of the Court stem from its perceived difficulties in relation to appeals based on factual error. The main ground of appeal for errors of fact is fresh evidence and these appeals are particularly problematic because they require the Court to trespass on the fact-finding role of the jury somewhat in assessing new evidence on appeal against the evidence presented at trial in order to determine whether the conviction is unsafe.<sup>7</sup> There appears to be a broad consensus that the Court's problems in determining

---

1963) 330; A. Samuels, 'Appeals Against Conviction: Reform' (1984) *Crim LR* 337; J.R. Spencer, 'Criminal Law and Criminal Appeals: The Tail That Wags The Dog' (1982) *Crim LR* 260; The Runciman Royal Commission on Criminal Justice (RCCJ) Report, Cmnd 2263 (1993) (HMSO, London), ch 10, para 3; S. Roberts and L. Weathered, 'Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission' (2009) 1 *Oxford Journal of Legal Studies* 43; C. McCartney and S. Roberts, 'Building Institutions to Address Miscarriages of Justice in England and Wales: 'Mission Accomplished?'' (2012) 80 *University of Cincinnati Law Review* 1333; C. McCartney and C. Walker, 'Criminal Justice and Miscarriages of Justice in England and Wales,' in C. Ronald Huff and Martin Killias (Eds), *Wrongful Conviction International Perspectives on Miscarriages of Justice* (Temple University Press: Philadelphia, 2008) pp. 183-211; House of Commons Justice Committee, *12<sup>th</sup> Report – Criminal Cases Review Commission*, HC850, 25 March 2015, available at

<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/85002.htm>, last viewed 20 February 2017; JUSTICE, *Criminal Appeals* (Stevens and Sons: London, 1964). The term 'factually innocent' in this article is used to describe those appellants who were wrongly convicted because they did not commit the crime.

<sup>2</sup> In *R v A(D)*, Lord Bingham stated 'the Court is in no position to declare that the appellant is innocent... That is not the function of this court. Our function is to consider whether in the light of all the material before us this conviction is unsafe.' [CA, unreported, transcript 14 March 2000].

<sup>3</sup> For a discussion on the two interpretations of 'unsafe' see Lord Woolf's judgment in *R v Hanratty* [2002] 2 Cr App R 30. See also S. Roberts, "'Unsafe' Convictions: Defining and Compensating Miscarriages of Justice' (2003) 66(3) *Modern Law Review* 441.

<sup>4</sup> See, for example *R v Fell* [2001] EWCA Crim 696; *R v Ward* (1993) 96 Cr App R 1; *R v Kelly* [2003] EWCA Crim 2957; *R v Martin C* [2003] EWCA Crim 1246; *R v Mattan* The Times, 5 March 1998; *R v Roberts*, [1998] EWCA Crim 998.

<sup>5</sup> This is also enshrined in Article 6(2) of the ECHR: 'everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.'

<sup>6</sup> See Michael Zander: 'The presumption of innocence exists quite independently of whether the defendant is innocent or guilty, and indeed has nothing to do with the question of guilt or otherwise.' *The Times*, 20 August 1994.

<sup>7</sup> Criminal Appeal Act 1995, s.1(1). The Court of Appeal (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case."

factual error appeals are caused by too much deference being shown to the jury verdict,<sup>8</sup> undue reverence to the principle of finality,<sup>9</sup> and a lack of resources that has led to the fear that the floodgates would open and there would be a deluge of applications to appeal which the Court could not cope with.<sup>10</sup> Whilst there appears to be a consensus on the problems, the difficulty is identifying the source of the problems because it is not clear whether they derive from the legislative powers the judiciary have been given or their interpretation of those powers.

As a result of the Court's problems in determining factual error appeals, in common with other legal jurisdictions, this has meant that it is far easier to succeed on an appeal based on procedural irregularity in England and Wales than it is for an appeal based on fresh evidence.<sup>11</sup> This explains why more appeals are brought on the basis of irregularities and why more convictions are quashed on that basis. This is also explained by there being a twenty-eight day time limit after conviction to lodge a 'notice of an application for leave to appeal' which can be extended at the discretion of the Court of Appeal, the Registrar or the Deputy Registrar.<sup>12</sup> It is very difficult to find fresh evidence in twenty-eight days so the appellant's grounds of appeal at first instance tend to be those alleging procedural errors. This succeeds in reinforcing the importance of procedural irregularities on appeal and downplays arguments of factual error. In applications relying purely on a claim of factual innocence there may be little on which to progress the case if there are no legal or procedural arguments or they have been argued and the appeal has failed. The difficulty then arises of the defendant having to locate fresh evidence in order to succeed on appeal. In most cases, the appellant will have to apply to the Criminal Cases Review Commission (CCRC) to refer the case back to the Court of Appeal which is not an easy task.<sup>13</sup>

---

<sup>8</sup> See R.E. Ross, *The Court of Criminal Appeal* (Butterworth and Co, London, 1911); D. Seaborne Davies, 'The Court of Criminal Appeal: The First Forty Years' (1951) 1 *JSPTL* (NS) 425; M. Knight, above n. 1; K. Malleon, Review of the Appeal Process, RCCJ Research Study No 17 (HMSO, London, 1993); Tucker Committee, *Report of the Departmental Committee on New Trials in Criminal Cases* Cmnd 9150 (1954) (HMSO, London); Donovan Committee, *Report of the Interdepartmental Committee on the Court of Criminal Appeal* Cmnd 2755 (1965) HMSO, London); RCCJ, above n. 1 at ch 10. S. Roberts 'Reviewing the Function of the Criminal Division of the Court of Appeal in England and Wales' *Jersey and Guernsey Law Review* (forthcoming).

<sup>9</sup> See Malleon, above n.1; Pattenden, above n.1 at 74; B. Woffinden, *Miscarriages of Justice* (Hodder and Staughton: London, 1987) 322; P. Hill, 'Finding Finality' (1996) *New Law Journal* 1552; A. Sanders and R. Young, *Criminal Justice* (Butterworths: London, 2000) 641.

<sup>10</sup> See K. Malleon, 'Miscarriages of Justice and the Accessibility of the Court of Appeal' (1991) *Crim LR* 323; RCCJ, above n.1 at ch.10; J.R. Spencer 'Does Our Present Criminal Appeal System Make Sense' (2006) *Crim LR* 677;

<sup>11</sup> See Malleon, above n. 8.

<sup>12</sup> For a discussion on the reasons for granting an extension of time see the judgment given by Lord Bingham CJ in *R v Hawkins* [1997] 1 Cr App R 234.

<sup>13</sup> The CCRC was established by the Criminal Appeal Act 1995 after a recommendation by the Royal Commission on Criminal Justice, replacing what had previously been known as the Home Secretary's Reference (s.17 CAA 1968). It has the power to refer cases to the Crown Court and the Court of Appeal on conviction or sentence arising from England, Wales and Northern Ireland. References can be made to the Court of Appeal to

This article uses both qualitative and quantitative empirical research in order to try to determine what the Court's approach is in fresh evidence appeals and if there are problems, it seeks to determine whether it is the wording of the law or the interpretation of the law by the judiciary which is to blame. In order to place the empirical research in context, it is necessary to outline the law and historical approaches to fresh evidence appeals.

### **Historical approaches to fresh evidence appeals**

The history of criminal appeals in England and Wales reveals a familiar pattern of crisis, caused by high profile miscarriages of justice, and reform.<sup>14</sup> The creation of the Court of Criminal Appeal<sup>15</sup> in the Criminal Appeal Act (CAA) 1907 was described by JUSTICE as 'the product of one of the longest and hardest fought campaigns in the history of law reform.'<sup>16</sup> Several reports were published between 1844 and 1906 criticising the law and suggesting reform, usually in the wake of high profile miscarriages of justice. It took 31 bills before the Court was finally created.<sup>17</sup> The main opponents to reform at the time proved to be the judiciary with various reports from the period revealing that the judges were not opposed to a criminal appeal system as such, as the judiciary did not object to their decisions being reviewed in relation to sentences or questions of law, but were clearly very hostile to an appeal system based on errors of fact.<sup>18</sup> The reasons given by the judges were to resonate through the history of criminal appeals and can be summed up as follows: they did not believe that innocent people were convicted;<sup>19</sup> they felt that it would lessen the responsibility felt by jurors who would be less reluctant to convict on doubtful evidence if they knew the decision could be appealed;<sup>20</sup> they felt a right of appeal would lessen the deterrent effect of

---

review a conviction (s.9(1)); a sentence other than one fixed by law (s.9(3)); a verdict of not guilty by reason of insanity (s.9(5)); or a finding that a person under a disability did the act or omission charged against him (s.9(6)). Once the reference has been made it is treated as a normal appeal and leave is not required on the grounds referred but it will be required on any additional ones (s.315 Criminal Justice Act 2003). To refer a case, the CCRC is given statutory guidance under s.13, which states that there must be a "real possibility" arising from an argument or evidence that was not raised during the trial or at appeal, or from "exceptional circumstances" that the conviction or sentence would not be upheld. For an analysis of fresh evidence appeals and the Criminal Cases Review Commission, see S. Roberts and L. Weathered, above n. 1.

<sup>14</sup> See, Pattenden, above n.1; Nobles and Schiff, above n.1; McCartney and Roberts, above n.1.

<sup>15</sup> The Court of Criminal Appeal was created in the Criminal Appeal Act 1907 and this became the criminal division of the Court of Appeal in the Criminal Appeal Act 1966. References to 'the Court' in this article encompass both.

<sup>16</sup> JUSTICE, *Criminal Appeals* (Stevens and Sons, London, 1964) 6.

<sup>17</sup> Different sources suggest different numbers of bills but 31 is the figure listed in the *Return of Criminal Appeal Bills* (1906) H.L. 201.

<sup>18</sup> The views of the judges can be ascertained from the evidence given in the following reports: Commissioners on Criminal Law, *Second Report on the Criminal Law*, cmnd. 343. (1836) (London:HMSO); Commissioners on Criminal Law, *Eighth Report on the Criminal Law*, Parl. Pap., (1845) vol. xiv, 161; House of Lords Select Committee, *Report of the Select Committee of the House of Lords on the Administration of the Criminal Law*, cmnd. 523 (1848) (London:HMSO); Royal Commission on the Law Relating to Indictable Offences, *Report of the Royal Commission on the Law Relating to Indictable Offences*, cmnd. 2345. (1879) (London:HMSO).

<sup>19</sup> See Select Committee Report, *ibid* (Baron Parke at 4; Lord Denman CJ at 44; Lord Brougham, at 49).

