Criminal Law

Miscarriages of justice: putting errors right

by Richard Alexander

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There is a story of an opera singer who, after years of appearances in small theatres, was asked to play the part of Calaf in Puccini's *Turandot* at La Scala. His performance of 'Nessun dorma' was greeted by great cries of 'Encore!' Flattered, he repeated the aria. Again the cries of 'Encore!' rang out and again he repeated the aria. This continued for some time until at last he cried, 'Enough! We must continue with the opera!' – whereupon an old man in the stalls said, 'No. You will do it again. And again. And again – until you do it right.'

Some may think that a similar approach has been taken in some of our higher profile criminal cases. Our better known appeals have, it could be argued, asked our legal system to re-examine cases, sometimes again and again, until they got it right. Although over 10 years have now passed since the overturning of the convictions of the Guildford Four, the Maguire Seven and the Birmingham Six, these arguably remain the cases that most swiftly come to mind, at least in England, when the phrase 'miscarriages of justice' is mentioned. Certain lessons have been learned, however, from those and other cases and the purpose of this article is therefore to look at the changes that have come about since the Guildford Four were released in 1989, in particular concerning the bringing of an appeal based on new evidence.

It is worth stating in passing that in strict legal terms, as opposed to procedure, the law of both England & Wales and Northern Ireland contains very few actual offences of terrorism. (Although the system set out in this paper applies to both these jurisdictions, it does not apply to Scotland.) Some do exist, notably membership of a proscribed organisation and concealing funds which are to be used for, or which derive from, acts of terrorism (a particular variety of money laundering), but the acts which are the subject of high profile cases, i.e. preparing, planting and detonating bombs, are dealt with as ordinary criminal offences. Where victims are killed, a charge of murder will be preferred; another offence commonly charged is that of doing an act, or conspiring to do so, to cause an explosion under s. 3 of the *Explosive Substances Act* 1883, an offence covering equally the terrorist and the sole bomber of minorities. In Northern Ireland (but not in England & Wales), there is the difference that terrorist cases are heard by a judge without a jury, but the legal process involved in an appeal is precisely the same as that for any criminal conviction.

NEW EVIDENCE

That new evidence may constitute a ground of appeal is not new. Section 23 of the *Criminal Appeal Act* 1968 ('the Act') entitles the Court of Appeal to consider any evidence that it sees fit, although the court is required, under s. 23(2), to have regard to whether:

(1) the evidence appears credible;

(2) it appears that the evidence may afford any ground for allowing the appeal;

(3) the evidence would have been admissible at the trial; and

(4) there is a reasonable explanation for the failure to adduce the evidence at trial.

The first three are a matter of common sense. The new evidence must clearly be believable and also relevant to the appeal, while the third criterion merely underlines the point that the general rules of evidence that pertain to a criminal trial at first instance apply also to an appeal. The fourth is perhaps more significant. In general, the evidence in question must have arisen, or at least come into the possession of the defence, since the original trial. The principle is that the defence is expected, during the trial, to conduct its case as competently and thoroughly as possible and Court of Appeal will therefore not be sympathetic to a request to introduce evidence that the defence simply omitted to mention earlier. It may, however, agree to hear it on the grounds that it shows that the conviction is unsafe: the incompetence of counsel (or the instructing solicitors) should not be permitted to cause a continued miscarriage of justice. The court will, however, in such cases issue a very stern reprimand to the legal representatives, particularly counsel, concerned.

In most cases, however, the reason is that the evidence has only subsequently come to light. An example of this is the case of *R v Ahluwalia* [1992] 4 All ER 889. Kiranjit Ahluwahlia had suffered severe and repeated violence and humiliation at the hands of her husband of a period of some considerable time. She therefore poured petrol into his bedroom while he was asleep and set light to it, with the result that he burned to death. At her trial for murder, she raised two lines of defence. The first was that she had not intended either to kill her husband or to cause him very serious bodily harm. The jury, perhaps wondering what she thought would result from her husband being covered in burning petrol, rejected this. Her second line of defence was that of provocation, that the sustained abuse had provoked her into what she had done. This, too, was rejected, although it was upheld on appeal.

