

MISCARRIAGES OF JUSTICE:
The Uncertainty Principle

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This thesis is submitted in candidature for the degree of Doctor of Philosophy

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July 2009

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ACKNOWLEDGEMENTS

My appreciation is extended to the following people: -

- My supervisors Professor Mike Maguire and Dr Lesley Noaks who promoted the academic freedom to develop this project combined with encouragement, interest and wise, helpful advice at the right times.
- Liz Renton for her good humoured and reliable guidance through the administrative maze.
- All the participants who gave their time and personal experiences to provide insights and information for this research.
- All at “Press”, in particular Steve, Kathy and Leanne for taking all the pressure and giving me space, support and refreshments to undertake this project.
- Paul Sweeney for his support, ideas and for proof reading the document.
- Angela for her encouragement, passion for justice and inspirational ideas.
- Christiane for being always around and ever interested despite the distances.
- Mike Slevin for his support and humour and for keeping the wheels of industry turning to help pay for academic indulgencies.
- Julie Price and Mike Naughton for providing valuable links with the Innocence Network and help with contacts.
- Liz and Colin Green for their interest and help with contacts.
- My Mother and late Father for their unquestioning love, support and belief and for their immaculate example of humanity.

ABSTRACT

The thesis examines in detail the potential for error and distortion in the criminal justice process and the concept of case construction which may contribute to wrongful convictions. The effectiveness of post conviction procedures is then also considered. Three detailed case studies are utilised to illustrate case construction, post conviction issues and current social/cultural factors that may impact on miscarriages of justice.

The thesis argues that the “Uncertainty Principle” permeates the criminal justice process such that wrongful convictions are an inevitable risk and moreover that, while there are certain safeguards that protect from some of the problems of the past, there remains a high potential for such events to occur. This potential is exacerbated by the current political “convictionist” rhetoric and policy framework and by trends and developments in the media world and the consequent social influence of this.

Further concerns are expressed at the continuing reluctance of post conviction agencies, most notably the Court of Appeal, to fully recognise the risks inherent in the system. Consequently post-conviction procedures continue to function on the principle of finality within the system and prioritise the protection of the decisions of the lower courts. It is argued that the principle should not be finality but uncertainty and that the protection of the innocent rather than the protection of the image of the system should be the paramount concern.

The thesis considers the often illusory nature of some of the principles of the criminal justice system and utilises notions of “magical legalism” (Cohen 2001) and other psychological processes that may be involved in maintaining the illusions.

Some recommendations for change are proposed, focusing primarily on the philosophical change that is required to change the principles originally designed to protect the innocent from illusion into reality.

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List of Abbreviations

ACPO - Association of Chief Police Officers

CACD - Court of Appeal Criminal Division

CCRC - Criminal Cases Review Commission

CPS - Crown Prosecution Service

CJIA - Criminal Justice and Immigration Act 2008

CPIA - Criminal Procedure and Investigation Act 1996

DNA - Deoxyribonucleic acid

ESDA - Electro-static Document Analysis

FSS - Forensic Science Service

HOLMES - Home Office Large Major Enquiry System

IPCC - Independent Police Complaints Commission

LSC - Legal Services Commission

MIR - Major Incident Room

MIRSAP - Major Incident Room Structured Administrative Procedures

MLP - Multi- Locus Probes (DNA test)

MOJO - Miscarriages of Justice Organisation

NCIS - National Criminal Intelligence Service

NDNAD - National DNA Database

NOF - Notice of Referral (from CCRC)

PII - Public Interest Immunity

PSOR - Provisional Statement of Reasons (from CCRC)

PTSD - Post Traumatic Stress Disorder

RIPA - Regulation of Investigatory Powers Act 2000

RCCJ - Royal Commission on Criminal Justice 1993

RCCP - Royal Commission on Criminal Procedure 1981

SAFARI - Supporting all Falsely Accused with Reference Information (Newsletter)

SGM plus - Second Generation Multiplex (DNA test)

SIO - Senior Investigating Officer

SLP - Single Locus Probes (DNA test)

SOR – Statement of Reasons (from CCRC)

STR - Short Tandem Repeat Analysis (DNA test)

TIE - Trace Implicate and Eliminate

INTRODUCTION

“Few of us can easily surrender our belief that society must somehow make sense. The thought that the State has lost its mind and is punishing so many innocent people is intolerable. And so the evidence has to be internally denied”

Arthur Millar (Quoted in John Pilger “Hidden Agendas” 1998: 44)

INTRODUCTION

Overall Aim of the Research

This study seeks to increase understanding of miscarriages of justice both at the pre-conviction and post-conviction stages.

Four key inter-related research questions are addressed: -

- Why have wrongful convictions continued to occur despite systemic reforms and an extensive body of knowledge about the causes? (Parts 1, 3 & 5)
- What are the underlying experiential, interactional and institutional processes involved in the creation and sustaining of wrongful convictions? (Parts 3, 4 & 5)
- How might the current social and political landscape affect the potential for wrongful convictions to be created and sustained (Part 5)
- What changes might help prevent or rectify wrongful convictions? (Part 6)

The study is unique, as far as the author is aware, in that in addressing these questions it takes views from various perspectives within the criminal justice system, including lawyers, police officers, journalists and expert witnesses, and considers these in combination with detailed case studies, based on analysis of case records, and in-depth interviews with people who have had their convictions quashed at appeal, or maintain that they have been wrongly convicted. Thus comparisons of various perspectives and understandings are possible.

Previous work on this subject has, in the main, dealt with general themes, with specialised areas, or with individual case studies (see Introduction to Chapter 2). It is the combination of different perspectives in this study that differs from previous work on this subject. Equally importantly the study aims to locate miscarriages of justice

within a changing social and criminal justice landscape, exploring how the risks of wrongful conviction and the effectiveness of systems for putting them right may be affected by developments in public, government and professional attitudes to crime and justice and by legal processes and policy reforms.

The focus starts from the perspectives of people who have been cleared, or remain convicted but maintain wrongful conviction, in relation to serious offences. This is based on a sample of eleven cases of homicide convictions (involving 12 people) where there has been extensive cause for concern. Three of these cases are presented in the form of detailed case studies. The approach however is a broad one and takes in the perspectives of others directly or indirectly involved in the process. The scope of the study therefore spans a wide range of related issues and includes document analysis and observation alongside direct voices. The case study element enables some consideration of detail and close scrutiny within this broad structure.

The main theoretical perspective adopted involves the concept of ‘case construction’. It will be argued that this is not only central to the explanation of how wrongful convictions arise but also that original case constructions are structurally protected by legal rules and traditions and frequently pervade public and media perceptions. Consequently wrongful convictions, built on misleading case constructions, can prove immensely difficult to correct in the face of the legal systems’ adherence to notions of certainty and finality. In developing the argument the thesis employs a number of other theoretical ideas in particular the notion of the “uncertainty principle” and an adaptation of the idea of “magical legalism” described by Cohen (2001).

The uncertainty principle underlies the argument throughout the thesis; in particular the first half of the thesis presents a wealth of examples of how an emerging narrative of events can become distorted and misleading. This discussion draws on both literature and empirical data from the study. Proof beyond reasonable doubt is a noble ideal but one that can easily become illusory in a complex world where complex people try to unravel complex events. The criminal justice system needs, it will be argued, to embrace the uncomfortable yet essential notion of uncertainty, both in investigation and in post conviction procedures. The uncertainty principle challenges the foundations of the legal system, in particular the notions of ‘proof’ and finality. It is argued that these

ideas provide a false sense of security and that a truer security is achieved from a constant vigilance and acceptance of uncertainty – a willingness to revisit and review the narratives that have been constructed.

The concept of ‘magical legalism’ is utilised, particularly in the second half of the thesis, to explain the psychological process that is used within the criminal justice system to justify false claims of certainty and proof; moreover to show how faith in procedure can sometimes be used to hide uncertainty and ultimately justify inhumanity and injustice. Cohen (2001) explains the concept as follows: -

“Magical legalism is a method to ‘prove’ that an allegation could not possibly be correct because that action is illegal.....torture is strictly forbidden in our country, we have ratified the Convention against Torture; therefore what we are doing cannot be torture. Many such legalistic moves are wonderfully plausible as long as common sense is suspended”

Cohen 2001: 108

This idea is used broadly within the thesis in order to show how allegiance to rules and procedure can be used to maintain a belief that what the system has decreed must necessarily be right and true. Magical legalism is the device that facilitates denial of the uncertainty principle.

Much of the thesis is empirically driven and backed by chapters that develop the argument by reference to literature (Chapters 1, 2, 9, and 12). It is often the case that where miscarriages of justice are concerned ‘the devil is in the detail’, understanding miscarriages often involves getting to grips with copious and complex information. It is for this reason that the thesis cannot avoid presenting considerable detail in places to evidence the claims being made. This is particularly true of the three case studies in chapters 5, 10 and 14 which provide quite detailed information to evidence overall themes. Chapters 15, 16 and 17 draw back from the detail to some extent to map out the key issues and claims of the thesis.