<sup>20</sup> *Ibid.* (Lord Denman CJ at 45; Lord Brougham at 49).

the criminal law;<sup>21</sup> and they felt that there were insufficient numbers of judges to handle the anticipated volume of appeals.<sup>22</sup>

In the absence of an appeal system for errors of fact, the prerogative of mercy was the mechanism for rectifying miscarriages of justice. The Home Secretary could grant a free pardon which was a declaration of innocence.<sup>23</sup> One of the reasons it took so long to establish the Court was that it was felt it was not needed as long as the Home Secretary had this power to remedy injustice. However, the cases of Adolf Beck and George Edalji revealed the deficiencies in the procedure when the Home Office rejected sixteen attempts by Beck to have his conviction reviewed. This case, and others,<sup>24</sup> showed that a criminal appeal system based on errors of fact was urgently needed.

The Court was originally given wide powers under section 9 of the CAA 1907 to admit evidence on appeal<sup>25</sup> but the judges chose to interpret those powers narrowly and imposed hurdles from the civil law such as: that evidence had to be credible and relevant to the issue of guilt,<sup>26</sup> that the evidence had to be admissible,<sup>27</sup> and that the evidence could not have been put before the jury.<sup>28</sup> The case of *R v Parks*<sup>29</sup> showed that the Court was initially applying an objective test in deciding fresh evidence appeals by analysing the influence that fresh evidence may have had on the original jury, or a reasonable jury but obviously without having heard the evidence itself. Lord Parker CJ alluded to why the Court would take a restrictive approach to fresh evidence appeals, '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

---

<sup>21</sup> Ibid. (Baron Parke at 8; Lord Brougham at 49).

<sup>22</sup> Ibid. (Baron Parke at 5; Baron Alderson at 10; Lord Brougham at 8).

<sup>23</sup> A free pardon releases a person from the effect of a penalty or a consequence of a sentence though quashing the conviction can only be done by the Court of Appeal. The grant of a free pardon is restricted to cases where it is impractical for the case to be referred to an appellate court and secondly, where new evidence has arisen that has not been before the courts, demonstrating beyond any doubt either that no offence was committed or that the defendant did not commit the crime. The applicant must be technically and morally innocent. See Hansard, HC Vol. 483, col. 701 (November 25, 2008) (Maria Eagle, Parliamentary Under Secretary of State for Justice) available at <https://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081125/debtext/81125-0016.htm#08112592000047>, last viewed 17 April 2017. See also Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report*, 2009 available at <http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/about/docs/royal-prerogative.pdf>, last viewed 17 April 2017.

<sup>24</sup> See Pattenden, above n. 1, n. 215 at 30 for other examples.

<sup>25</sup> Under section 9 the court could order the production of documents, exhibits or any other thing connected with the proceedings. It could also order a compellable witness to attend and be examined and hear the evidence of a competent but not compellable witness such as a spouse.

<sup>26</sup> *R v Dunton* [1908] 1 Cr App R 165.

<sup>27</sup> *R v Tellett* [1921] 15 Cr App R 159.

<sup>28</sup> *R v Jones* [1908] 2 Cr App R 27. These principles were summarised by Lord Parker LCJ in *R v Parks* in 1962 'First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence that is credible evidence in the sense that it is well capable of belief. Fourthly, the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.'

[1962] 46 Cr App R 29.

<sup>29</sup> Ibid.

be kept within narrow confines, otherwise in every case this court would be in effect asked to effect a new trial.<sup>30</sup>

As the Court is a review Court it does not have the power to rehear the case. Therefore, Lord Parker was correct in that it cannot perform a retrial with the new evidence. The problems of being restricted by a review function were exacerbated in the Court's early years by it not having the power to order a retrial as demonstrated by two high profile cases of *R v Rowland*<sup>31</sup> and *R v Devlin and Burns*,<sup>32</sup> where the Court refused to hear new evidence because to do so would usurp the function of the jury. In the absence of the ability to order a new trial, an inquiry by the Home Secretary was ordered into both cases to review the convictions. As a result of these cases, the issue of retrials was raised by the then Lord Chief Justice, Lord Goddard in the House of Lords in 1952. The debate centred on the issue of fresh evidence and the problem highlighted by Lord Goddard was the Court of Criminal Appeal considering fresh evidence rather than a second jury, 'but how could we, without usurping the functions of a jury, which is something our Court has always refused to do.'<sup>33</sup> The almost unanimous conclusion of the participants in the 1952 debate was that a new trial was the appropriate forum in which to hear significant fresh evidence, especially of events that had occurred post-conviction. It was anticipated that the power would be 'used very sparingly...in proper cases.'<sup>34</sup>

In 1952, the Tucker Committee was set up to review the issue of retrials.<sup>35</sup> The Committee was unanimous in proposing that the Court should be given the power to order a retrial in cases which involved fresh evidence but this was not implemented until ten years after it reported. This was possibly due to the lack of public interest as public pressure is usually the catalyst for reforming the appeal process. Indeed, it was the high profile case of Aloysius 'Lucky' Gordon<sup>36</sup> in 1963 which provided the impetus needed for implementing the Tucker Committee proposal as the case 'served to crystallise a growing uneasiness about the limitations of the Court.'<sup>37</sup>

The Court was given the power to order a retrial in fresh evidence appeals in section 1(1) of the CAA 1964 and it was hoped by some that this would succeed in liberalising the

---

<sup>30</sup> Ibid. at 32.

<sup>31</sup> [1947] Cr App R 29. For an analysis of the case see Williams, above n. 1, at 114-119.

<sup>32</sup> This case was unreported, but see *Inquiry into certain matters arising subsequent to the conviction at Liverpool Assizes on 27 February 1952 of Edward Francis Devlin and Alfred Burns of the murder of Beatrice Alice Rimmer*, Cd. 8522 (1952) (London).

<sup>33</sup> Cited in Nobles and Schiff, above n.1 at 63.

<sup>34</sup> Parl. Debs 8 May 1952, cols 747-755.

<sup>35</sup> See above n. 8.

<sup>36</sup> Gordon had been convicted of assaulting Christine Keeler and fresh evidence led the Court of Criminal Appeal to quash the conviction. The case attracted much publicity as Keeler had been the mistress of the Secretary of State for Defence and was an important prosecution witness in another trial (Stephen Ward) then in progress.

<sup>37</sup> JUSTICE, above n. 1 at 28.

Court's approach to these appeals,<sup>38</sup> by the Court ordering a retrial where previously it would have upheld the appeal. This could be a disadvantage to the appellant if previously the conviction would have been quashed but now it is sent for retrial. During the debates on the 1964 Bill it was highlighted how rare fresh evidence appeals were with Lord Parker CJ, whilst supporting the Bill, pointing out that the figures for 1962 showed that there were only four applications for the calling of fresh evidence, out of 1000 applications for leave to appeal against conviction, none of which was allowed.<sup>39</sup> This small number could be explained by fresh evidence being hard to find but a different explanation is if appellants knew they were extremely unlikely to succeed they would be unlikely to appeal on the basis of fresh evidence even if they could find it.

As a result of criticisms of the working practices of the Court, the Donovan Committee was set up in 1965<sup>40</sup> to review its working practices, including fresh evidence appeals. It agreed with the various pronouncements in the judgments that the Court was not a court of retrial and an appeal to it 'is not an appeal by way of a rehearing of the case.' The Committee acknowledged that, if fresh evidence was admitted as a matter of course, there would clearly be a risk that the Court would on occasions find itself re-trying a case - 'a function which Parliament did not intend it to discharge, and for which it is in any event inadequately equipped.'<sup>41</sup> The Committee reported that the conditions the Court had imposed on the reception of fresh evidence were too narrow and the condition that 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.<sup>42</sup> This condition directly related to the principle of finality so it is not surprising the Court took a restrictive approach given its need to ensure that cases should not be repeatedly reviewed and retried on appeal.<sup>43</sup>

The Government accepted the Committee's recommendation but the relevant clause in the resulting Bill did not initially contain the words 'there was a reasonable explanation for the failure to place it before the jury.' This was because in the case of *R v Kelly*,<sup>44</sup> the Court had taken a seemingly liberal approach to fresh evidence and it was thought that the Court had already adopted the recommendation of the Donovan Committee, so there was no need

---

<sup>38</sup> For example, during the debates on the Criminal Appeal Bill 1964, Frank Soskice, stated '...one of the objectives of the Bill is that the rather stringent provision limiting the circumstances in which new evidence can be made available to the Court of Criminal Appeal is loosened.' H.C. Debs, 13 February 1964, col. 615.

<sup>39</sup> H.L. Debs, 14 January 1964, cols. 532 – 533.

<sup>40</sup> See Donovan Committee, above n.8.

<sup>41</sup> Ibid. at para 132.

<sup>42</sup> Ibid. at para 136.

<sup>43</sup> See above n.9.

<sup>44</sup> [1965] 2 All ER 250.

to expressly state it in the Act. An amendment was proposed by Anthony Buck to incorporate these words as ‘the situation seems to be getting better,’ but the issue of non-availability of evidence at trial was not fully dealt with ‘save by obiter dicta.’<sup>45</sup> There was general support for this amendment with various people pointing out that the appellant may be wrongly advised by lawyers not to include the evidence at trial.<sup>46</sup> The Under Secretary of State for the Home Department, Dick Taverne, stated that the new clause was acceptable to the Lord Chief Justice who confirmed that it reproduced the court’s present approach but ‘if provision is necessary, those words seem to me to be as reasonable as one could provide. It could be left to the court to interpret what ‘a reasonable explanation’ was, but I would echo the hope of [Mr Silkin]<sup>47</sup> that the courts will give it a liberal interpretation.’<sup>48</sup>

The accepted amendment was incorporated into the new fresh evidence provisions in section 5 of the CAA 1966:

Without prejudice to the generality of s.9 of the 1907 Act, where evidence is tendered to the Court of Appeal under that section, the Court shall, unless they are satisfied that the evidence if received would not afford any ground for allowing the appeal, exercise their power under that section of receiving it if

- (a) it appears to them that the evidence is likely to be credible and would have been admissible at the trial on an issue which is the subject of the appeal; and
- (b) they are satisfied that it was not adduced at the trial, but that there is a reasonable explanation for the failure to adduce it.

The new section altered existing practice in two ways. First, it imposed a duty on the court to receive fresh evidence where formerly there was a discretion. Second, it need no longer be shown that the evidence was not available at the trial but simply that there was a reasonable explanation for the failure to adduce it. The clear intention of Parliament was to liberalise the test.