At her appeal, Mrs Ahluwahlia introduced a third line of defence, which had not been advanced at her trial: that she was, at the time she killed her husband,

suffering from diminished responsibility. In other words, her psychological state was disturbed and she could therefore not be held responsible for her actions. In support of this claim, she produced a number of psychiatric reports. None of these reports had been offered at her trial; nonetheless, the Court of Appeal decided to admit them. They held that there may well have been an arguable defence which, for reasons that were unexplained, had not been presented at trial. The conviction was therefore unsafe and unsatisfactory and a retrial was ordered, at which she was acquitted.

The defendant is only able to produce such evidence, however, if he or she is granted leave to appeal: there is no automatic right of appeal from the Crown Court. (In some cases, the trial judge may grant a certificate that the case is fit for appeal, but this is rare.)

The question therefore arises: if leave to appeal is refused and new evidence then comes to light, what remedy is then available? This, of course, was the position in the *Guildford Four* and *Birmingham Six* cases. In the *Guildford Four* case, the evidence was that of an alibi which, it was suggested, had been concealed by the police. Whether or not it was deliberately concealed, it was certainly not disclosed to the defence. In that of the *Birmingham Six*, the evidence was more technical. In essence, the basis of the prosecution case was that traces of the explosive nitro-glycerine had been found on the defendants' hands, suggesting that they had prepared a bomb. It subsequently emerged, however, that small amounts of nitro-glycerine are (or at any rate were in the mid-1970s) used in the manufacture of the gloss with which playing cards are coated. Tests conducted on the hands of those taking part in them before and after they played a few hands with these cards showed similar traces of nitro-glycerine to those found on the hands of the Birmingham Six.

In such cases, the state may itself intervene. Until recently, the procedure was that the evidence was presented to the Home Secretary. He considered it and, if he was suitably persuaded, referred the case to the Court of Appeal. Upon such a reference, the court was obliged to hear the case. This system had, however, obvious flaws. It was considered by many to be unsatisfactory that the decision whether or not a case should be referred to the Court of Appeal should be taken by a politician. Politicians, of whatever party, are inevitably influenced by considerations other than purely legal ones, not least when an election is approaching. It is generally recognised, for example, that Michael Dukakis' campaign in the US presidential election of 1988 was substantially damaged by the explicit reference in Republican Party broadcasts to his decision as Governor of Massachusetts to release a convicted murderer. In the UK, similar issues arise in relation to the release of those serving a life sentence for murder, a decision taken by the Home Secretary. The raising, for example, of the question whether Myra Hindley should now be released has invariably resulted in her victims' bereaved relatives, some now quite elderly, appearing to express their outrage on national television.

Furthermore, the Home Secretary need not, of course, have any legal qualification or training whatsoever. A number of past holders of the post have, in fact, been qualified lawyers of some considerable note, but this has by no means always been the case. Finally, the suggestion has been made, whether or not with justification, that party politics have on occasion played a role, not least in relation to IRA cases. The view has never been dispelled in the *Guildford Four*, *Birmingham Six* and *Maguire Seven* cases that the Home Secretary repeatedly refused leave to appeal, despite cogent defence evidence, simply because the government did not wish to see Irish republicans, once in jail, released. It was also suggested that the Conservative Government also did not wish to see the police undermined.

CRIMINAL CASES REVIEW COMMISSION

In relation to the discretion to release those serving life sentences, the debate continues. In relation to the reference of cases to the Court of Appeal, however, the position was changed by the 1995 Act, which abolishes such references by the Home Secretary and transfers this role to the Criminal Cases Review Commission, which is set up for the purpose.

The Commission's membership is set out in s. 8 of the Act. It consists of at least 11 members, who are appointed indirectly by the prime minister. This does not mean, however, that it is any sense an agent of the state. This is made explicitly clear in s. 8(2):

'The Commission shall not be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown; and the Commission's property shall not be regarded as property of, or held on behalf of, the Crown.'