The Structure of the Thesis

The thesis is organised into six parts as follows: -

Part 1: The Risk of Wrongful Conviction.

This Part is essentially a review of literature relating to miscarriages of justice. Chapter 1 considers the questions of how miscarriages of justice can be defined and quantified. Chapter 2 then reviews the literature to consider the many factors and situations that might impact upon the risk of wrongful convictions occurring, by considering the investigative, evidential and legal contexts. However this is not a conventional literature review in that, for the most part, it focuses on risk factors and in doing so forms one of the key arguments of the thesis – that wrongful convictions are numerous and that there are inevitable risks of ‘error’. Existing literature that relates to post conviction procedures is considered later in Part 4. Part 5 incorporates the third part of the literature review relating to social and political trends in relation to crime and justice.

Part 2: Methodology and Qualitative Issues

Chapter 3 considers the justification for this research and the approach and position taken. Chapter 4 then describes the structure and methods used, including the strengths and weaknesses inherent in the research and details of the participants involved.

Part 3: Case Construction

The core concept of ‘case construction’ is explored in detail, using the research data from this study, to show how false case constructions can be built up and portrayed or internalised as ‘truth’. Chapter 5 presents the in-depth case study of the Jonathan Jones case in order to demonstrate how obscure and irrelevant circumstantial factors can be interpreted and re-constructed to form a case that satisfies the evidential requirements of

the criminal justice system. Furthermore, the case study shows how modes of thinking may be influenced by assumptions about “close perpetrators” and unfounded narratives of inexplicable evil premeditation (‘The Agatha Christie Syndrome’). Chapters 6, 7 and 8 then draw further on the research data, including references to other cases focused upon in the research. Chapter 6 considers case construction in terms of corruption and the often ill defined moral boundaries of policing and the criminal justice system. The ‘Cardiff Newsagent Three’ case is given particular consideration. Chapter 7 then illustrates how misleading information and human error can create or compound erroneous case constructions. The chapter focuses particularly on the key areas of witnesses, disclosure and scientific evidence. Chapter 8 then explores the role of assumptions, interpretations and selectivity; returning to the ‘close perpetrator assumption’, ‘the Agatha Christie syndrome’ and considering issues of identity, character assassination, control, and coincidence.

Part 4: Post Conviction Procedures

This Part considers the mechanisms available for the correction of wrongful convictions. Chapter 9 comprises the second part of the literature review, but again uses literature to develop an argument. The chapter illustrates the fundamental structural and attitudinal issues that limit the capacity of post conviction mechanisms, in particular the Court of Appeal, to correct many wrongful convictions. This is then followed by the second in-depth case study in Chapter 10: The case of Mike Attwooll and John Roden is, to date, the longest running case dealt with by the Criminal Cases Review Commission (CCRC), being referred to the Court of Appeal after 10 years as an ‘active’ CCRC case. The chapter discusses the adequacy, and structural limitations, of the CCRC’s work on this case in the light of their own professed guiding principles and follows the story through the actual appeal (probably by contrast one of the shortest murder appeals of modern times). The case, it is argued, illustrates how the traditional conservatism and restrictive approach that dominates the Court of Appeal nullifies much of the potential of the CCRC to correct injustice. Chapter 11 draws further on the research data to examine the views of participants on the CCRC and the Court of

Appeal and includes consideration of claims of intellectual dishonesty and bureaucratic obstruction.

Part 5: Could it Happen Now? Current Contexts and Risks

Chapter 12 constitutes the third part of the literature review, giving numerous examples of the dominant trend away from caution about justice in error towards an approach where ease of obtaining convictions seems to be increasingly the priority. A trend that brings, it will be argued, increased danger of wrongful conviction. Chapter 13 uses study data to consider police, legal and media cultures in this modern context and how social factors may be impacting in these areas on the potential for wrongful convictions to be created and sustained. Chapter 14 then provides the third and final in-depth case study. The Sion Jenkins case is examined and presented as a modern reflection of a world where legal illusions, groupthink and moral disengagement combine to create an unfounded conviction, the evidential distortions of which are defended by bureaucratic and ‘convictionist’ logic and supported by a one dimensional media response. Some parallels with Orwellian concepts of ‘doublethink’ and the inversion of truth and logic are made in this chapter. Chapter 15 takes this argument further exploring how ideology and ‘magical legalism’ (Cohen 2001) help to support belief in the fundamental principles of the legal system, such as proof beyond reasonable doubt and jury infallibility, despite the logical flaws and largely illusory nature of these principles in ongoing practice.

Part 6: Concluding Reflections

Chapter 16 summarises the conclusions on the four key research questions and attempts to propose some recommendations from the study both in the sense of procedural and policy approaches and modes of thinking about wrongful convictions/miscarriages of justice, thus outlining some practical implications of adopting the uncertainty principle. Suggestions for systemic reforms are limited in this section, in favour of an emphasis on trying to develop a more enlightened and realistic mode of thinking about the criminal justice system and its inevitable propensity to error. This is broadly framed in

terms of a “freedom model” (Sanders and Young 2000) and the need for new directions in the political approach to justice issues, which might in turn re-direct the media (rather than vice versa). Similarly there is a plea for aspects of police and legal training to directly address the issue of wrongful convictions and for judges and the CPS to move towards a more ethical adversarialism in which they are much more prepared to use their offices to protect the innocent rather than prioritising protection of the system. Finally Chapter 17 reflects briefly on the human consequences of wrongful conviction as a restatement of the importance and ethical nature of the issue.

PART 1

THE RISK OF WRONGFUL CONVICTION

"It is trite to say that we're human, therefore we occasionally make mistakes. It's also probably an understatement. It would be more accurate to say that a lot of human beings are hard wired to make mistakes all the time. Our prejudices and preconceptions inevitably lead us in one direction, often the wrong one."

Clive Stafford Smith (2007: 158) "Bad Men: Guantanamo Bay and the Secret Prisons"

CHAPTER 1

DEFINING AND QUANTIFYING MISCARRIAGES OF JUSTICE

The Problem of Definition

“After thinking about it I decided the key word is victim ...when an individual is found guilty of a crime they didn’t commit, when someone is the victim of a crime without any form of retribution...when someone’s a victim of a legal systemThe key word would be victim, whichever side of the fence it is.”

(Journalist 3)

Miscarriage of justice is an inherently difficult term to define for at least two reasons: Firstly the term might represent many different notions and secondly, even if narrowed down to mean the conviction of a factually innocent person; innocence is rarely a matter of universally agreed certainty.

The first of these problems has been summed up by Walker (1999) who describes a broad view of miscarriages of justice that might include: the application of unjust laws; disproportionate or inconsistent treatment; failure to follow due process; institutional racism or class differences; being convicted of the wrong offence or charge; and the acquittal of the factually guilty. The recognition of the acquittal of the factually guilty as a miscarriage of justice was clearly important to a number of professionals interviewed in this study. This was particularly emphasised by police officers but also by a number of journalists, lawyers and others, some of whom saw it as a greater problem than the conviction of the innocent, not only in terms of numbers but in relation to the impact on victims: -

“I think it’s unbalanced if you don’t at least refer to the fact that a miscarriage of justice as far as the victim is concerned, the parents of the person killed, the family and the police officers who spend months and years putting the case together and the CPS, when someone is found not guilty on a technicality when they are clearly guilty, is as much for us all a miscarriage of justice as the Guildford Four or whatever” (Police Officer 3)

A similar sentiment has been voiced by former Prime Minister Tony Blair in a speech on “rebalancing the criminal justice system”: -

“It is perhaps the biggest miscarriage of justice in today’s system when the guilty walk away unpunished”

Tony Blair (2002) quoted in Naughton (2007: 21)

Participants who maintain wrongful conviction however were often keen to emphasise that a wrongful conviction brings not only devastation to them and their family and friends but, assuming a crime has in fact been committed, also a wrongful acquittal of the actual perpetrator and a potential failure to protect society. This view was shared by a number of professionals: -

“I mean what fuels me more and more and more in miscarriages of justice is not just that there are worthless idiots like (named person) in prison but that the fellow who killed those women and children is still out there, he’s got away with it”.

(Journalist 1)

It may be that the emphasis felt by individuals depends to a large degree on individual experience; police officers may deal with the distress of victims and their families but not with the distress of the wrongly convicted and their families and friends. Personal perspectives may depend upon who is crying on whose shoulder. The relationship of different modes of thinking and their possible impact on potential wrongful conviction is further explored within this study.

The second issue concerns the often disputed definition of a miscarriage of justice as a case involving ‘factual innocence’, meaning simply that the person convicted did not commit the crime concerned. A successful appeal or acquittal does not necessarily equate with factual innocence neither does a conviction necessarily equate with factual guilt [for more extensive discussion of these issues see for example Naughton (2007: Ch 1) or Duff, Farmer, Marshall and Tadros (2004)]. Furthermore factually innocent people can remain convicted for many years, or permanently; this does not make them guilty but they may well be construed that way in the eyes of most citizens. This is one of the reasons why this study has incorporated the views of some people who maintain factual innocence yet remain convicted (see Chapter 3).