The provisions of the 1964 Act and the 1966 Act were consolidated in the CAA 1968 and section 5 became section 23 of the 1968 Act. Section 23(1) consists of a general discretion for the Court to admit evidence ‘if they think it necessary or expedient in the interests of justice.’ In addition section 23(2) sets out a duty to admit evidence if certain

---

<sup>45</sup> H.C. Debs, 15 July 1966, cols. 1993-1994.

<sup>46</sup> See, for example, Mark Carlisle ‘There are various reasons which may lead to evidence not being called at the trial. People who are not represented may not realise that a piece of evidence is relevant; or it may be due to a bad decision by counsel or solicitors which is later regretted when it becomes apparent that such evidence may have had a bearing on the case.’ H.C. Debs, 5 August 1966, col. 919.

<sup>47</sup> S.C.Silkin ‘A reasonable explanation’ is a phrase which can be construed in a strict or very liberal way. I echo the hope that the new clause will be given a very liberal interpretation.’ Ibid. at 922.

<sup>48</sup> Ibid.

criteria of credibility, relevance, and an adequate explanation for not adducing it at the original trial are fulfilled. It would seem that initially the more liberal approach to fresh evidence promised by the Lord Chief Justice during the debates on the 1964 Act, and initiated in the case of *R v Kelly*,<sup>49</sup> continued. In *R v Harris*,<sup>50</sup> for example, the fresh evidence was admitted as 'the justice of the case required that it should be heard.' However, Edmund Davies LJ in *R v Stafford and R v Luvaglio*<sup>51</sup> took a more cautious approach to the Court's new powers when deciding whether the evidence was credible:

It is clear that a more liberal attitude than hitherto prevailed was introduced by the provision in section 5 [of the 1966 Act] that the fresh evidence sought to be introduced *shall* be received unless the court is satisfied upon the grounds specified in the section that it ought to be. Nevertheless, public mischief would ensue and the legal process could become indefinitely prolonged were it the case that evidence produced at any time will generally be admitted by this Court when verdicts are being reviewed. There must be some curbs, the section specifies them, and we proceed to consider the present applications with due regard to them.<sup>52</sup>

This case made it clear that the Court saw its role as reviewing verdicts, not to rehear cases which illustrates why fresh evidence cases are treated with such caution. This also showed how important the principle of finality was to judicial decision-making. After a failed attempt to quash the conviction at the Court of Appeal, this case eventually went to the House of Lords on a point of law which clarified the Court's approach to its new fresh evidence powers.<sup>53</sup> The Court rejected the previous objective test of whether the original jury might have been influenced by the fresh evidence and adopted a new subjective approach. The test to be applied was set out by Viscount Dilhorne:

The court has to decide whether the verdict was unsafe or unsatisfactory and no different question has to be decided when the court allows fresh evidence to be called.....Parliament has, in terms, said that the court should only quash a conviction if, there being no error of law or material irregularity at the trial, 'they think' the verdict was unsafe or unsatisfactory. They have to decide and Parliament has not required them power to quash a verdict if they think that a jury might conceivably reach a different conclusion from that to which they have come. If the court has no reasonable doubt about the verdict, it follows that the court does not think that the jury could have one.<sup>54</sup>

---

<sup>49</sup> See above n. 44.

<sup>50</sup> [1966] *Crim LR* 102.

<sup>51</sup> [1968] 53 Cr App R 1.

<sup>52</sup> *Ibid.* at 3.

<sup>53</sup> *Stafford v DPP* (1974) AC 878.

<sup>54</sup> *Ibid.* at 892.

The *Stafford* judgment has been the subject of much criticism,<sup>55</sup> most notably from the former Law Lord, Lord Devlin, who criticised the approach of the judges on the grounds that the accused now had a mixed trial by judges and jury. He stated:

They [the judges] did not hear the old witnesses and there are no specific findings about them to be found in the general verdict. So the judges have to decide upon their reliability on the record, fortified by conjectures from the verdict; to reach their verdict, the judges would say, the jury must have believed this or that. In assessing the reliability of the new witnesses...the judges are on their own.<sup>56</sup>

Lord Devlin went on to say:

It seems to me that even those judges who are in favour of extending the domain of the judges over the facts must accept that the position which has now been reached is not a satisfactory one. Instead of the re-trial by jury for which Parliament provided in 1964, there is an imperfect re-trial by judges, in which the normal appellate review has been swallowed up.....I do not think that in 1964 Parliament would have taken kindly to a trial by judges alone in fresh evidence cases.<sup>57</sup>

Lord Devlin felt that most cases involving fresh evidence should be sent for retrial before a fresh jury as anything less was a denial of the appellant's constitutional right to trial by jury. Pattenden's view is that Lord Devlin's criticism is based on a crucial assumption that the right to trial by jury persists after a trial has already taken place; the counter view is that a defendant's right to trial by jury is fully satisfied by the original trial.<sup>58</sup>

The Court of Appeal further clarified the operation of section 23 in the case of *R v Lattimore and Others* which was a reference by the Home Secretary.<sup>59</sup> The issue in this case was the relationship between the discretionary power in section 23(1) and the duty in section 23(2). Lord Scarman acknowledged there was confusion between the two provisions and explained that if the fresh evidence failed to meet the conditions in 23(2) the evidence could still be admitted at the discretion of the Court under 23(1). He referred to Edmund Davies LJ's comment in the first *Stafford and Luvaglio* case that there had to be some curbs on section 23(1) but he did not think Edmund Davies meant that the conditions in section 23(2) should be imposed on section 23(1). He stated that in the exercise of section 23(1) the Court should have regard to the conditions but 'Parliament by subsection (1) has placed upon the Court the power to do what it thinks is necessary or expedient in the interests of justice: the

---

<sup>55</sup> See P. O'Connor, 'The Court of Appeal: Re-Trials and Tribulations' (1990) *Crim LR* 615; R. Buxton, 'Miscarriages of Justice and the Court of Appeal' (1993) 109 *Law Quarterly Review* 66.

<sup>56</sup> P. Devlin, *The Judge* (Oxford University Press: Oxford, 1979) at 158-9.

<sup>57</sup> *Ibid.* at 171-172.

<sup>58</sup> See Pattenden, above n. 1 at 196.

<sup>59</sup> [1975] 62 Cr App R 53. See above n.13.

burden of the power is heavy, but may not be off-loaded by treating the conditions specified in subsection (2) as decisive in the exercise of the discretion under subsection (1).<sup>60</sup>

The approach taken by the House of Lords in *Stafford* was confirmed in 1989 by the Court of Appeal in one of the failed Birmingham Six appeals, *R v Callaghan*.<sup>61</sup> The appellants had submitted that the judges should look at the case through the eyes of the jury and, if they were to think that the jury *might* have come to a different conclusion had the jury themselves heard the new evidence, then the appeal should be allowed regardless of what the judges themselves thought. The judgment of the Lord Chief Justice followed *Stafford* and rejected the earlier 'jury impact' test as the method for determining fresh evidence appeals:

Although the Court may test its views by asking itself what the original jury might have concluded, the question which in the end we have to decide is whether in our judgment, in all the circumstances of the case including both the verdict of the jury at trial upon the evidence they heard, the convictions were safe and satisfactory.<sup>62</sup>

The difficulty this causes is that if the Court is deciding on the basis of what it thinks of the evidence, this is essentially usurping the role of the jury. This moves the Court away from its review function towards a rehearing one; it has to make assumptions about what the jury thought of the evidence it heard when convicting the defendant and marry that up with the new evidence the Court has heard and decide whether the conviction is unsafe. This results in, as Lord Devlin argued, an imperfect retrial by judges. When this is combined with its deference to the jury and its reverence for finality, it can be difficult to overturn convictions on the basis of new evidence.

A major review of fresh evidence appeals was conducted by the Royal Commission on Criminal Justice (RCCJ) in 1993.<sup>63</sup> The RCCJ concluded that the Court's powers under section 23 were adequate but were perhaps being construed too narrowly. The Commission stated it thought it understandable that the Court would view fresh evidence with some suspicion and the Court was right not to wish to encourage defendants to think of the Crown Court trial as a 'practice run'. On the other hand, the Court must be alive to the possibility that the fresh evidence may exonerate the appellant or at least throw serious doubt on the conviction.<sup>64</sup>

The Commission stated that it had been suggested in evidence to them that the Court took an excessively restrictive approach to whether the fresh evidence had been available at the trial and whether there was a reasonable explanation for the failure to

---

<sup>60</sup> This principle was confirmed by Lord Ackner in *R v Sanchez*, 5 July 1984. See Pattenden, above n.1, at 134.

<sup>61</sup> [1989] 88 Cr App R 40. This was confirmed again in *R v Byrne* [1989] 88 Cr App R 33.

<sup>62</sup> *Ibid.* at 46.

<sup>63</sup> RCCJ, above n. 1.

<sup>64</sup> *Ibid.* at ch 10, para. 55.

adduce it. It stated that 'we would urge that in general the court should take a broad, rather than a narrow, approach to [fresh evidence appeals].'<sup>65</sup> It had been suggested to the Commission that the test in section 23(2) that the evidence had to be 'likely to be credible' was too high a test and it 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'.<sup>66</sup>

The Commission discussed the case of *Stafford*, and the criticisms of the decision by Lord Devlin. It agreed that there was some force in Lord Devlin's criticisms and suggested that wherever possible the Court should order a retrial of the case rather than decide the issue for itself as 'the Court of Appeal, which has not seen the other witnesses in the case nor heard their evidence, is not in our view the appropriate tribunal to assess the ultimate credibility and effect on a jury of the new evidence.'<sup>67</sup> The Commission also stated that where a retrial was impracticable or otherwise undesirable, the Court of Appeal should follow the *Stafford* test and decide the matter for itself rather than just simply allowing the appeal.<sup>68</sup> This is problematic because the Court cannot consider a retrial until it has decided to quash the conviction and if the Court is more likely to uphold the conviction if it decides the matter for itself then the issue of ordering a retrial will not arise.

These recommendations were accepted by the Government<sup>69</sup> but the amendment to the Court's fresh evidence powers was confusing as to its aims. The intention behind the amendment to section 23 CAA 1968 by the RCCJ was clearly to widen the basis upon which fresh evidence would be admitted by the Court of Appeal. This seemed to be accepted by the Government when introducing this part of the Criminal Appeal Bill into Parliament. The then Home Secretary stated that "The Bill also lowers the threshold for the admission of fresh evidence along the lines recommended by the Royal Commission...".<sup>70</sup> However, when amendments to section 23 were introduced in the House of Lords, Baroness Blatch stated that her understanding from the Lord Chief Justice was that the amendments would not restrict fresh evidence being admitted nor change Court practice.<sup>71</sup> Therefore, there was confusion as to whether these amendments were to liberalise the Court's approach to fresh evidence appeals or to allow the Court to continue what it had been doing prior to the

---

<sup>65</sup> Ibid. at ch.10, para. 56.