To what extent a body may be regarded as fully independent of the state when all its members are appointed by the prime minister is, of course, an interesting question. The risk of compromise is, however, somewhat reduced by the members having fixed terms of office. An incoming prime minister will therefore find that the Commission contains persons appointed by his predecessor who will continue to serve for some years. Although the terms are of up to five years only (renewable for up to a further five), a comparison may, therefore, be drawn with the judges of the US Supreme Court.

At least one third of its members must have been a barrister or solicitor, either in England & Wales or in Northern Ireland, for at least 10 years, only one year less than the seniority requirement for a judge. At least two-thirds must have some knowledge of the criminal justice system. The full experience criteria are set out in s. 8(6):

'At least two-thirds of the members of the Commission shall be persons who appear to the Prime Minister to have knowledge or experience of any aspect of the criminal justice system and of them at least one shall be a person who appears to him to have knowledge or experience of any aspect of the criminal justice system in Northern Ireland; and for the purposes of this subsection the criminal justice system includes, in particular, the investigation of offences and the treatment of offenders.'

The Commission's principal role is to refer cases to the Court of Appeal. This it does in respect not only of actual convictions, but any finding that the defendant committed the act, even if not the offence, with which he was charged. These will include verdicts of not guilty by reason of insanity (quite rare), the rather more common verdict of guilty of manslaughter (as opposed to murder) on

grounds of diminished responsibility, as well as any conviction of an alternative offence to the one charged. For example, a person may be charged with causing grievous bodily harm with intent, the details being that he is accused of waiting for the victim outside a bar and severely beating him up when he came out. He denies any involvement and says that, if – as appears to be the case – the victim was beaten up outside the bar, someone else must have done it. The jury find that the defendant did attack him, but that he did not intend to injure him as seriously as he did. They therefore find him not guilty – not of occasioning grievous bodily harm with intent, but of the lesser offence of occasioning grievous bodily harm or possibly even, if they are not satisfied that the injuries were really serious, merely of actual bodily harm. Provided that the specified conditions are met, this alternative conviction may also be the subject of a reference by the Commission.

In addition, the Commission may refer the sentence imposed to the Court of Appeal, whether or not it refers the actual conviction (s. 9(1)(b) for convictions in England & Wales, s. 10(1)(b) for convictions in Northern Ireland). A reference of a conviction, however, always includes a reference of the sentence as well unless 'the sentence is fixed by law'. At present, this means a life sentence in a murder case, but it may be seen that it will also apply to any minimum or fixed sentence that may be introduced in the future. Examples will include mandatory life sentences (and also, arguably, other minimum sentences) under the *Crime (Sentences) Act* 1997 or a mandatory ban under the *Football Spectators Act* 1989 on attending matches in the event of a conviction for an offence of violence or relating to public order in connection with football.

The procedure frequently starts with an application by, or on behalf of, the accused. Section 14(1) of the Act makes clear, however, that such an application is not necessary:

'A reference of a conviction, verdict, finding or sentence may be made ... either after an application has been made by or on behalf of the person to whom it relates or without an application having been so made.'

Where an application is made, it is a factor to be considered by the Commision in deciding whether or not to make a reference, as are 'any other representations made to the Commission in relation to it' (s. 14(2)(b)) and 'any other matters which appear to the Commission to be relevant' (s. 14(2)(c)). On the basis of these, it must then decide whether the conditions for making a reference, set out in s. 13(1), are met. These are that:

(1) the Commission considers that there is a real possibility that the conviction or other finding would not be upheld if the reference were made; and

(2) the basis for this view is an argument or evidence which was raised neither at the trial nor in any appeal or application for leave to appeal.

Where the sentence is referred, the prospect of success must be based on an argument or point of law that was not raised at an earlier stage. Finally, an appeal must already have been determined or an application for leave to appeal refused.

It may be seen, however, that some cases may not neatly fit these criteria. The Act therefore contains a catch-all provision in s. 13(2):

'Nothing in subsections (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it.'

As stated earlier, once the Commission has made a reference, the Court of Appeal must hear the case. This is, however, all that is required: the Court is to view the reference just as though it were an appeal (brought, of course, with leave) by the defendant. The final decision rests with the Court of Appeal.