This study therefore focuses on people who have, or may have been, wrongfully convicted, in the sense that they maintain that they are factually innocent. It does this while recognising that wrongful convictions or miscarriages of justice are almost always disputed concepts, at least for a period of time, if not permanently: -

“If someone gets convicted and they haven’t done it then that’s a miscarriage of justice, but you won’t know that till you know it, will you? Until something material comes up”.

(Police Officer 6)

This of course poses somewhat insurmountable problems for quantifying the occurrence of these events.

The Problem of Measuring the Incidence of Miscarriages of Justice

No figures exist that can reliably quantify the incidence of such a disputed and elusive concept as factual innocence, or indeed of the other conceptions of miscarriage of justice mentioned above. It would, for example, be equally difficult to ascertain how many people are wrongly acquitted as it is to ascertain how many are wrongly convicted. Similarly the length of time that it often takes to resolve miscarriages of justice makes it difficult to form any judgement on whether the problem is increasing or decreasing, as even current figures on successful appeals, for example, reflect the correction of past errors not those convictions occurring at the current time.

That said, a number of attempts have been made over the years, using different approaches, to give some idea of the scale of the problem. Furthermore it is possible to infer from some related figures and anecdotal experiences that the scale of the problem may be substantial. While this section looks at attempts to estimate the number of wrongful convictions it should be recognised that even if this could be done with any accuracy, it does not quantify the harm incurred by these events, however many or however few they may be.

One way of estimating incidence has been to seek the opinions of professionals involved. For example in 1979 Baldwin and McConville’s study of over 900 trials

found that around 5% of convictions were dubious in the view of judges and lawyers. A similar approach was taken by Zander and Henderson (1993) in their research for the Royal Commission on Criminal Justice, which suggested that “problematic” convictions occurred in 2% of Crown Court cases in the opinion of judges and 17% of Crown Court cases in the opinion of defence lawyers.

The possible implications of this might be deduced from Home Office Criminal Statistics figures (2005: Table S 2.2). Of the 76,164 defendants tried, 58,288 were convicted and 43,986 received a custodial sentence. Table 1 below estimates the possible consequences, if this lawyers’ opinion research reflects an accurate picture of reality, using the 2005 figures. The figures reflect only Crown Court convictions and do not include Magistrates Court convictions where around 97% of cases are handled.

Table 1: Possible Implications of Research Based on Lawyers’ Opinions

2005 Crown Court Figures		Zander and Henderson 2% (Judges’ estimates)	Baldwin and McConville 5% (Judges’ and Lawyers’ estimates)	Zander and Henderson 17% (Defence Lawyers’ estimates)
No. Tried	76,164			
No. Convicted	58,288			
No. Imprisoned	43,986			
Possible wrongful convictions		1166	2914	9908
Possible wrongful imprisonment		880	2199	7477

Clearly if any of these estimates are close to the factual reality of current times then a great many innocent people are being convicted and/or imprisoned. The lowest of these figures would roughly reflect the annual intake of referrals to the Criminal Cases Review Commission (CCRC) (see below).

A second way of estimating the scale of the problem is illustrated by the approach of Liberty, NAPO and Conviction (1992) who identified 163 cases (still convicted at the time) of serious offences where there was cause for concern about the safety of the conviction. Here the measure was based on an analysis of the way the cases had been

constructed, taking into account professional opinions on each case and identifying recurrent themes such as confessions, non-disclosure, misleading scientific evidence etc. This approach of course gave insights into the nature of a considerable number of serious cases but no direct evidence on the scale of the problem in less serious cases.

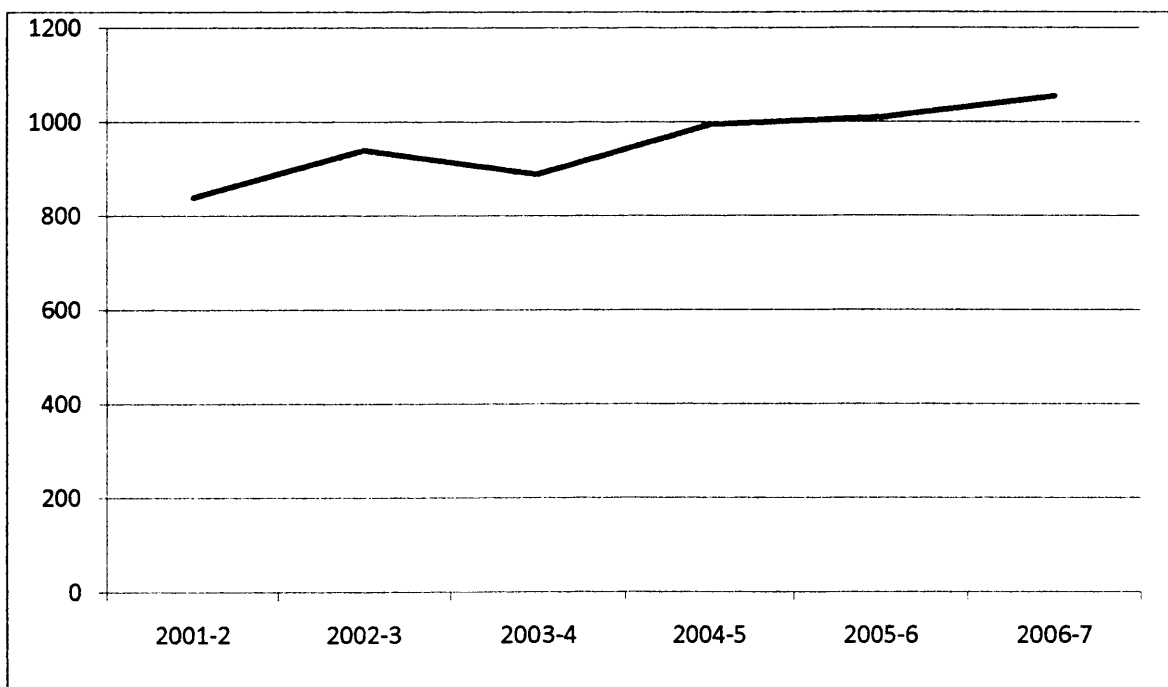
A third, more recent and more legally based, approach, epitomised in the work of Naughton (2003 and 2007), is to produce estimates from statistics of successful appeals. Naughton acknowledges that successful appeals do not necessarily measure guilt or innocence. They are however, he suggests, the system's own measure of miscarriages of justice and the only truly measurable way of looking at the issue. Furthermore he stresses that miscarriages of justice have traditionally been construed primarily in terms of high profile serious crimes tried in crown courts. In response to this tendency it is argued that a true picture of the extent of miscarriages should take account of all miscarriages whether they occur in crown courts or magistrates courts. Taking figures of successful appeals over a 20 year period 1986-2005, it is shown that the annual average number of successful appeals from magistrates' court cases is 4,496, add to this the annual average of successful appeals from crown court cases (237) and the overall annual average is 4,733 (Naughton 2007:40-42). While this is a small percentage (approx 0.3) of the total number of convictions currently occurring, about one and a half million a year (Home Office Criminal Statistics 2005), it nonetheless, Naughton argues, constitutes a vast pool of harm and injustice which is unacceptable in human rights terms. Furthermore there is a resistance within the system against appeals such that this figure may only represent the 'tip of a much greater iceberg'.

In addition to the more formal research attempts to quantify the level of incidence, it is possible to make certain observations that suggest that the occurrence of wrongful convictions is considerable: -

Following a recommendation of the Royal Commission on Criminal Justice (1993), the Criminal Cases Review Commission (CCRC) was established in 1997 as an independent body set up to review possible miscarriages of justice. The Commission has a limited remit and only reviews cases that have exhausted standard appeal options and can present new evidence or argument (see Chapter 9). Nonetheless, since its inception, the CCRC has been swamped with referrals which continue to rise from the initial levels of 800-900 to over 1000 a year currently. The CCRC had received 9,698

applications from April 1997 up until April 2007 and had completed the review of 8,951. It is true that only 356 (4%) were referred to the Court of Appeal and of the 313 cases actually determined (43 referred cases were still awaiting an appeal in April 2007), only in 187 (68%) of these referred cases was the conviction quashed (CCRC 2007: 19). However this must be seen in the light of the restrictive CCRC remit and it can be argued that the probability that around 97% of applicants to the CCRC are dishonest applications by guilty people is remote (see Chapter 9). The newly established Innocence Projects in a number of UK Universities, which give students case experience on working on potential miscarriages of justice under academic and legal supervision, provide a resource to help people establish a case for a CCRC referral (see www.innocencenetwork.org.uk). A recent enquiry by the author established that the waiting list for allocation of cases to Innocence Projects is already over 200. While the anecdotal response of some professional participants in this study was that wrongful convictions are rare and increasingly rare, the pressure on bodies established to review cases is unrelenting and increasing: -

Chart 1: Applications to CCRC since 2001 (CCRC 2007: 16)



The focus of this study is on serious cases, with most of the detailed examples involving murder. The significance of miscarriages of justice in less serious offences should not, as Naughton (2007) has highlighted, be underestimated. However there is some evidence that murder and sexual offence convictions may be particularly prone to error,

or at least are more likely to be referred by the CCRC. Although the number of murder cases referred by the CCRC fell in 2006-7 the Annual Report of 2004-5 states that murder case referrals constitute about a third of its referrals while sexual offences constitute another third (CCRC 2005: 18).