<sup>66</sup> Ibid. at ch 10, para 60. This proposal was not new. In *R v Stafford* and *R v Luvaglio*, Edmund Davies LJ interpreted the phrase 'likely to be credible' as meaning 'well capable of belief.' This was following the interpretation in *R v Parks*. In *R v Beresford*, Sachs LJ restated the definition that credible was defined as 'well capable of belief' and approved Edmund Davies LJ's cautious approach to the issue of credibility but also expanded this cautious approach to include availability as well. [1971] 56 Cr App R 143.

<sup>67</sup> RCCJ, above n.1 at ch 10, para. 62.

<sup>68</sup> Ibid. at ch 10 para. 63.

<sup>69</sup> See Home Office (1994) *Criminal Appeals and the Establishment of a Criminal Cases Review Authority: A Discussion Paper*.

<sup>70</sup> *Hansard*, H.C. Vol 256, Col 25, 6 March 1995.

<sup>71</sup> *Hansard*, H.L. Vol. 565, Col 567, 26 June 1995.

changes in the law. This was a reference to the supposed liberal approach the Court was taking prior to the CAA 1995 under the stewardship of Lord Chief Justice Taylor.<sup>72</sup> This was the same argument during the debates on the 1966 CAA that the Court was taking a liberal approach prior to the legislative changes.

The amendments to the fresh evidence provisions are in section four of the CAA 1995 which amended the provisions in section 23 of the 1968 Act. The amendments to section 23 were that the duty to admit new evidence was abolished, but the power to admit new evidence is made subject to a duty to consider the same factors as limited the former duty: credibility, relevance to the safety of the conviction, admissibility at trial and the reasonableness of the explanation for the failure to adduce the evidence at trial. Following the recommendation of the RCCJ, the requirement that new evidence be 'likely to be credible' had now become 'capable of belief.' As under the previous legislation, the Court's power to receive evidence is unfettered, provided it considers it necessary or expedient in the interests of justice to do so, regardless of the above factors. The Court's rarely used power to rehear the evidence presented at the trial was abolished.<sup>73</sup> The removal of the Court's power to rehear trial evidence reinforces the review function which arguably is what has caused some of the problems in the first place.

The key to the liberalisation of the Court's approach would be whether the overriding consideration is if it is in the interests of justice to admit the evidence regardless of whether the four factors have been satisfied. The restrictive approach of the Court can be demonstrated by undue weight being given to any of the four factors in the face of evidence which may lead to the conviction being unsafe. This was expressed by JUSTICE in their response to the RCCJ report:

There is clearly a consensus that what is considered as fresh evidence should no longer be subject to the restrictive approach adopted by the Court of Appeal in the past. Our view is that although the Court is entitled to seek and take account of any explanation why evidence which was available was not adduced at the trial, this should not be the determining factor; the test must be a broad one of whether the evidence goes to the safety of the conviction.<sup>74</sup>

---

<sup>72</sup> Lord Taylor CJ had taken over from Lord Lane CJ who had been heavily criticised by miscarriage of justice campaigners for his handling of cases, most notably for his comment at one of the failed Birmingham Six appeals: 'as has happened before in References by the Home Secretary to this court, the longer this hearing has gone on the more convinced this court has become that the verdict of the jury was correct.' See *R v Callaghan* above n.61.

<sup>73</sup> Criminal Appeal Act 1995, s. 4(1)(a).

<sup>74</sup> JUSTICE (1994) *Remedying Miscarriages of Justice* 6.

In the more recent judgment of *R v Erskine*,<sup>75</sup> the Lord Justice CJ has sought to clarify the operation of section 23:

Virtually by definition, the decision whether to admit fresh evidence is case and fact specific. The discretion to receive fresh evidence is a wide one focussing on the interests of justice. The considerations listed in subsection (2)(a) to (d) are neither exhaustive nor conclusive, but they require specific attention. The fact that the issue to which the fresh evidence relates was not raised at trial does not automatically preclude its reception. However it is well understood that, save exceptionally, if the defendant is allowed to advance on appeal a defence and/or evidence which could and should have been but were not put before the jury, our trial process would be subverted. Therefore if they were not deployed when they were available to be deployed, or the issues could have been but were not raised at trial, it is clear from the statutory structure, as explained in the authorities, that unless a reasonable and persuasive explanation for one or other of these omissions is offered, it is highly unlikely that the “interests of justice” test will be satisfied.<sup>76</sup>

How this works in practice will be discussed using empirical research below. A major development in recent years which may have had an impact on the working practices of the Court in fresh evidence appeals is the case of *R v Pendleton*<sup>77</sup> and it is necessary to outline the development of this judgment before discussing the empirical research.

### **Pendleton and the Court’s decision-making process**

As discussed above, initially the Court applied the objective jury impact test in determining the appeal but the House of Lords in *Stafford* decided the test should be more subjective. The case of *R v Pendleton* gave the House of Lords the opportunity to review the *Stafford* judgment. The Crown relied on the decision in *Stafford* while the appellants relied on the judgment of *R v McNamee*<sup>78</sup> where Swinton Thomas LJ had applied the jury impact test:

We have.....concluded that the conviction is unsafe because we cannot be sure that the jury would have reached the same conclusion that they were sure of guilt if they had the fresh evidence we have heard. Furthermore the case as presented to us by both sides is very different to that presented at trial.

The leading speech in *Pendleton* was given by Lord Bingham who discussed the difficulties of the Court’s task in relation to fresh evidence appeals as:

---

<sup>75</sup> [2010] 1WLR 183.

<sup>76</sup> *Ibid.* at 193.

<sup>77</sup> [2002] 1 WLR 72.

<sup>78</sup> [1998] EWCA Crim 3524.

...it will ordinarily be safe for the Court of Appeal to infer that the factual ingredients essential to prove guilt have been established against the satisfaction of the jury. But the Court of Appeal can rarely ever know, save perhaps from questions asked by the jury after retirement, at what points the jury have felt difficulty. The jury's process of reasoning will not be revealed and, if a number of witnesses give evidence bearing on a single question, the Court of Appeal will never know which of those witnesses the jury accepted and which, if any, they doubted or rejected.<sup>79</sup>

Lord Bingham accepted the appellant's submission that the starting point had to be recognition of the jury as the tribunal of fact but he was not persuaded that the House of Lords had laid down any incorrect principle in *Stafford*, 'so long as the Court of Appeal bears very clearly in mind that the question for its consideration is whether the conviction is safe and not whether the accused is guilty.'<sup>80</sup> Therefore:

The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe.<sup>81</sup>

Donald Pendleton's appeal was allowed on the basis that the Court of Appeal had failed to appreciate that the importance of the fresh evidence was such that it would have led to the trial being conducted completely differently:

Had the jury been trying a different case on substantially different evidence the outcome must be in doubt. In holding otherwise the Court of Appeal strayed beyond its true function of review and made findings that were not open to it in all the circumstances. Indeed it came perilously close to considering whether the appellant, in its judgment, was guilty.<sup>82</sup>

Lords Steyn and Hope agreed with Lord Bingham's reasoning but Lord Hobhouse took a differing view, though agreeing that the conviction should be quashed. He felt that changing the test to 'unsafe' had reinforced the reasoning in *Stafford* that 'appeals are not to be allowed unless the Court of Appeal has itself made the requisite assessment'<sup>83</sup> as:

in my judgment it is not right to attempt to look into the minds of the members of the jury. Their deliberations are secret and their precise and detailed reasoning is not

---

<sup>79</sup> See above n.77 at para. 16.

<sup>80</sup> *Ibid*, at para. 19.

<sup>81</sup> *Ibid*.

<sup>82</sup> *Ibid*, at para. 28.

<sup>83</sup> *Ibid*, at para. 35.

known. For an appellate court to speculate, whether hypothetically or actually, is not appropriate. It is for the Court of Appeal to answer the direct and simply stated question: Do we think that the conviction was unsafe?<sup>84</sup>

*Pendleton* failed to bring clarity. The question after *Pendleton* was what approach the Court of Appeal would follow in fresh evidence appeals; would it be Lord Bingham's supposedly more liberal approach in highlighting the jury impact test or Lord Hobhouse's reinforcement of the supposedly more restrictive *Stafford* approach?

### **The Stafford approach**

The reinforcement of the *Stafford* approach of Lord Hobhouse is illustrated by cases such as *R v Hanratty*,<sup>85</sup> *R v Akiner*,<sup>86</sup> *R v Izzigil*,<sup>87</sup> *R v JB*,<sup>88</sup> *R v Hakala*,<sup>89</sup> and *R v Cleeland*<sup>90</sup> where the Court appeared to make its own evaluation of the fresh evidence and upheld the appeals. In *R v Hakala*, one of the reasons given for the reinforcement of the *Stafford* approach was that:

The judgment in "fresh evidence" cases will inevitably therefore continue to focus on the facts before the trial jury, in order to ensure that the right question – the safety, or otherwise, of the conviction - is answered. It is integral to the process that if the fresh evidence is disputed, this court must decide whether and to what extent it should be accepted or rejected, and if it is to be accepted, to evaluate its importance, or otherwise, relative to the remaining material which was before the trial jury: hence the jury impact test. Indeed, although the question did not arise in *Pendleton*, the fresh evidence adduced by the appellant, or indeed the Crown, may serve to confirm rather than undermine the safety of the conviction. Unless this evaluation is carried out, it is difficult to see how this court can perform out its statutory responsibility in a fresh evidence case, and exercise its "power of review to guard against the possibility of injustice". However the safety of the appellant's convictions is examined, the essential question, and ultimately the only question for this court, is whether, in the light of the fresh evidence, the convictions are unsafe.<sup>91</sup>

The *Stafford* approach was reinforced in the judgment of *R v Ahmed*.<sup>92</sup> In that case, Mantell LJ referred to the case of *R v Hakala* and also *R v Hanratty* which had both approved *Stafford* and cited with approval the speech from Judge LJ in *R v Hakala* above. He stated

as is shown in *Pendleton* and *Hakala* it is for this Court to decide whether or not the evidence should be accepted. If it is accepted, the question is then as to its impact on the safety of the conviction.<sup>93</sup>

---

<sup>84</sup> *Ibid*, at para. 38.

<sup>85</sup> [2002] EWCA Crim 1141.