In addition to its role of referring cases to the Court of Appeal, the Commission has powers of investigation. These are exercised at the behest of the Court of Appeal. The court, under s. 23A(1) of the *Criminal Appeal Act* 1968, in the case of England & Wales, and s. 25A(1) of the *Criminal Appeal (Northern Ireland) Act* 1980 in the case of Northern Ireland, may direct the Commission to investigate any matter that the court thinks relevant to the determination of a case if it believes that:

- an investigation by the Commission will help resolve the matter; and
- the matter is unlikely to be resolved without such an investigation.

The significance of this cannot be overstated. The defendant, and even his legal advisors, often do not have the resources to discover all the relevant facts, while the prosecution and law enforcement agencies would not appear to have a strong vested interest in continuing to pursue an investigation themselves once a person has been convicted and the crime is 'solved'. Moreover, a law firm, let alone a defendants' friends and family, does not have the powers to compel co-operation that are given to the Commission.

Once the direction is given, the Commission conducts the investigation in such manner as it sees fit, although it is required to keep the Court of Appeal informed of progress. If, in the course of its investigation, it decides to investigate a related matter, it may do so, although this, too, must be reported to the Court of Appeal.

In pursuit of an investigation, the Commission is empowered under s. 17 of the *Criminal Appeal Act* 1995 ('the 1995 Act') to require any 'person serving in a public body' in 'possession or control of a document or other material which may assist the Commission in the exercise of any of their functions' to produce the document or material or allow the Commission access to it. The Commission may also direct that the material is not to be damaged or destroyed. Section 17(4) makes clear that the duty of secrecy or confidentiality is no bar to complying with a Commission investigation:

'The duty to comply with a requirement under this section is not affected by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) which would otherwise prevent the production of the document or other material to the Commission or the giving of access to it to the Commission.'

The Commission is also entitled, under s. 19 of the 1995 Act, to appoint investigating officers to carry out its enquiries. These may be drawn from the public body that originally investigated the offence or from any police force. It sometimes happens, however, as in the *Guildford Four* case, that certain officers are suspected, or at least accused, of

tampering with or concealing evidence. To guard against this, the section goes on to empower the Commission specifically to preclude a particular person, public body or police force from supplying the investigating officers.

The Criminal Cases Review Commission has, of course, only been in existence for a relatively short time. It may, therefore, be considered too early to judge its success. It has in that time, however, achieved two notable successes, both particularly remarkable for the length of time that the defendants had spent in jail. Readers may recall that the Guildford Four were in prison for 15 years, while the Birmingham Six were in prison for 17 years. In 1997, the case of Paul Andrews was referred by the Commission to the Court of Appeal after he had been imprisoned for 25 years. Andrews, a soldier at the time of his arrest, had been convicted of the murder of a 14-year-old girl. He had steadfastly maintained his innocence, claiming that he had never even met the victim. Such continued denial of guilt invariably leads in the UK to ongoing imprisonment since it is a condition of the prisoner being considered to be rehabilitated and fit to be returned to the community that he accept what he has done and show suitable regret and remorse. Following the Commission's reference of the case, Andrews' innocence was finally upheld by the Court of Appeal and he was released. He remains the longest-serving prisoner in a miscarriage of justice case.

The second longest, Paddy Nicholls, was released on bail in March 1998 pending his appeal and his conviction was quashed on 12 June 1998. He had served 23 years in jail, although an admission of guilt might well have resulted in release 10 years earlier. Nicholls, then 46, was convicted of the murder of an elderly woman, a friend of his, who was found dead at the foot of the stairs in her flat following a heart attack. Two prominent pathologists (one of whom was later involved in the autopsy on Rudolf Hess) gave evidence for the prosecution to the effect that the woman had been badly beaten and then suffocated, a view based on marks to her face. The shock and violence of the attack had, it was said, led to the heart attack from which the woman actually died. Further evidence adduced by the prosecution was that Nicholls, who in fact it was who found the woman's body, had lied to the police, denying having been at her flat on the day of her death. This lie he admitted in court, saying that he was afraid of the police, having been beaten up by them a week earlier, and therefore wished to distance himself from the scene.