In the case of murder the remarkably high incidence of successful appeals, even in the face of a very conservative Court of Appeal (see Chapter 9), was revealed in a recent parliamentary written answer (House of Commons, Hansard, June 2007): -

Mr. Marsden: To ask the Minister of State, Ministry of Justice how many people who were jailed in the United Kingdom for (a) murder and (b) manslaughter have been subsequently found innocent by the Court of Criminal Appeal and released since 1987.

Ms Harman: The following table shows the number of people whose conviction for (a) murder and (b) manslaughter was quashed by the Court of Appeal Criminal Division between 1996 (the first year for which reliable figures are available) and 2007. For cases which involved an order for retrial, the final result is not known.

Table 2: Quashed Murder and Manslaughter Convictions 1996-2007

	Conviction quashed; no order for retrial		Conviction quashed; retrial ordered		Total convictions quashed
	Murder ⁽¹⁾	Manslaughter ⁽¹⁾	Murder ⁽¹⁾	Manslaughter ⁽¹⁾	
1996	1	—	4	—	5
1997	9	4	6	1	20
1998	20	5	21	4	50
1999	12	5	4	—	21
2000	8	2	7	2	19
2001	11	1	6	—	18
2002	14	4	6	1	25
2003	22	1	9	2	34
2004	14	4	14	1	33
2005	12	4	8	1	25
2006	15	7	5	4	31
2007 ⁽²⁾	1	—	3	—	4

⁽¹⁾ Also includes inchoate offences ⁽²⁾ 1 January 2007 to 30 April 2007

Leaving out the incomplete 2007 figures (and assuming the low figure for 1996 represents the full year) this amounts to an average of 21 murder convictions being quashed per year (8 of these on average were retried and some may have been reconvicted). In 2005 there were 370 convictions for murder in England and Wales (Home Office Criminal Statistics 2005). If all the quashed convictions occurred in England and Wales the error rate, even by Court of Appeal standards, would be approaching 6%. However given that the figures were requested for the UK they presumably include Scotland and Northern Ireland. It might be reasonable to assume therefore that the error rate in England and Wales (a much higher population area) would be likely to be around 5%, clearly a much higher level than the 0.3% approximation above when all convictions and all appeals are taken into account.

In terms of sexual offences, quantification is even more problematic given the range of offences and the fact that evidence is often based on one testimony against another rather than other concrete evidence. The Home Affairs Committee (2002) expressed concern that the large number of historical sex abuse cases in recent times may represent a “whole new genre” of miscarriages of justice and, as stated above, sexual convictions continue to comprise a third of all CCRC referrals. While establishing truth in these kind of cases is problematic and may result in the political concern about the level of acquittals that has been widely reported in the media (see for example Travis 2005 *The Guardian*) there is no doubt that false accusations do sometimes result in wrongful convictions. Monthly issues of the news sheet SAFARI (Supporting All Falsely Accused with Reference Information) record not only a number of cases where people have been cleared of sexual offences but also an ongoing catalogue of cases where individuals have been convicted of making false accusations. The March 2007 issue for example contains six examples of convictions for making false accusations (SAFARI 2007).

Campaigning groups experience similar pressures from numbers of people maintaining wrongful conviction. The Miscarriage of Justice Organisation (MOJO), formed by Paddy Hill of the ‘Birmingham Six’, currently has over 400 cases on its books (as reported to the author), and anecdotal reports from campaigners and some lawyers and journalists support the pressing need for support in reviewing cases: -

“There is every reason to believe that cases of wrongful imprisonment have increased in recent years. There is no statistical proof of this, but the increasing tide of desperate letters to people like myself tells its own story. And the letters no longer concern only those who might be considered to be at the margins of society; increasingly they involve articulate well-informed middle class people”

(Woffinden 2000:2)

The question of whether the nature and type of miscarriage of justice is changing is another issue that is difficult to establish. What is undoubtedly true and is illustrated by the cases featured in this study, is that miscarriages of justice can happen regardless of class, race or gender and regardless of whether there is any history of offending.

In conclusion, given the disputed nature of wrongful convictions and the time lapse inevitably involved in overturning convictions, any estimate of incidence is inherently problematic and uncertain. Furthermore miscarriages of justice, and the justice system, do not correct themselves; they are only overturned by good fortune and special endeavours, without which the dark figure of wrongful convictions remains hidden. Nonetheless there is some evidence that a substantial number of miscarriages of justice occur within the criminal justice system. The next chapter examines the inherent risks within the system and its social context, which might contribute to the occurrence of wrongful convictions.

CHAPTER 2

THE CRIMINAL JUSTICE SYSTEM AND THE POTENTIAL FOR ERROR

This chapter draws on an extensive range of literature in order to consider the extent to which wrongful convictions are an inherent risk in the complex situations and processes within which the criminal justice system functions. The “Introduction” discusses some general perspectives and examples of different kinds of literature on this subject. This is followed by detailed sections on “The Police and Investigative Context”, “The Evidential Context” and “The Legal and Adversarial Context”.

Introduction

“In every miscarriage of justice, the whole is far greater than the sum of its parts. In short, one must go beyond the study of individual sources of error to understand how social forces, institutional logics and erroneous human judgements and decisions come together to produce wrongful convictions”

(Leo 2005: 211)

Richard Leo, writing in the USA context, describes how the causes and consequences of wrongful convictions have been written about by lawyers, journalists and activists for over eight decades but only recently are criminologists and social scientists emerging to write on this topic (Leo 2005: 201). Similar statements could apply to Britain. Niblet (1997: 24) for example points out issues of non disclosure in capital cases such as that of Timothy Evans in 1949. Furthermore the problem has been consistently highlighted over many years by journalists, lawyers and to a lesser extent academics (for example Brandon and Davies 1973; Woffinden 1987; Justice 1989; Kennedy 1991; Mansfield 1993; Rose 1996; Walker and Starmer 1999; Belloni and Hodgson 2000; Walker 2002; Naylor 2004). These and other works have identified the now familiar features of miscarriages of justice such as: -

False Confessions

Unreliable witnesses and 'false custody confessions'

Identification problems

Non-disclosure of evidence

Police malpractice

Misleading expert or scientific evidence

Poor defence representation

These features are examples of what Leo calls "The familiar plot of wrongful conviction" (Leo 2005: 207) which he describes as the first category of writing on this topic. Leo goes on to identify two other categories. Firstly "specialised literatures" (p 208-210), in particular psychologists' accounts of specific problematic areas such as eyewitness testimony, suggestibility, memory and other cognitive functions (see references under 'The Evidential Context' below), and secondly "case study accounts" (p 211) which look in detail at individual cases (For example Callan 1997; Hale 2002; Hill P.J.1995: Hill P. 1990; Sekar 1997; Rose, Panter and Wilkinson 1997)

While acknowledging the value of this work, Leo argues that a greater theoretical understanding is needed of the deeper psychological, sociological and institutional causes of wrongful convictions (p 213) – an understanding of the 'root' causes rather than the 'legal' causes. There is a need to: -

“..re-conceptualise the study of miscarriages of justice, most fundamentally, as about the study of human behaviour and human error in social and organisational contexts”.

(Leo 2005: 213)

This perspective reflects in many respects the kinds of questions that this study is attempting to address. In particular why has the apparently extensive knowledge about the nature and causes of miscarriages of justice not had a greater effect on reducing the problem (see previous chapter) and what are the social and psychological processes that lie behind the lack of change despite this knowledge?

It should be acknowledged that there has been some significant work that has viewed this and related issues from a wider sociological perspective. Four important examples are as follows: -

McBarnet (1981) examined how the gulf between the legal, rights based, rhetoric of the law is compromised and manipulated by ongoing construction and interpretation of case law in the courts and by the wide police and judicial discretion that is utilised to construct an essentially 'convictionist' system.