<sup>86</sup> [2002] EWCA Crim 957.

<sup>87</sup> [2002] EWCA Crim 925.

<sup>88</sup> [2002] EWCA Crim 543.

<sup>89</sup> [2002] EWCA Crim 162.

<sup>90</sup> [2002] EWCA Crim 293.

<sup>91</sup> See above n. 89 at para. 11.

<sup>92</sup> [2002] All ER (D) 80.

The Privy Council had the opportunity to review *R v Pendleton* in *Dial and Dottin v The State*.<sup>94</sup> This was a death row case from Trinidad and Tobago. There was undisputed information that an identification witness had lied at trial. The majority (three-two) dismissed the appeal and Lord Bingham was in the majority. Lord Brown outlined the approach to use when determining fresh evidence appeals. He stated:

In the Board's view the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the court itself, and is not what effect the fresh evidence would have had on the mind of the jury. That said, if the court regards the case as a difficult one, it may find it helpful to test its view 'by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict' (*Pendleton* at p 83, para [19]). The guiding principle nevertheless remains that stated by Viscount Dilhorne in *Stafford* (at p 906) and affirmed by the House in *Pendleton*:

While ... the Court of Appeal and this House may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question [whether or not the verdict is unsafe].<sup>95</sup>

It is not clear from this whether Lord Bingham was now retreating from his views in *Pendleton* and following Lord Hobhouse's line of reasoning in *Pendleton* which reinforced *Stafford*. There were two dissenting judgments from Lords Steyn and Hutton which appeared to emphasise the jury impact test of *Pendleton*.

In *R v. Dunn & ors*,<sup>96</sup> Goldring LJ explained the differences between *Pendleton* and *Dial* as a difference in 'emphasis.' These cases were discussed in *R v Burridge*.<sup>97</sup> In this case, counsel for the appellant had argued that '*Dial* weakened the rigour of the test identified in *Pendleton* as exemplified by the fact that Lord Steyn (who had been party to the decision in *Pendleton*) dissented'<sup>98</sup> in *Dial*. Leveson LJ rejected this and stated:

Furthermore, as to the principle, it is important to underline that Lord Bingham was part of the majority judgment articulated by Lord Brown and would hardly have been so had he considered that the analysis of *Pendleton* and the subsequent decisions was not both accurately reflected and fairly illuminated by Lord Brown's exposition of

---

<sup>93</sup> Ibid. at para 37.

<sup>94</sup> [2005] UKPC 4.

<sup>95</sup> Ibid, at paras. 31 and 32. The cases cited were *R v Hakala*; *R v Hanratty* and *R v Ahmed* as authority.

<sup>96</sup> [2009] EWCA Crim 1371.

<sup>97</sup> [2010] EWCA Crim 2847.

<sup>98</sup> Ibid. at para. 100.

the law. We have no doubt that it was: both in *Stafford v DPP* and *Pendleton*, the House of Lords rejected the proposition that the jury impact test was determinative, explaining that it was only a mechanism in a difficult case for the Court of Appeal to "test its view" as to the safety of a conviction.<sup>99</sup>

More recently in *R v Ahmed (Mushtaq)*,<sup>100</sup> Hughes LJVP stated (citing *Pendleton*):

The responsibility for deciding whether fresh material renders a conviction unsafe is laid inescapably on this court, which must make up its own mind. Of course it must consider the nature of the issue before the jury and such information as it can gather as to the reasoning process through which the jury will have been passing. It is likely to ask itself by way of check what impact the fresh material might have had on the jury. But in most cases of arguably relevant fresh evidence it will be impossible to be 100% sure that it might not possibly have had some impact on the jury's deliberations, since *ex hypothesi* the jury has not seen the fresh material. The question which matters is whether the fresh material causes this court to doubt the safety of the verdict of guilty..... Where fresh evidence is under consideration the primary question "is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury." (Dial). Both in *Stafford v DPP* [1974] AC 878 at 906 and in *Pendleton* the House of Lords rejected the proposition that the jury impact test was determinative, explaining that it was only a mechanism in a difficult case for the Court of Appeal to "test its view" as to the safety of a conviction. Lord Bingham, who gave the leading speech in *Pendleton*, was a party to *Dial*.<sup>101</sup>

In *R v O'Donnell*,<sup>102</sup> the CCRC had referred a case on the basis that the new material submitted might have affected the jury's verdict. Hughes LJ rejected this saying:

This is not the acid test on appeal but only an advisable cross-check as explained in *Pendleton* [2001] UKHL 66; [2002] 1 Cr App R 34. The responsibility, in a fresh evidence case, for deciding whether the conviction is safe or not is inescapably laid on this court. Both in *Stafford v DPP* [1974] AC 878 at 906 and in *Pendleton* the House of Lords rejected the proposition that the jury impact test is determinative. It cannot be because it will rarely be possible to be 100% sure that fresh evidence could not have affected the jury's deliberations, since *ex hypothesi* it did not see it.<sup>103</sup>

This *Stafford* approach has been approved more recently in *R v Noye*,<sup>104</sup> *R v O'Meally*,<sup>105</sup> and *R v Edward Brown*.<sup>106</sup> This may seem to be the prevailing approach, but despite these authorities, the jury impact test is still being used in some cases.

---

<sup>99</sup> *Ibid.* at para. 101.

<sup>100</sup> [2010] EWCA Crim 2899.

<sup>101</sup> *Ibid.* at para. 24.

<sup>102</sup> [2012] EWCA Crim 2393.

<sup>103</sup> *Ibid.* at para. 35.

<sup>104</sup> [2011] EWCA Crim 650.

<sup>105</sup> [2015] EWCA Crim 905.

<sup>106</sup> [2015] EWCA Crim 1328.

## Jury impact test

There are a number of cases where the Court used the jury impact test to quash the conviction.<sup>107</sup> The Court's consistent claim that it decides whether the conviction is unsafe and not whether the appellant is guilty gives rise to a number of judgments where the Court says it cannot speculate on the decision-making process of the jury at trial. It then appears to do just that when deciding that the new evidence may have had an impact on their decision at trial. It is not entirely clear how the Court is able to decide whether the fresh evidence may have had an impact on the jury without trying to ascertain why they made the decisions they did with the evidence they heard and how this new evidence would have influenced that decision. A useful case in this respect is *R v A*,<sup>108</sup> where the appellant was convicted of rape and the fresh evidence the Court heard was three witnesses casting doubt on the complainant's story. Counsel for the prosecution then sought leave to call the complainant and the Court refused with Laws LJ stating:

We acknowledge that there are cases in which the court has received evidence adduced by the Crown to rebut fresh evidence called for an appellant. They include instances where objective scientific material is available which refutes the new testimony, or may do so. This case is in a different category. We would have been invited to measure the complainant's credibility against that of the new witnesses for the appellant. That is very close to the trial process itself, given the nature of the three issues in the appeal and the fact that the complainant's credibility was at the heart of the case. We should be trespassing onto the proper territory of the jury. In those circumstances we declined, as we have said, to receive evidence from the complainant.<sup>109</sup>

The Court quashed the conviction seemingly accepting that the evidence from the witnesses showed the complainant had admitted to lying. It is difficult to see how this is not the Court usurping the role of the jury.

There are also examples of the jury impact test being used to uphold the appeal.<sup>110</sup> These cases show that the jury impact test is as capable of resulting in convictions being upheld as it is in them being quashed. Although the general view is that the jury impact test is preferable because the Court deciding the issue for itself is more likely to lead to a usurping of the role of the jury which it does not like to do, these cases appear to be

---

<sup>107</sup> See, for example, *R v Dennis and others* [2004] All ER (D) 05; *R v Aspery* [2004] All ER (D) 183; *R v Jenkins* [2004] All ER (D) 295; *R v Nawaz and others* [2007] All ER (D) 200; *R v P* [2007] All ER (D) 296; *R v Vernett-Showers and others* [2007] All ER (D) 285; *R v Holdsworth* [2008] All ER (D) 03; *R v Cadman* [2008] All ER (D) 43; *R v A* [2006] All ER (D) 431; *R v Cullen* [2003] All ER (D) 151; *R v Devaney* [2003] All ER (D) 63; *R v Wickens* [2003] All ER (D) 208; *R v Nealon* [2014] EWCA Crim 574; *R v Thompson* [2014] EWCA Crim 836; *R v George* [2014] EWCA Crim 2507.

<sup>108</sup> [2014] EWCA Crim 1292.

<sup>109</sup> *Ibid.* at para. 19.

<sup>110</sup> See, for example, *R v Ambler* [2003] All ER (D) 206; *R v Bartrip* [2005] All ER (D) 420; *R v Harper* [2005] All ER (D) 134; *R v Barnes* [2008] All ER (D) 268; *R v Rogers* [2006] All ER (D) 57 and *R v Pluck* [2010] EWCA Crim 2936.

weighing up what the jury would or would not make of the evidence beyond all reasonable doubt so it is not overly clear what the differences are between the approaches. When determining if the conviction is unsafe, the Court must be deciding if the new evidence raises a reasonable doubt about guilt. If this is the decision-making process, then the Court is usurping the jury's role when deciding whether the conviction is unsafe based on new evidence. This is to some extent inevitable in these appeals as the Court is deciding on evidence that was never before the jury. The Court is unable to order a retrial until it has quashed the conviction so it still has to choose which approach to take if it wishes to order a retrial. The findings from the empirical evidence will now be discussed.

### **Empirical research**

As the previous discussion shows, the Court's approach to these appeals has largely been described as restrictive, though it has occasionally been acknowledged as taking a more liberal approach. The difficulty is that without a normative baseline with which to measure the Court's approach it can be difficult to determine whether the Court is taking a restrictive or a liberal approach. With that in mind, the judgments in this article are analysed in terms of whether it is possible to indicate whether the Court is being restrictive or liberal. Before the current sample of judgments is discussed, it is necessary to outline the quantitative findings from the last major empirical study on fresh evidence appeals to place the current sample in context. Research was conducted by Kate Malleon for the RCCJ and the data used as the principal basis for that study is that derived from published and unpublished Court of Appeal judgments.<sup>111</sup> Malleon reviewed the first 300 appeals against conviction of 1990, analysing each judgment separately to gather information 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 these were recorded in order to obtain both qualitative and quantitative information on the Court's powers and practices.

The research for this article was conducted replicating the Malleon study in order to try to assess whether the changes in the CAA 1995 and the case of *R v Pendleton* had made any difference.<sup>112</sup> This study reports on findings from a relational content analysis of the first 300 available appeals against conviction which the Court considered in 2016. The transcripts of the appeals were taken from Casetrack.<sup>113</sup> Some of the transcripts on the

---

<sup>111</sup> Malleon, above n. 8.