In addition to the length of time served, the case has two other interesting features. First, the deceased had not, in fact, been murdered at all. This contrasts with many other cases, such as those of the *Guildford Four*, the *Birmingham Six*, *Stephen Young* and more recently *Paul Andrews*, referred to above. In these cases, it was beyond dispute that the deceased had been murdered: the pubs in Guildford and Birmingham were indeed bombed and the schoolgirl was certainly murdered. The only question was who was responsible. In the case of Nicholls, however, it transpired that the woman's heart attack was from entirely natural causes. Records, which had been withheld not only from the defence but from the prosecuting counsel as well, showed that she had suffered from a heart complaint for some time. Further new forensic evidence also showed that the head injuries were caused by a fall downstairs. The Court of Appeal made its view of the case abundantly clear: not only did the judges apologise to Nicholls for the time he had spent in prison, but they described the work of the original pathologists as 'inadequate, inappropriate and grossly misleading'.

The second interesting point is the standpoint adopted by the police officer in charge of the case. He made it clear from the start that he believed that Nicholls was innocent. He had therefore frequently visited Nicholls throughout his 23 years in prison and accompanied him at the press conference to celebrate the overturning of his conviction.

A final point regards appeals after the accused has died. Where the new evidence only comes to light after some considerable time, it can of course happen that by then the accused is dead. This does not preclude an appeal. It may perhaps seem a little pointless to seek to overturn a conviction once the defendant is dead – after all, it is too late to release them from prison. It can, however, be of great importance to the accused's family. A notable example concerned the case of Bentley, who was convicted and, despite a jury recommendation of mercy, executed in the 1950s for the murder of a police officer. The facts of the case are sufficiently well known for it not to be necessary to repeat them here, although it is perhaps worth recalling that Bentley's accomplice, Craig, who actually fired the shot, escaped the hangman's noose through being only 17 years old.

Bentley's execution rather appeared to be the end of the matter, but his sister, Iris, began a persistent campaign to clear her brother's name, ideally through a quashing of his conviction or through a pardon by the Queen. Eventually she succeeded.

The current law on the subject is found in s. 44A of the 1968 Act (inserted by the 1995 Act). This states that, where the defendant is dead, an appeal may be brought or continued if he died part way through the appeal process by 'a person approved by the Court of Appeal'. Such approval is normally given either to the defendant's widow or widower or to the executor of his will. It may also be given, however, to 'any other person appearing to the Court of Appeal to have, by reason of a family or similar relationship with the dead person, a substantial financial or other interest in the determination of a relevant appeal relating to them'. Bentley's sister would come into this latter category. Under s. 44A(4), approval may not be given more than one year after the defendant's death unless the appeal is begun by a reference by the Criminal Cases Review Commission.

REMEDIES

Once the Court of Appeal overturns a conviction, two remedies are available. In either case, the conviction is quashed. In some cases, this simply means a substitution of a verdict of not guilty and the accused is released. This is what happened in the case of the *Guildford Four*. This is then the end of the matter. Until 1996, the court did have the power, where it accepted that the conviction was wrong (usually because of a defect in the trial procedure) but felt nonetheless that no miscarriage of justice had occurred, to refuse to quash the conviction. Under the 1995 Act, this has been abolished: if the conviction is unsafe, it is to be quashed.

The court does, however, have the power, which is frequently exercised, to quash the conviction, but then order a retrial. The power is set out in s. 7(1) of the 1968 Act:

'Where the Court of Appeal allow an appeal against conviction ... and it appears to the Court that the interests of justice so require, they may order the appellant to be retried.'

In this respect, it may be likened to the *cour de cassation* in the French system.

Such retrial must, however, take place within two months. Once this period has expired the retrial may only take place with the leave of the Court of Appeal, and the defendant may in such circumstances apply for the retrial order to be set aside.

CONCLUSION

In conclusion, it may be seen that a detailed system is available for putting right miscarriages of justice. The accused may bring an appeal against the conviction or, where he or she is dead, the family may clear the accused's name by bringing it on his or her behalf. In addition, the Criminal Cases Review Commission may refer the case to the Court of Appeal and has extensive powers of investigation to support such a reference. It will not prevent miscarriages of justice occurring in the first place but it does at least mean that a remedy is available where they do.

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