McConville, Sanders and Leng (1991), taking an approach that they describe as both structural and interactionist identified the crucial concept of "case construction". Case construction involves the interpretation, addition, subtraction, selection, re-formulation and in some cases creation of evidence in order to build a 'legal' case (McConville et al 1991: Ch 1). Case construction is enacted by the use of such techniques as subtle witness manipulation, adjustment of statements to fit the case, manipulating interview content or physical evidence and ignoring alternative leads or scenarios (Eady 2003: 40-44). McConville et al's work invoked some critical responses (Davis 1992; Dixon 1995; Morgan 1995), largely argued on the basis that the study itself was selective in its approach (see Introduction to Part 3 below). However the existence and importance of case construction has been recognised and described by numerous writers (for example Green 1997; Sanders and Young 2000; and Innes 2003). The subtle manipulations of case construction help to put the more blatant "causes" of wrongful conviction into the context of a social and institutional process. In so doing they illustrate why reforms such as the protection of suspects established by the Police and Criminal Evidence Act 1984 may frequently be circumvented by more obscure manipulations. Thus ironically while oppressive treatment in police custody might provide a strong legally categorised basis for an appeal, a host of minor, carefully crafted, manipulations of evidence that combine to substantiate a false case may be much more "appeal resistant" (Eady 2003: 70).

Nobles and Schiff (2000) provide a third example of work that has undertaken a more holistic approach based on cultures and social systems. The problems inherent in the clash of cultures and different constructs of truth and reality within different groups, in particular the legal, media and scientific communities, are described in terms of

autopoietic systems theory and the notion of “Tragic Choices” (Calabresi and Bobbitt 1978). Autopoiesis suggests that certain social systems will tend to seek solutions to problems by self-referencing back to the structures and ideas that created the problems in the first place, while ‘tragic choices’ have to be made in relation to limited resources and the conflicts between individual rights and social control. Consequently there are inherent problems in the different ways that truth is conceived by the legal, media and scientific worlds and ‘truth’ in the legal world has to be traded off against an impression of fairness and against cost.

It is apparent that while work such as the three examples above have added valuable insights to the understanding of miscarriages of justice, it might be argued that they have had even less impact on changing the system than the work undertaken on the more specific ‘legal’ causes (Confessions, disclosure, scientific validity etc). There seems to be an implied acknowledgement of this point in the conclusion of Nobles and Schiff’s book:-

“Where does this analysis leave those committed to reforming criminal justice so as to narrow the gap between its practices and the values of truth and due process? With, we hope, a greater awareness of the difficulties that they face”

(Nobles and Schiff 2000: 260)

Naughton (2007) provides a fourth and more recent example of this wider more sociological analysis. Naughton uses Foucault’s notions of ‘Governmentality’ to describe how, in this field, as in others, the process of governing and the construction of reality, policy and system change is a negotiated struggle between various parties – a feature of ‘due process democracies’ as opposed to ‘sovereign’ states where the governing authority is dominant. Major events (in this case specific high profile cases of injustice) are identified as crucial to promoting discourse and therefore power and influence, hence leading to potential change such as the foundation of the Court of Appeal, the abolition of capital punishment, the Police and Criminal Evidence Act (PACE) and Royal Commissions. Such events enhance the power of alternative perspectives (subjugated discourses) at certain crucial times. The point about ‘governmentality’ is therefore particularly relevant to contested issues in post conviction and policy matters although it may also allude to the different narratives

employed by different players involved in the construction of false convictions. Naughton widens the view of miscarriages of justice to include all successful appeals (see Chapter 1 above) and explores the nature and extent of harm and the role, and potential to create change, of campaigning groups and discourses such as human rights. The analysis is critical but not defeatist and the theoretical position allows for a pragmatic approach that aims towards positive change.

On a similarly more positive note, cultures can undergo change and it perhaps remains to be seen whether developments in police training (the recently implemented National Occupational Standards in “Professionalising the Investigation Process” for example) will result in more awareness of the dangers of case construction or conversely more ‘sophisticated’ applications of the process. Certainly some senior police officers have shown awareness of the dangers of premature targeting, the need to see the bigger picture and “to investigate the offence not the individual”, in other words an awareness of the dangers of false case construction (Eady 2005: 39-40).

Leo (2005: 207) stresses the need to “develop a more sophisticated body of theoretically informed and policy relevant knowledge on this important topic”. Whether sophisticated analysis will in fact inform or influence policy may depend upon many factors beyond the control of the social scientist. However cultural change may rely on the ability to question assumptions and to question systems that have become culturally rooted and unquestioned. One common assumption is that the criminal justice system is based on well founded and safeguarded systems rather than pragmatic potentially flawed “necessities”. This may be an example of a social reality that is simultaneously believed and disbelieved in order to make sense of the world (Cohen 2001: Ch 2).

The following account describes some of the, perhaps inevitable, flaws and compromises that exist in the criminal justice system which in combination may make the production of injustice much more likely than is commonly perceived to be the case. The analysis focuses primarily on major serious crimes although much may be applicable to more minor offences.

The Police and Investigation Context

Police Culture and Experience

The so called ‘canteen culture’ of policing with its tendency to be cohesive, suspicious and machismo in nature has been well documented (Holdaway 1983; Skolnick 1975; Chan 1996; Reiner 2000). The nature of police work, dealing constantly with crime and society’s problems, can expose officers to some of the worst aspects of human nature which can impact dramatically on their view of the world: -

“The one thing I know after 30 years in this job is that nothing will ever surprise me about what people are capable of doing to each other. Some of the things I’ve had to deal with... ..the violence is almost unimaginable”

(Innes 2003: 245 quoting an experienced Senior Investigating Officer)

Innes (2003:14-17) suggests that detective work might be seen as a concentrated version of police culture with even stronger notions of apprenticeship, greater autonomy and lower visibility. While there is evidence that culture varies with rank (Reiner 2000) and that police training and investigation is becoming more formalised and supervised (Centrex 2005) much along the lines suggested by Maguire and Norris (1992), Innes’ study nonetheless reveals that detective work remains to a large extent a matter of persuasion, deception, innovation and misdirection (Innes 2003: 75-80). In order to fight crime and dishonesty it is necessary to find legal ways around restrictions; to make enquiries which appear to be about one thing but are in fact about another, to overstate or manipulate potential charges, to obtain fingerprints before arrest from an informally offered cup of tea and so on. According to Innes these creative and adaptive ways of ‘working around’, rather than breaking, the rules are seen as core skills. Furthermore: -

“For detectives, the meaning of standards such as ‘beyond reasonable doubt’, ‘reasonable grounds’ and ‘oppressiveness’ is open to interpretation”

(Innes 2003: 75)

Crucially Innes (p 80) acknowledges in his study that some ‘right’ convictions appear to have been obtained by ‘creative’ methods. It is here that detective work seems to exemplify the notion of “tragic choices” (Nobles and Schiff 2000) in that such methods

may be necessary to solve some crimes but they also run the risk of leading to false case constructions and wrongful convictions. This tragic choice between social control and justice and due process may be ameliorated to some degree by other safeguards especially where these recognise the risks inherent in the nature of police culture and experience. However there are echoes here of the notion of ‘noble cause corruption’ coined in September 1992 by the then Chief Inspector of Constabulary Sir John Woodcock; the idea that fabrication of evidence and perjury were justified in order to prevent the acquittal of the factually guilty (Rose 1996: 12). The application of ‘creative’ detective work and case construction, like noble cause corruption, runs the risk of convicting the factually innocent as well as the factually guilty.

Detective work puts great emphasis on experience and on “skills involving perception of small, interactional or environmental cues which, based on experience and knowledge, are identified as being either appropriate or out of place” (Innes 2003: 146). These skills are in part informed by information including probability factors such as the frequent association of murder with close or family relationships and the typologies of certain crimes (Innes 2003: Ch 2). Innes (p 146) gives an example of how detectives’ assumptions about the nature of a wife’s grieving reaction to her husband’s death gave direction to the inquiry which eventually led to her conviction for murder. He describes the making of assumptions here as a ‘skill’. While this might sometimes be the case, such assumptions can also constitute a ‘risk’, as can the over reliance on probability factors leading to a one dimensional focus on those close to the victims (see Chapters 5 and 8 below). Furthermore the reality of the idea that detectives are more skilled at detecting liars than other groups of people has not stood up to psychological research scrutiny (Vrij 2004). In fact the very notion that non-verbal indications are even there to be read by observers, however skilled, is questionable. Research on deception suggests that common assumptions about such reactions as gaze aversion or fidgeting being related to lying are false and simply reflect individual and situational differences. Indeed “there is no single verbal, non-verbal or physiological cue uniquely related to deception” (Vrij 2004: 160).

It is in the light of the adversarial system and case construction that the dangers of potentially misleading assumptions embedded in occupational culture and practice are amplified. The construction of the police narrative can involve the formation of moral

identities for victims and suspects. The police must play the politics of the adversarial system by working up the moral rules and portraying a selective biography of the suspect as the type of person who would commit the crime (Innes 2003: 163-172). Police culture is therefore also about an awareness of the adversarial role, about overcoming legal safeguards and pre-empting the strategies that the defence might employ.

Confessions and the Police and Criminal Evidence Act (PACE) 1984

“He pushed the gun back into my mouth and again pulled the trigger. Again there was just a click. He pulled the gun out and waved it.
‘You must have a charmed life,’ he said then put the gun against my eye and spoke quietly; ‘Third time lucky’”.