<sup>112</sup> A brief replication study was conducted in 2002 but the comparison years chosen for this article (1990 – 2016) were preferred due to the larger time frame and more detailed study. See S. Roberts, 'The Royal Commission on Criminal Justice and Factual Innocence: Remediating Wrongful Convictions in the Court of Appeal' (2004) 1(2) *JUSTICE Journal* 86 for the smaller study. Both studies produced similar findings.

<sup>113</sup> See <http://www.casetrack.com/index.html>. Casetrack was a database that held the majority of judgments of the Criminal Division of the Court of Appeal from 1996 onwards. This database closed on the 28 February 2017.

database were not available as they were subject to reporting restrictions so where this occurred the next transcript was accessed.<sup>114</sup> The appeals reviewed covered the period from January to July 2016. The same methodology as Malleson was adopted in order to provide a comparison.

This study has not sought to determine in any reliable statistical terms, whether the CAA 1995 had changed the way in which the Court makes its decision as compared with Malleson's findings in 1990. In order to make such claims, the research would have had to have been constructed in a way that would permit a more sophisticated analysis including the use of multiple regression tests. This form of analysis would have assisted in determining whether other intervening factors between the two studies, such as the introduction of the Human Rights Act, a change in political climate, or a change in senior judges, may have had a greater effect of any perceptible change in Court of Appeal decision making, than the introduction of the CAA 1995. This study does provide an indication of the ways in which the Court's decision making has changed since the introduction of the CAA 1995 and may serve as a basis for future quantitative analysis that attempts to verify or reject these tentative hypotheses.

### **The 1990 and 2016 samples of judgments**

Malleson had a total of twenty-three cases in her sample in which fresh evidence was raised (eight per cent of the total appeals). Four out of the twenty-three cases involved expert or forensic evidence and sixteen involved witnesses of fact with two in the 'other' category. See table below.

---

<sup>114</sup> The cases subject to reporting restrictions tend to be those where children are involved but there is no information on them on Casetrack so it is impossible to give any details of what they are. They will include sentence appeals, appeals against conviction and renewed applications to appeal.

**Table 1.1: Type of fresh evidence cases before the Court of Appeal (Criminal Division)  
January to July 1990**

Type of Fresh Evidence	Allowed	Dismissed/ Refused	Adjourned/ Retrial <sup>115</sup>	% of total
New witness of fact	2	7	1	44%
Trial witness of fact	1	4	1	26%
New expert witness	0	1	2	13%
Trial expert witness	0	1	0	4%
Other	1	2	0	13%
<b>TOTAL(N= 23)</b>	<b>4</b>	<b>15</b>	<b>4</b>	<b>100%</b>

In fourteen of the twenty-three cases the evidence was admitted by the Court (sixty-one per cent). Of these, Malleson states four were allowed and two were adjourned for a full hearing (being renewed applications). In two cases retrials were ordered. Therefore, Malleson states that 'the number of appeals which succeeded on the basis of fresh evidence was small, being less than seventeen per cent of the total fresh evidence cases and just over one per cent of all the cases reviewed.'<sup>116</sup> These figures are based on the number of appeals allowed without a retrial. Malleson's findings will now be compared with the 2016 sample of judgments.

In 2016, there were a total of forty-two cases in the sample in which fresh evidence was raised (fourteen per cent of the total appeals). Seven out of the forty-two cases involved expert or forensic evidence and fourteen involved witnesses of fact with twenty-one in the 'other' category. See table below.

<sup>115</sup> The fresh evidence in the retrials cases was new expert evidence and a trial witness of fact claiming to have wrongly identified the appellant. The fresh evidence in the cases adjourned was a new witness of fact and new expert evidence.

<sup>116</sup> Malleson, above n. 8 at 9.

**Table 1.2: Type of fresh evidence cases before the Court of Appeal (Criminal Division)  
January to July 2016**

Type of Fresh Evidence	Allowed	Dismissed/ Refused	Adjourned/ Retrial	% of total
New witness of fact	0	8	1	19%
Trial witness of fact	0	5	0	14%
New expert witness	1	5	0	14%
Trial expert witness	0	0	1	3%
Other	0	21	0	50%
<b>TOTAL(N = 42)</b>	<b>1</b>	<b>39</b>	<b>2</b>	<b>100%</b>

The first thing to note is that there were far more appeals based on fresh evidence in 2016 than in 1990 with twenty-three in 1990 and forty-two in 2016. This is potentially evidence of a more liberal approach in 2016 as it could be suggested a greater number of fresh evidence appeals are getting through the leave filter. However, the majority of fresh evidence appeals in the 2016 sample were renewed applications to appeal having initially being rejected by the single judge and therefore, were still seeking leave to appeal.<sup>117</sup> The evidence was admitted by the Court in eight of the forty-two cases (nineteen per cent) in 2016 which is significantly lower than sixty-one per cent in 1990. This is potentially evidence that the Court is now more restrictive than it was in 1990 and twenty of the appeals in 2016 were non-counsel applications and in many of those the applicant had drafted his/her own grounds of appeal. Malleon conducted a separate study on counsel and non-counsel appeals and her conclusions were that counsel-renewed applications had a substantially higher success rate than non-counsel applications which may account for the low figure of fresh evidence admitted.<sup>118</sup>

Of the eight appeals where the fresh evidence was admitted in 2016, one was allowed and seven were dismissed. In two cases, a retrial was ordered. Therefore, the number of appeals which succeeded on the basis of fresh evidence in 2016 was very small being two per cent of the total fresh evidence cases and 0.3 per cent of all 300 cases

<sup>117</sup> Malleon only makes reference to two of her sample being renewed applications to appeal so if this is the case there was a significant increase in these appeals in the 2016 sample.

<sup>118</sup> Above n.8 at 35.

reviewed. These figures are based on the one appeal allowed. The two per cent figure in 2016 is obviously much lower than seventeen per cent in 1990 which is possibly evidence of the Court's restrictive approach as fresh evidence was admitted in a higher number of appeals in 1990. The larger number of appeals based on fresh evidence in 2016 may be evidence that more fresh evidence is now being brought to the Court which is beneficial but the success rate of one per cent of all cases reviewed in 1990 and 0.3 per cent in 2016 shows that fresh evidence appeals remain very rare and the chances of success are rarer still.<sup>119</sup>

If the cases where a retrial was ordered are included in the 'success' rate then the figures are slightly improved. Malleson had two retrials ordered so if these were added to the four appeals allowed without retrials then the number of appeals succeeding (six) on the basis of fresh evidence in 1990 was twenty-six per cent which is a slight improvement on seventeen percent which is the success rate without retrials included. This represents two per cent of all the appeals in the 1990 sample. There were two retrials ordered in the 2016 sample so if these were added to the one appeal allowed without a retrial then the number of appeals succeeding (three) on the basis of fresh evidence in 2016 was seven per cent which is a slight improvement on two per cent which is the success rate without retrials included. This represents one per cent of all the appeals in the 2016 sample. A retrial cannot be ordered unless the appeal is quashed first so the ordering of a retrial is at least acknowledgement that the appellant has succeeded in the very difficult task of overturning the conviction. Including retrials in the success rate does show a slight improvement in the figures but the comparisons between the two samples still show that the chances of success in 2016 were significantly lower than they were in 1990 and the chances of success remain very rare in fresh evidence appeals however they are measured.

In 1990, four out of the twenty-three cases involved expert or forensic evidence and sixteen involved witnesses of fact, with two in the 'the other' category. In 2016, seven out of the forty-three cases involved expert or forensic evidence and fourteen involved witnesses of fact with 21 in the 'other' category.<sup>120</sup> The first two categories are obviously very similar with the major difference being two in the 'other' category in 1990 and 21 in the 'other' category in 2016. The large rise in the 'other' category can partly be explained by the large number of

---

<sup>119</sup> These figures are taken from the sample of judgments that were available on Casetrack. Casetrack held both reported and unreported judgments but the judgments where there are publication restrictions are not available and could not be accessed for this research. As these judgments could not be viewed it was not possible to know whether they were fresh evidence appeals but it is very possible that some of them were so if they had been included in this study these figures may have been higher. However, given the similarities with the success rate between the two studies, it is possible that including these judgments would not have made a noticeable difference.

<sup>120</sup> This category includes appeals where the fresh evidence was not actually stated; *R v Patel* [2016] EWCA Crim 453; *R v Shaikh* [2016] EWCA Crim 504; *R v Otti* [2016] EWCA Crim 865; *R v Moate* [2016] EWCA Crim 350; *R v Dcruze* [2016] EWCA Crim 308.

non-counsel appeals. If the applicant has drafted his/her own grounds they are not easily categorised as they tend to be specific to the individual case and therefore, the Court may have difficulty understanding what the fresh evidence is and whether it has made the conviction unsafe which is why counsel appeals have a much higher chance of success. It would seem that the rise in non-counsel applications is inevitable given the recent cuts in legal aid<sup>121</sup> which is detrimental to the applicant because he/she is more likely to be unsuccessful and also for the Court because the hearings take longer which has an impact on waiting times and the backlog of cases waiting to be heard. In the latest Court of Appeal (Criminal Division) Annual report 2015-2016 the Registrar of Criminal Appeals stated:

Applications for leave to appeal lodged by applicants acting in person have increased markedly this year and now stand at approximately 9.21%. Those numbers are now very significant and it looks as if the percentage will be over 10% next year. There is a price to be paid for this because the case management of cases place a much greater demand on the resources of my Office, in terms both of advice to applicants and support to the judiciary.<sup>122</sup>

As a result of the rise in non-counsel applications, the Court has introduced a new procedure whereby all grounds by applicants in person are reviewed by lawyers and a summary prepared before the permission stage to ensure that genuine grounds are identified at an early stage.<sup>123</sup>

Fresh evidence appeals are the most problematic for lawyers because it may take years to find new evidence and, as this and other research shows, it is very difficult to succeed with these appeals. It is even more difficult to succeed if the applicant is drafting his/her own grounds and the increase in these appeals is a worrying development, particularly if innocent people are languishing in prison because they are unable to get legal representation and navigate the difficulties of the appellate process.<sup>124</sup>

### **Qualitative findings**

The qualitative findings fall into three categories in the 2016 sample, first, the decisions that referred to section 23 CAA 1968 directly when deciding the appeal, second, those who do

---

<sup>121</sup> See, for example, O. Bowcott, 'Legal aid cuts: lawyers to begin boycott that could see courts grind to a halt' *The Guardian*, 30 June 2015. Available at <https://www.theguardian.com/law/2015/jun/30/criminal-lawyers-promise-boycott-legal-aid-cases-lower-rate> (last accessed 20 February 2017).