(Paddy Joe Hill 1995: 77)

Any reading of Paddy Joe Hill’s account of the torture and intimidation perpetrated by the West Midlands Serious Crime Squad on the Birmingham Six in 1974 should explain why most of the group signed statements in police custody confessing to the IRA bombings of two Birmingham pubs, at that time the biggest mass murder in British history (Hill P. J. 1995:3). Paddy Hill himself still refused to confess despite the violence and threatening suggestions about what might happen to his family. The police might claim that their corruption had “noble cause” and that they acted in the belief that traces of nitro-glycerine had been found on some of the men. (The tests of Dr Frank Skuse were much later shown to be entirely misleading). No such excuse can be offered for the torture and intimidation of the Guildford Four that same year, against whom the confessions extracted were the only evidence (Paul Hill 1990).

Where confessions did not adequately fit the case their content could be changed at a later time. The development of ESDA testing (Electrostatic Document Analysis) highlighted the indentations made on the pages of statements; indentations that could show how statements had been changed as the case “progressed”. Officers maintained in court that these statements were contemporaneously recorded. Many years later ESDA tests showed in numerous cases that this was untrue and that statements and confessions had effectively been re-written to fit the police case. The more famous of

these included the Birmingham and Guildford convictions, the Tottenham 3, the Bridgewater 4 and the Darvell Brothers (Rosenburg 1992; Rose 1996).

Where vulnerable suspects are concerned, false confessions have not always relied on physical violence, although the implied threat may have been significant. Long hours of detention with disturbed sleep, oppressive questioning and the planting of false information could be equally effective. Stephan Kisko (Rose, Panter and Wilkinson 1997), Stephen Downing (Hale 2002), Stephen Miller of the Cardiff 3 (Sekar 1997) and Elgin Raghip of the Tottenham 3 (Rozenburg 1992) provide a few of the most notorious examples. Confessions therefore could be induced by oppression, or they could be complete fabrications written by police officers and signed under oppressive circumstances or off the record comments falsely ascribed to suspects (“verballing”). The experience of oppressive custody aimed at inducing confessions has been well documented (Hill 1990; Hill P.J. 1995; Rose, Panter and Wilkinson 1997; Hale 2002; Sekar 1997). Such examples illustrate historical incidences where police culture has become distorted to the point of overt corruption and criminality.

In 1975 the Court of Appeal overturned the convictions of three vulnerable young men for the murder of Maxwell Confait, on the basis that their confessions had been obtained by oppressive police interrogation in the absence of any legal advice or protection. The government reacted to this high profile event by establishing the Fisher Inquiry that reported in 1977 and provided conclusions that led to the Royal Commission on Criminal Procedure (1981), chaired by Sir Cyril Phillips. The Royal Commission made recommendations that formed the basis of the Police and Criminal Evidence Act 1984. PACE brought in a range of measures designed to provide safeguards in police custody, replacing the piecemeal legal precedents known as the “Judges’ Rules” that previously governed this area. Clear limits were introduced on the permitted periods of police custody (up to 36 hours on the authority of a senior officer, extended to 96 hours if authorised by a magistrate). The right to legal advice from the outset of detention was established and the right to the support of an “appropriate adult” for the young or for those considered vulnerable as a result of limited or impaired mental capacities. Rules were established to prevent oppressive interviewing, for contemporaneous recording of all interviews and for a comprehensive record of time spent in custody to prevent ‘off the record’ interviewing or oppressive tactics.

Ironically while the process of establishing these crucial safeguards was slowly proceeding, many of the notorious cases mentioned above were being built upon the very methods that PACE aimed to prevent.

There have been different conclusions from research on the effects of PACE. In the main these recognise some significant positive changes but also recognise limitations in practice, for example, the questionable level of independence of custody officers (Brown 1997), the methods employed to discourage suspects from requesting a solicitor (McConville, Sanders and Leng 1991), the lack of effective protection provided by many solicitors and continuing coercive or unfair questioning (Baldwin 1992, McConville and Hodgson 1993) and the police role in editing tapes of interviews, potentially in a way that is loaded towards the prosecution position (Baldwin and Bedward 1991). In addition the system has the potential to be worked around and adapted (McConville et al 1991) for example, by framing what were effectively 'off the record interviews' as welfare interviews (Bottomly, Coleman, Dixon, Gill and Wall 1991). Moreover PACE regulations do not extend to events occurring outside the police station (Maguire 2002) or to 'confession' evidence gathered in prisons (Dein 2002).

Much of the research on PACE is now quite dated although the government's current review of PACE has elicited numerous responses, such as the possibility of post charge interviewing and stopping the custody 'time clock' while waiting for solicitors or experiencing other delays (Home Office 2007). Moreover the issue has become clouded with increasing lengths of detention without charge (currently 28 days) being permitted under Terrorist legislation. The review has brought forward other perspectives on PACE, for example the notion that since the abolition of the unqualified right to silence in Criminal Justice and Public Order Act 1994 the 'trial process' effectively begins in the police station with the building of evidence on the basis of comments in interviews (Edwards 2007), the need for greater, and more empowered, support from lay visitors, social workers, families, friends and legal advisors ('anchored pluralism') and greater insistence that suspects get the legal and other protection they should have to balance police power in the custody situation (Sanders 2007). From a police perspective it has been argued that some relaxing of PACE regulations could be made in order to reduce some of the obstructive and bureaucratic consequences, given

that “since the introduction of PACE the police service has undergone a radical transformation in its professionalism” (Wilding 2007: 65). Whether one subscribes to this view or not, it is perhaps the key point that derives from PACE research; that regulation alone is insufficient unless the issue of police culture is addressed: -

“Successful regulation therefore, requires not only the specification of rules but an understanding of the views, attitudes and practices of ordinary officers”

(Maguire 2002)

One of the key aims of PACE was to safeguard against false confessions.. However false confessions may still be a risk where particularly vulnerable suspects are concerned. Psychological research has identified various forms of confessions, the falseness of which may be difficult to detect and may not be entirely safeguarded by the presence of a solicitor or the recording of interviews (Independent Civil Liberty Panel 1992). This might include: -

Voluntary confessions by mentally disordered people who confuse fantasy and reality, or confessions deriving from a desire for notoriety or a wish to protect someone else.

Coerced-compliant confessions made for immediate gain or relief, such as the belief that questioning will end and release would follow with the problem being sorted out later.

Coerced-internalised confessions where the pressure of the situation leads suggestible individuals to temporarily distrust their own recollections and falsely believe that they are actually guilty.

(Gudjonsson 1992)

While the potential for these kinds of confessions to be made by vulnerable suspects was often manipulated by police officers in the notorious cases of the past they remain a risk even with the protections of PACE, as the problem may lie, in part at least, in the psychology of the person. Neither does the existence of PACE necessarily eliminate police disregard of the rules (as illustrated by the post PACE cases of the Cardiff Three

and the Cardiff Newsagent Three) or the ability of the police to work around the rules (McConville Sanders and Leng 1992, Maguire 2002).

The Complexity of Major Crime Investigations

The investigation of a major crime involves the collection of vast amounts of material including often thousands of statements. The frequently cited problem of non-disclosure of relevant material to the defence as a cause of miscarriages of justice (Niblet 1997, Walker and Starmer 1999) has sometimes been the result of deliberate concealment. However the quantity of information involved might make the issue even more prone to error or lack of conscientiousness than it is to deliberate malpractice.

All this material needs to be recorded in appropriate records and this may involve a large police team and a large selection of specialists from both within and outside the police force (see Appendix 1). The potential for error or omission in recording, in procedure or in the handling of forensic exhibits is considerable (Townley and Ede 2004) and contamination of scientific exhibits can occur in many ways both intentionally and unintentionally (see Appendix 2). In the face of the complexity and information overload that may occur, coupled with budget constraints, the desire to get convictions and the considerable degree of police discretion that the process requires, there is a real risk that corners may be cut: -

“Investigating Officers must guard against temptation to test only for corroboration and not for elimination” ... (thus not submitting contact trace material for testing) ...”which may well have eliminated a suspect or failed to corroborate suspicions which linked the suspect to the scene”

(Townley and Ede 2004: 75)

There are now established organisational measures such as the establishment of Major Incident Rooms (MIR) with Major Incident Room Structural Administrative Procedures (MIRSAP) and the use (in most though not all serious cases) of the HOLMES (Home Office Large Major Enquiry System) computer system to organise, store and cross reference information, all under the overall direction of a Senior Investigating Officer (SIO). These provide some safeguards and greater efficiency in major enquires.

However the potential for human error is clearly substantial even before deception, tricks or blatant corruption come into consideration. Even within this system, material must be graded and evaluated for its relevance and may be 'fast tracked', a process that has the potential to enhance over focusing on a particular theory (Innes 2003: 98).

"Certainly, once a suspect was identified, there was immense pressure to discontinue previous lines of enquiry which were now seen as unproductive and costly"

(Innes 2003: 261-2)

Innes also describes (p 259) the concept of 'Compliance Drift' where working under pressure on long running cases can lead to deviations from standard practice becoming rapidly accepted and normalised. This appears to solve perceived problems but can also produce "unexpected iatrogenic effects (effects created by the enquiry itself) at a later stage". Innes' observations of murder investigations suggested to him that compliance drift could explain malpractice but also that it is "particularly persuasive" in accounting for a "far greater number" of "normal errors" which may or may not lead to miscarriages of justice (p 262).

It might be argued that many of these features happen in all sorts of complex human endeavours and to a degree reflect inevitable human limitations. As one detective in Innes' study put it there is "a lot of potential scrutiny" within a Major Incident Room:

"...but its still not going to stop someone going out and doing or saying things they shouldn't, but that's life"

(Innes 2003: 98)

Police investigations into serious crimes are however made additionally complex and risky in that they rely on a multitude of interpretations and evaluations of information from people of all kinds, many of who may give misinformation either deliberately or mistakenly (Townley and Ede 2004; Innes 2003; Heaton-Armstrong, Shepherd and Wolchover 1999).

Policing can never be a pure science and establishing reliable truth in the face of a mass of complex information and misinformation, most of which is open to interpretation and

evaluation, is inherently risky before the possibility of deliberate corruption is even considered.

External and Internal Pressure

When a major high profile crime occurs (and also with lower level crime that is causing a lot of public concern) the police in particular are under pressure from a number of angles. As one Senior Investigating Officer (SIO) in Innes' study (p 94) described it, pressure comes from "the media creating problems", from Divisional Commanders who need staff who have been seconded to major enquiries back on normal duties, from "upstairs" (senior ranking officers) who are concerned about cost and reputation, and from the knowledge that ones own reputation can be damaged if things go wrong. There is also a sense of public duty and responsibility to victims and to the public which in turn is extremely important to the image and morale of the police. This element may be particularly important in explaining why the police are so reluctant to accept miscarriages of justice even when these are formally established by the courts. This may be especially true in high profile cases: -

"Where public confidence in the police's ability to control crime has been increasingly eroded, high profile murder cases provide a 'litmus test' where their investigative abilities can be publicly tested"

(Innes 2003: 22)

The tendency to seek to selectively build on leads that have taken up time and resources rather than abandon them in the face of evidence that does not fit cannot be justified given the consequences of constructing injustice. Such practices may be understood however, especially if those involved can convince themselves, perhaps wrongly, that their initial lead was a valid one. Consequently as Innes observed: -

"On some investigations detectives were observed to continue to follow a line of enquiry even though they were in possession of material suggesting the defunct nature of the guiding theory"

(Innes 2003: 185)

Pressure comes also from political and social forces. Richard Webster (2005) describes how many wrongful convictions arose in relation to historical abuse accusations in care homes made by former residents many years later in adulthood. The social work profession's adoption of the 'California model' of 'Progressive Disclosure' encouraged the idea that accusations of sexual abuse were likely to be made many years later as the process of progressive disclosure took place. Webster describes how the North Wales Police were initially sceptical of many of the accusations until: -

“To a surprising degree senior officers had begun to embrace the idea that the denial that sexual abuse had occurred was a normal part of the process of disclosure”

(Webster 2005: 231)

Thus in the process of 'trawling' ex care home residents and questioning them about abuse, early denials were not accepted but responded to by more visits and more leading questions, offers of therapy and hints about compensation. The outcome has been described in terms of the creation of a whole new genre of miscarriages of justice (Home Affairs Committee 2002).

Such events suggest that where serious and emotive issues are concerned, the police and legal authorities are as suggestible as the rest of society to influential trends in thinking, especially if elaborated by media representations and popular assumptions. Pressure, in whatever form, may well have the propensity to exacerbate the kinds of risks to the integrity of an investigation that have been outlined above.

Policing Styles and the Merging of 'Moral' Boundaries.

The 'crisis of confidence' in the criminal justice system in the early 1990s came about as a result of numerous high profile miscarriages of justice leading to the establishment of the Royal Commission on Criminal Justice which reported in 1993. Arguably these events, together with the embedding of the regulatory mechanisms that had been introduced under PACE 1984 (see above), led to the 'passing of the old regime' (Rose 1996) that had been epitomised by examples of “proven police malpractice – as well as instances of systemic corruption” (Maguire and Norris 1992: 97). The modern era of

policing, it is argued, is now based on more consistent and professional training and management guided by national doctrines, regulations and codes of practice (Centrex 2004/5). The style of policing is also to a greater extent intelligence led with an emphasis on evidence gathering (through 'forensics', intelligence gathering, surveillance and other covert techniques) prior to arrest (Maguire 2000), an approach which may reduce the tendency to rely on confessions (Maguire and Norris 1992: 106).

These assurances however must be taken with considerable caution, not only because of the potential power of more subtle case constructions (see Part 3 below) or the risk of errors compounding a complex process as described above, but also because of the likelihood that when scientific and technical resources do not produce results, officers may still be likely to fall back on "the familiar sources of witness statements and confessions" (Maguire and Norris 1992: 106). Many of the changes that have occurred in policing reflect the recommendations made by Maguire and Norris (1992: 107-117) but their work highlights two highly problematic areas: -

Firstly traditional 'weak spots' in policing practice are "profound and extremely resistant to solution" (p 120) and are likely to remain very difficult to quantify, to prove or to supervise. Specifically:-

- The conduct of interviews (although PACE has impacted on this as far as suspects are concerned, but not necessarily with regard to witnesses)
- Conversations outside the interview room, the honesty of which nobody knows or can ever perhaps know for sure.
- Contact with witnesses and statement taking (the use of unreliable witnesses and the subtle altering of accounts)
- Police eyewitness accounts that claim to have seen more than they did.

(Maguire and Norris 1992: 103-4)

Secondly they acknowledge the dangers that surveillance policing brings, notably the risks associated with participating informants, sting operations and agents provocateurs (p. 119-120).

These issues, particularly the use of informants, reflect again the 'tragic choice' inherent in policing – the need to use dubious tactics and dubious compromises to investigate the activities of dubious people. The informant system epitomises this problem and its inherent risks to reliable investigation: -

“It is about that murky world of half truth, deception, innuendo and betrayal”

(Billingsley, Nemitz and Bean 2001: 5)

“It is inducements, psychological coercion, deceit and manipulation strategies that are at the heart of securing informers' motivational commitment”

(Dunningham and Norris 1996)

The study of the informant system by Dunningham and Norris (1996) revealed that 85% were recruited while under arrest or subject to a police enquiry and that the detectives, not the suspects, initiated the idea of informing in 84% of cases. A third of informants were motivated by the prospect of charges being dropped and 71% of officers handling informers felt that “to run informers you have to be as devious as they are” (Dunningham and Norris 1996: 403).

It has become, in some forces, “accepted good practice for every arrested person to be considered as a potential source of information” (Clark 2001: 41). There are clearly risks and ethical issues, especially where informers are “participating” (actively involved in the crimes under investigation), when they are juveniles and when they gain rewards on the basis of greed, revenge or self protection. There is also the danger that reward money may be used to support drug addiction or dealing and cases where ‘role reversal’ has taken place with the informer using the officer as a source of information and immunity in return for payment and mutual protection from exposure (Clark 2001: 39-44).

Perhaps most blatantly of all, in relation to miscarriages of the justice, the use of prison informants who claim to have overheard, or had confided in them, confessions from others, has been a feature of many serious miscarriages of justice. The safeguards of PACE which aim to protect against false confessions in police custody are therefore completely undermined in “the naked circumstances in which cell confessions are invariably alleged” (Dein 2002: 634). The courts still allow conviction solely on the

basis of such evidence (as classically in the trials and appeals of Michael Stone (1998-2005) enabling “unreliable and unscrupulous people to use and abuse the criminal justice system by giving false evidence” (Sekar 1997: 122). The rewards for such unscrupulousness can include the dropping or reduction of charges, sentence reductions, transfers to lower category prisons or early release (Wilson, Ashton and Sharp 2001:97).

The use of informants may become more important when the police have weak evidence or no other leads and therefore use informants “to identify or suggest possible suspects” (South 2001: 74). The ethical compromises and dangers of such approaches are self evident. In 2006 the Government refused to publish a report of the Surveillance Commissioners (a group set up under the Regulation of Investigatory Powers Act 2000 to give independent oversight of surveillance activities) that had reportedly raised concerns about prison inmates being coerced into becoming informants. The issue has come to light following the suicide of a prisoner who had claimed he had been coerced into fabricating a confession from Michael Stone. (Reported in “The Mail on Sunday” 7/5/06). The idea sometimes portrayed to the courts, that informant information is likely to be “freely given”, is frequently disingenuous (Williamson and Bagshaw 2001: 59).