<sup>122</sup> Citing approximate percentages for previous years; 2015: 6.6%, 2014: 5%, 2013: 3.4% and 2012 2.53%. Available at <https://www.judiciary.gov.uk/wp-content/uploads/2017/02/cacd-lcj-report-2016-final.pdf> (last accessed on 20 February 2017).

<sup>123</sup> *Ibid*, footnote 2.

<sup>124</sup> For further discussion on this see, J. Arkinstall, 'Unappealing Work: The Practical Difficulties Facing Solicitors Engaged In Criminal Appeal Cases' (2004) 1(2) *JUSTICE Journal* 95 and also Roberts and Weathered, above n. 1.

not refer to it directly but use the terminology from it, and third, those who do not refer to it at all. These approaches are discussed in turn.

There were sixteen cases in the sample where section 23 was directly mentioned. Three of these were allowed and there were two retrials ordered. Of those allowed, in *R v IB*,<sup>125</sup> post-trial forensic testing had been done on the complainant's underwear which revealed more than one DNA profile. The Court considered the factors in section 23(2) and in particular whether the new evidence afforded any ground for allowing the appeal. The Court admitted the evidence and quashed the conviction due to the doubts it raised about the safety of the conviction. In the controversial case of *R v Evans*,<sup>126</sup> the fresh evidence was a post-trial witness who had had a previous relationship with the complainant.<sup>127</sup> This was a referral by the Criminal Cases Review Commission. The new evidence was heard '*de bene esse*'<sup>128</sup> where the Court hears the evidence without considering section 23 first. This is a more liberal approach because the Court does at least hear the evidence before making a judgment on it whereas the Court may use section 23 to reject the evidence without hearing it. The Court concluded that all four conditions in section 23(2) had been satisfied, admitted the evidence, quashed the conviction and ordered a retrial.<sup>129</sup> The Court appeared to be taking a very proactive approach in *R v Chitolie*<sup>130</sup> where the applicant had drafted his own grounds of appeal and wished to represent himself in Court. The Registrar of Criminal Appeals had been concerned about this because it was felt there was evidence that the applicant had a mental illness and therefore, should have been judged unfit to plead at trial. The applicant refused to accept that he had a mental illness but the single judge referred it to the full Court to consider this with fresh evidence from a consultant psychiatrist. The Court rejected the applicant's own grounds but admitted the evidence of the psychiatrist under section 23 and quashed the conviction substituting a finding of unfit to plead under section 6(2) CAA 1968. This would not have happened without the interventionist approach of the Registrar, the single judge in giving leave and the full Court hearing the appeal.

---

<sup>125</sup> [2016] EWCA Crim 1758.

<sup>126</sup> [2016] EWCA Crim 452. Ched Evans was a professional football player and the case had attracted a large amount of publicity. The case was sent for retrial and he was acquitted.

See <https://www.theguardian.com/football/2016/oct/14/footballer-ched-evans-cleared-of-in-retrial> (last accessed 20 February 2017).

<sup>127</sup> This was problematic because it related to the complainant's sexual behavior and therefore there had to be a consideration of section 41 of the Youth Justice and Criminal Evidence Act 1999.

<sup>128</sup> This translates into 'for what it is worth.'

<sup>129</sup> The important recent case of *R v Cross* [2014] EWCA Crim 96 was mentioned where the Lord Chief Justice had stated that where a Court agreed to hear fresh evidence it did so *de bene esse* and, in light of the argument, then considered whether it should be admitted. The Court emphasised that the decision about whether or not to hear fresh evidence rested with the full Court hearing the appeal, not an earlier Court at a directions hearing or the single judge determining leave to appeal.

<sup>130</sup> [2016] EWCA Crim 14. This was two appeals heard together. The other appeal was *R v Marcantonio*.

The most common reason for rejecting the fresh evidence under section 23 was because the evidence was available at trial and there was no reasonable explanation as to why it was not used.<sup>131</sup> In the other cases, the reasons for rejection were more varied in relation to section 23. In *R v Marcantonio*,<sup>132</sup> evidence of psychiatrists was admitted under section 23 but the Court dismissed the appeal because the evidence did not show the appellant was unfit to plead at trial. In *R v Newman*,<sup>133</sup> the evidence of a new witness of fact was rejected because it was not capable of belief. In *R v Scholey*,<sup>134</sup> expert evidence of a head injury was rejected because it did not satisfy any of the elements in section 23(2). In *R v Prince*,<sup>135</sup> a statement from a co-defendant was rejected because it did not satisfy section 23(2). In *R v Malik*,<sup>136</sup> fresh evidence of threats by the co-accused was rejected because it did not satisfy section 23 without explaining why. In *R v Ebanks*,<sup>137</sup> various pieces of evidence such as e-mails, a passport and a lease were rejected because they would not afford any ground for allowing the appeal. In *R v Hindocha*,<sup>138</sup> the fresh evidence of statements relating to the honesty of the applicant was rejected because it was available at trial and did not afford a ground for allowing the appeal. In *R v Onukafor*,<sup>139</sup> documents from a Building Society were rejected because they would not have assisted the applicant.

There were eleven judgments in the sample where the terminology of section 23 was used without reference to the statute itself. The most common reason to reject evidence again was effectively section 23(2)(d) where the Court considered there was not a reasonable explanation for not adducing it at the original trial.<sup>140</sup> In the other two cases, the evidence was rejected because it did not afford any ground for allowing the appeal.<sup>141</sup>

It is clear from reading these judgments where section 23 is directly or indirectly referred to that the judges are aware that any evidence may be admitted under section 23(1)

---

<sup>131</sup> In *R v Calvert* [2016] EWCA Crim 890 CCTV evidence was rejected; in *R v Pratt* [2016] EWCA Crim 1304 expert opinion on CCTV evidence was rejected; in *R v Osmani* [2016] EWCA Crim 26 a secret tape recording between the applicant's father and suspect was rejected after being heard by the Court *de bene esse*, and in *R v Day* [2016] EWCA Crim 645 and *R v Reid* [2016] EWCA Crim 341 new witnesses of fact were rejected.

<sup>132</sup> See above n. 130.

<sup>133</sup> [2016] EWCA Crim 380.

<sup>134</sup> [2016] EWCA Crim 499.

<sup>135</sup> [2016] EWCA Crim 440.

<sup>136</sup> [2016] EWCA Crim 677.

<sup>137</sup> [2016] EWCA Crim 473.

<sup>138</sup> [2016] EWCA Crim 1114.

<sup>139</sup> [2016] EWCA Crim 361.

<sup>140</sup> In *R v Martin* [2016] EWCA Crim 474 an undated letter from a former prisoner was rejected; in *R v Richards* [2016] EWCA Crim 1305 a statement confirming a witness had lied was rejected; in *R v JW* [2016] EWCA Crim 1299 text messages from the applicant's daughter were rejected; in *R v Ward* [2016] EWCA Crim 1565 an email from the applicant to prove a time was rejected; in *R v Moate* [2016] EWCA Crim 350 vague witness statements were rejected; in *R v Angel* [2016] EWCA Crim 945 the evidence of two witnesses of fact was rejected; in *R v Good* [2016] EWCA Crim 921 statements of previous clients of the company were rejected; in *R v Julian S* [2016] EWCA Crim 1607 evidence from social networking websites was rejected, and in *R v Olabinio* [2016] EWCA Crim 1030 evidence from a witness of fact was rejected.

<sup>141</sup> In *R v Boon* [2016] EWCA Crim 1255 a statement from a witness not fit to attend the trial was rejected and in *R v Ezeh* [2016] EWCA Crim 1374 expert evidence from a 'digital forensic consultant' was rejected.

if it is in the interests of justice to do so. This effectively allows them to admit any evidence they wish without consideration of the conditions imposed by section 23(2). It would appear however, that the judges are reluctant to do this and more likely to apply the conditions in section 23(2) to determine the outcome. So although they do not have to consider the conditions in section 23(2), they seem more likely to do this rather than any broader considerations of what is in the interests of justice. The best example of this is *R v Osmani*<sup>142</sup> where counsel for the applicant argued that the interests of justice test (section 23(1)) should be the one for the Court to follow and, even if the evidence could have been available at trial, it still should prevail under section 23(1). In *R v IB*,<sup>143</sup> the Court stated ‘our first task is obviously, in considering whether to receive any evidence of such matters, to pay particular regard to those factors provided in section 23(2) of the Criminal Appeal Act 1968.’<sup>144</sup> Similarly, in *R v Reid*,<sup>145</sup> the Court stated ‘in the case of the evidence of the new witness we ask ourselves, in accordance with section 23(1) of the Criminal Appeal Act 1968, if it is necessary or expedient in the interests of justice to receive such evidence.....In doing so we take into account the criteria in section 23(2).’<sup>146</sup> In *R v Scholey*,<sup>147</sup> the Court stated ‘in our view, [the expert’s] report does not satisfy the requirements of section 23 of the 1968 Act. By reference to subsection (2) we do not think that the part of the report upon which [defence counsel] relies is capable of belief’.<sup>148</sup> In *R v Prince*,<sup>149</sup> the Court stated ‘in our judgment the proposed evidence does not come within the criteria set out at section 23(2) of the 1968 Act for it to be received.’<sup>150</sup> It would seem therefore, that the judiciary are applying section 23(1) restrictively by imposing the conditions in s.23(2) on s.23(1) when s.23(1) contains a much broader discretion to admit evidence.

It would also appear from these judgments that the condition in section 23(2) which causes the most difficulty is section 23(2)(d) and the reasonable explanation for not adducing the evidence at trial. The Court is reluctant to admit any evidence available at trial and its attitude is one of suspicion if it was available but not used with mention of ‘tactical games’ in the judgments.<sup>151</sup> This is harsh on the applicant if his/her own lawyers made an error but it is not surprising given the Court’s reverence for the principle of finality, and its review function which hamper its ability to investigate and rectify errors of fact.

---

<sup>142</sup> See above n. 131.

<sup>143</sup> See above n. 125.

<sup>144</sup> Ibid. at para 22.

<sup>145</sup> See above n.131.

<sup>146</sup> Ibid. at para. 17.

<sup>147</sup> See above n.134.

<sup>148</sup> Ibid. at para. 59.

<sup>149</sup> See above n. 135.

<sup>150</sup> Ibid. at para 9.

<sup>151</sup> See *R v Osmani*, above n.131 and *R v Calvert*, above n.131.

There were fifteen cases in the sample where neither section 23 nor the wording of section 23 was used to determine the appeal. Ten of these cases were non-counsel grounds and therefore it was understandable if the applicant was not using this terminology when drafting his/her own grounds, though the judges should be familiar with this terminology. The main reasons for rejection in these cases were that the evidence was not fresh; there was no merit in it; it was not relevant to anything, or it was unclear what the appellant was referring to.<sup>152</sup> These cases highlight the importance of having legal representation because they can be difficult to understand and are dealt with very briefly by the Court compared to those with legal representation, though having legal representation does not always assist the appellant as the interesting case of *R v Aboukadir*,<sup>153</sup> shows. This case was a referral from the CCRC. Aboukadir was convicted of sexual offences and his defence was that he had never had any sexual activity with the complainant. The CCRC had obtained fresh expert scientific evidence which showed that the appellant had indeed had sexual activity with the complainant. The appellant's lawyer had been instructed by his client to maintain that he had not had sexual activity at the appeal and the CCRC had referred on the basis that he did have sexual activity with her but the issue now was one of consent. The Court of Appeal was clearly perplexed at the appeal being run on a different factual basis to what had been run at trial and the opposing arguments of the appellant's lawyer and the CCRC. It was therefore understandable that the Court would uphold the conviction with DNA evidence showing the appellant was lying. A novel CCRC referral was *R v Charlton and R v Ali*,<sup>154</sup> where the CCRC argued that because of the wrongful conviction cases of *R v O'Brien and others*<sup>155</sup> and *R v Paris, Abdullahi and Miller*,<sup>156</sup> which were largely attributed to police malpractice, the convictions of Charlton and Ali were unsafe because the same police officers had investigated their cases. This was a novel approach because the appeal Court did not view this evidence as coming within the usual definitions of 'fresh evidence' and section 23 was not referred to in the case. The appeal was upheld because the Court felt there was evidence linking them to the crime.

In terms of the Court's decision-making process, the majority of the appeals were renewed applications to appeal and therefore the Court itself was making the determination of whether the evidence should be admitted as that is its task on these applications. This is

---

<sup>152</sup> See *R v Dcruze* [2016] EWCA Crim 308; *R v Otti* [2016] EWCA Crim 865; *R v Patel* [2016] EWCA Crim 453; *R v Shaikh* [2016] EWCA Crim 504; *R v Murray* [2016] EWCA Crim 278; *R v Dillion* [2016] EWCA Crim 316; *R v Higgins* [2016] EWCA Crim 1131; *R v Deya* [2016] EWCA Crim 464; *R v Mackley* [2016] EWCA Crim 1264; *R v Bish* [2016] EWCA Crim 699; *R v Williams* [2016] EWCA Crim 266; *R v Robinson* [2016] EWCA Crim 762.

<sup>153</sup> [2016] EWCA Crim 456.

<sup>154</sup> [2016] EWCA Crim 52.

<sup>155</sup> [2000] EWCA Crim 3.

<sup>156</sup> [1993] 97 Cr App R 99.

illustrated by Jackson LJ in *R v Newman*,<sup>157</sup> ‘the proposed fresh evidence is incapable of belief. In those circumstances we do not need to go into the more difficult issue of the effect of that evidence, if accepted, upon the safety of the conviction.’<sup>158</sup> However, in *R v Moate*,<sup>159</sup> and *R v Robinson*,<sup>160</sup> the Court stated that it had considered whether the conviction was unsafe as part of deciding whether the evidence should be admitted. In *R v Pratt*,<sup>161</sup> the Court seemed to suggest that the Court should consider unsafety when determining whether to admit the evidence. Haddon-Cave LJ stated,

This court must be satisfied as to two matters when considering fresh evidence applications such as this: first, that the party seeking to adduce the fresh evidence can demonstrate a reasonable excuse as to why such evidence was not put before the court below; second, that the fresh evidence is likely to result in a materially different outcome.<sup>162</sup>

It is not clear from this what a ‘materially different outcome’ means other than the conviction being unsafe. In the six full appeals against conviction, the Court decided the issue for itself with no mention of *Pendleton* in three appeals.<sup>163</sup> *Pendleton* was referred to in the other three appeals, in *R v Charlton and R v Ali*,<sup>164</sup> the Court referred to Mushtaq Ahmed,<sup>165</sup> and decided the convictions were not unsafe. In *R v Evans*,<sup>166</sup> Hallett LJ stated:

If the court was persuaded to receive the evidence we were invited to find that had it been given at trial it might reasonably have affected the decision of the jury to convict: *R v Pendleton* [2002] 1 Cr. App. R. 34 HL. It should therefore have a significant impact on the members of this court.<sup>167</sup>

The Court went on to quash the conviction with no reference to the jury so using the *Stafford* approach. A much larger sample of fresh evidence appeals would be required to determine how *Pendleton* works in practice and whether the jury impact test does provide a more liberal approach to determining the appeal.

## Conclusion

---

<sup>157</sup> See above n. 133.

<sup>158</sup> Ibid. at para 50.

<sup>159</sup> See above n. 120.

<sup>160</sup> See above n. 152.

<sup>161</sup> See above n. 131.

<sup>162</sup> Ibid. at para 16.

<sup>163</sup> *R v IB*, above n. 125; *R v Chitolie*, above n. 130; *R v Marcantonio*, ibid.

<sup>164</sup> See above n. 154.

<sup>165</sup> See above n. 100.

<sup>166</sup> See above n. 126.

<sup>167</sup> Ibid. at para 40.

It is difficult not to come to the same conclusion that Kate Maleson did twenty-seven years ago:

Taken together, the quantitative and qualitative data show 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. Moreover, the Court rarely sets out the reasoning behind its decisions about fresh evidence so that it is hard to discern in any detail what the Court's approach is to this category of appeal.<sup>168</sup>

The rise in the number of fresh evidence appeals in 2016 may be evidence of a more liberal approach but the majority of these were renewed applications to appeal and this is easily explained by the rise of these generally as stated in the Court of Appeal (Criminal Division) Annual Report mentioned above. The Court's approach still appears to be driven by its deference to the jury verdict and its reverence for the principle of finality. Even the most ardent miscarriages of justice campaigners have recognised the need for finality in the criminal justice process. For example, the campaigning journalist Bob Woffenden recognises the need for finality to avoid criminal justice deteriorating into a process in which repeated tribunals reassess the same issues which he admits would be 'self-defeating, impractical, and also absurdly expensive.'<sup>169</sup> He accepts the fear that an appellate body that failed to place restrictions on the cases it was willing to reassess would be overwhelmed. He also sees the danger that defence lawyers would treat a trial as a mere rehearsal of their 'full' case. But he then goes on to say that it is 'nevertheless unpardonable that appeal judges have allowed such considerations an overriding importance, with the result that the channels of judicial review have effectively been sealed.'<sup>170</sup>

A second campaigning journalist, Peter Hill also recognised that 'the reputation of any legal system depends on its ability to produce finality.'<sup>171</sup> However, he also stated that the Court has relied largely on its authority to produce finality, rather than the wisdom of its judgments. Hill states that to achieve finality there must be a more serious and thorough re-investigation than cases are thoroughly subjected to, coupled with a change of attitude towards the trial process; he says that finality in some cases may have to be the result of a longer process than a simple trial and 'inevitably such a process will need to be more inquisitorial than adversarial.' The large numbers applying to the CCRC would seem to suggest that the Court is not particularly effective at promoting finality as these are cases that have largely been through the appeal process and failed. Therefore, whilst the Court may assume that its approach is conducive to promoting finality, the difficulties of its

---

<sup>168</sup> Maleson, above n. 8 at 11.

<sup>169</sup> Woffenden, above n. 9 at 322.

<sup>170</sup> *Ibid.* at 340-1.

<sup>171</sup> Hill, above n. 9 at 1553.

decision-making process may actually prolong the process for many appellants who have to keep returning to the Court before they finally succeed in overturning the conviction.

The Court's review function and decision-making process can also contribute to a restrictive approach. If the reviewing of the conviction merely requires the Court to decide if there is evidence the jury could have convicted on, then fresh evidence appeals are at odds with this function. If new evidence was freely admitted on appeal then this would be straying into retrial territory which, as the Donovan Committee stated, was 'a function which Parliament did not intend it to discharge, and for which it is in any event inadequately equipped.' This prevents the Court looking into the merits of the case as it focuses on whether the jury *could* have convicted and not whether the jury *should* have convicted. This is most apparent in fresh evidence cases because the appellant is usually arguing there was a factual error in the sense that he/she did not commit the crime so an unsafe fresh evidence conviction is one more likely to be assumed to be factual innocence if overturned. That is not to say that the appellant is factually innocent in all fresh evidence appeals but if he/she is factually innocent then fresh evidence appeals are more likely to be the appeals that reflect this.

A more interventionist approach may be required with more use of the power of the Court to hear the evidence *de bene esse*. This would mean the appellant not having the restriction of section 23 when deciding whether to admit the evidence and the Court perhaps being more persuaded by oral evidence than evidence given on paper. It is not clear from the judgments if this will be allowed so allowing this as a matter of procedure may improve fresh evidence appeals. The Court is clearly using the conditions in section 23(2) to admit the evidence rather than the broader condition in section 23(1) of in the interests of justice so abolishing section 23(2) may liberate fresh evidence appeals as this would require the Court to focus on the interests of justice rather than the restrictions when deciding to admit it. A further solution may be to give the Court the power to order a retrial or to quash the conviction as, at the moment, the Court has to quash before it can discuss the possibility for retrial. If the Court had the option of ordering a retrial or quashing the conviction this may benefit the appellant who currently has the conviction upheld because a retrial cannot be considered until the decision is made to quash the conviction. The Court may be more inclined to order a retrial if it does not have the hurdle of deciding to quash the conviction first.

The Court was given wide powers under section 9 of the CAA 1907 to adduce evidence on appeal and it created its own restrictions so it would appear that initially it was the attitude of the judiciary that led to the problems. However, legislation then encapsulated those restrictions in section 23(2) which are now being used to limit the wide discretion the Court has under section 23(1) to admit evidence which was the fear of those who criticised

section 23 when it was enacted. Abolishing section 23(2) may solve this problem but not if the Court just imposes its own restrictions again through case law. Perhaps a more fundamental change is required to liberate fresh evidence appeals. It may now be time for a thorough review of the Court's function as a court of review to remedy injustice so the Court's powers are not continually changed with the hope of liberalising its approach only to be revisited when another crisis in criminal appeals appears in the future.