The justification for the widespread use of informants is essentially a utilitarian one: -

“The relative expense of surveillance and undercover operations make the increased use of informers very attractive in these times of ‘best value’ and ‘efficiency plans’”

(Williamson and Bagshaw 2001: 55)

The Regulation of Investigatory Powers Act (RIPA) 2000 provides a statutory framework that aims to bring areas of police work, such as surveillance and covert operations, into line with the requirements of the Human Rights Act 1998. Thus the Act makes provisions in relation to legality (the boundaries of police action, authorisation and accountability), proportionality, necessity and remedy (independent oversight by the Surveillance Commissioners and a tribunal to hear complaints) (Neyroud and Beckley 2001: 166). Details of regulation, senior officer authorisation and oversight have been further developed by ACPO (1999) and NCIS (2000).

According to Neyroud and Beckley (2001: 171) however the most obvious shortfall in RIPA “is the limited treatment of the crucial issue of participating informants”. Furthermore the considerations around proportionality and necessity aim to satisfy the requirements of Article 8 of the ECHR (Privacy and Family life) which largely deter police activities from imposing into areas beyond the investigation of crime and control of disorder. Covert operations in matters of crime and disorder are likely to be strongly influenced by the prevailing political atmosphere in which politicians and the media are suggesting amending the Human Rights Act (see for example The Times, The Observer, Mail on Sunday etc 14/5/06). It must also be noted that neither RIPA nor the Human Rights Act have impacted in any way on the matter of custody informants (the recent Surveillance Commissioners’ Report (see above) might have provided an opportunity for this to happen but the implications for trials and appeals seem to be deterring the government from any action on this issue).

Studies of investigation such as that of Innes (2003), also illustrate that selective case construction has not entirely been eliminated by the theoretical requirement of the Criminal Procedure and Investigation Act 1996 (CPIA), that police pursue all reasonable lines of enquiry whether these point towards or away from the suspect (Townley and Ede 2004: 5). Principles may influence practice but can be easily compromised in day to day realities and in subsequent government policies or legal priorities and discretions – the classic difference between ‘law in books’ and ‘law in action’.

The arguments used to justify the use of dubious and deceptive practices have been outlined by Ashworth (1998: 115-123). These include the overall benefit to the community, the idea that criminals deserve fewer rights and are only being played at their own game of deception and dishonesty, the difficulty of obtaining evidence in some cases and the seriousness of some offences. Ashworth endeavours to counter this essentially utilitarian and pragmatic argument with one based on proportionality and human rights. For Ashworth (1998: 138-9) lies, tricks and deceptions that break the rules or the law are unacceptable while disguises, informers, covert recording and surveillance raise fewer moral objections provided these do not involve unreasonable questioning or coercion and are properly justified and tested. The balance here much reflects the principles established by RIPA and by internal police guidelines.

Policy, rules and cultures of course interact and help to create change. However the realities of police work on the ground may still promote a process of working around the rules. Maguire and Norris (1992: 457) concluded that their study “confirms the importance of the occupational culture rather than the formal rule system in shaping police practice”. Over half the officers in the Maguire and Norris study for example considered it impossible to run informers in accord with the Home Office Guidelines in place at the time (p 456). The informer system and other covert operations remain open to abuse especially in the areas of secrecy (enabling the bypassing of rules and even oversight), coercion and deception, especially as those most deeply into crime are frequently the most valuable informers (Williamson and Bagshaw 2001: 59-60). Even with increased regulation and supervision the ethical and practical boundaries in these areas remain finely balanced and open to interpretation or distortion.

Conclusion

Accounts of miscarriages of justice have frequently identified the significance of police malpractice in creating wrongful convictions (for example Rosenberg 1992; Rose 1996; Walker and Starmer 1999) and there is no doubt that this has been at the heart of many such cases. Sometimes malpractice is gross and distinctive, sometimes it is more subtle. This account has attempted to illustrate that police work, by its nature and its social function, is inherently open to distortion even without intentional corruption and even with regulation and supervision. Both malpractice and human error can be seen as continuums in police work, while ethical boundaries are blurred and principles and practicalities can be conflicting. A culture cemented by solidarity in the face of society's problems is faced with highly complex investigations overloaded with information and misinformation. Investigations may then take place under both internal and external pressure for results, with officers' personal ambitions motivated by public duty and/or personal gain and prestige. These investigations then frequently take place in the murky world of deals and informers. The elimination of police corruption, if this were possible, would not necessarily eliminate the inherent danger of wrongful conviction.

It might be argued that the vast range of expert resources open to the police (see Appendix 1) and scientific advances would overcome many of the inherent problems. While this argument is not without some validity, there are nonetheless many problems in the nature of evidence itself which can exacerbate the inherent problems of policing. Some of these will now be considered.

The Evidential Context

Issues around the nature of evidence itself can be divided between those relating to physical or scientific evidence and those relating to people. Even this distinction is something of a simplification as the two interact with each other in complex ways. Physical evidence is often regarded, sometimes misleadingly, as more probative in criminal cases but is frequently absent, very limited or highly disputed. Consequently investigations and trials often rely heavily on what people say. As has been discussed above, the potentially frightening or oppressive nature of police custody can sometimes produce false statements or confessions, especially in people with complex vulnerabilities. What people say however is not purely about honesty or dishonesty, or even about oppression or specific vulnerabilities, but is also much more widely and inherently problematic in the light of knowledge about memory, perception and social interaction.

The Evidence of People

Witnesses and suspects (the term witnesses can be taken to include suspects in the following section unless otherwise indicated) may give accounts of events at various times from almost immediately after an event to many years later. Some witnesses, not perhaps uncommonly, given the nature of criminal investigations, may consciously and unambiguously lie in these situations. Lying itself sets up a whole range of dilemmas even if it can be established with any certainty: For example, does lying necessarily indicate guilt or is the witness trying to protect someone else, hiding some other uncomfortable or potentially misleading information or simply being deliberately

unhelpful? However what may often be inadequately appreciated in such situations is the potential complexity and frailty of human memory. Human memory is governed and formed not only by the mechanisms of the memory system but also by strategies, goals and intentions and (like eye witness accounts) by factors such as level of interest, age, gender, time of day, mood, level of education, emotional stress and so on (Cohen 1999: 4). Episodic Memory, based on direct experience may be influenced and contextualised by the information and knowledge already stored in the individual's memory (semantic memory). Moreover: -

“Perception is highly selective so that a great deal of information never enters sensory stores or is discarded almost immediately“.

(Cohen 1999: 7)

“Schema Theory” suggests that the gaps thus created, or information subsequently forgotten, is re-constructed often in a way that is inaccurate, incomplete, generalised or distorted. This can happen in the normal process of drawing on semantic memory but is also particularly susceptible to “retroactive interference” when new information disrupts the original recollections. Hence witness memory can be changed, confused or contaminated by information received after the event by, for example, reading newspapers, conferring with others or being asked leading questions (Cohen 1999: 9-12). Furthermore witnesses are particularly prone to be inaccurate when pressurised to give an answer (Cohen 1999: 16) and when there are long delays between observation and report (Davies 1999: 27). Both of these are situations that can commonly occur in police enquiries. The significance of this for miscarriages of justice is firstly that many cases rely to a considerable extent on detail – the time that something happened, the description of a person, the make or colour of a car and so on, and secondly that statements can change over time to fit the prosecution case (Eady 2003: 42).

“When people are asked to produce the same memory repeatedly it has been shown that their accounts undergo considerable transformation from one occasion to another..... This has particular importance for witness testimony since witnesses are usually interviewed repeatedly”

(Cohen 1999: 15)

Specialist training available for police investigators has been developed to guard against this risk in terms of ethical interviewing (Shepherd and Milner 1999). However the

temptation to subtly seek to progress the case must be considerable, especially given the tendency for memory to adjust ‘naturally’ to the complex interactional and contextual events of the investigation (as described above in terms of schema theory and retroactive interference). Most investigators should be aware of the need for ethical interviewing and ethical presentation of evidence and suspect interviews are now undertaken only by officers with specialist training. They work however in an adversarial context where the job of lawyers frequently involves the presentation of evidence in the strongest rather than the most balanced terms which can lead to the development of revised prosecution narratives as cases progress (see for example case of Sally Clarke in Appendix 3). Juries and most magistrates are unlikely to have specialist knowledge of the vulnerabilities of human memory. Judges are required to give a warning of the risks inherent in eyewitness testimony, the so called Turnbull Warning established by the case of *R v Turnbull* 1977 QB 224, but not of witness memory generally.

The inherent danger therefore with witness testimony is not purely that people may deliberately not tell the truth but that there is a serious risk that the evidence they give in good faith may be significantly inaccurate or re-constructed by a whole range of factors. Factors that investigators could deliberately contrive, conveniently accept or imply, or take on board at face value in good faith. This basic problem becomes infinitely more risky when witness recollections are influenced by such factors as drugs (Lader 1999), alcohol or physical illness (Norfolk 1999), mental illness, learning disabilities, abnormal mental states or personality disorders (Gudjonsson 1992 and 1999; Mackay, Colman and Thornton 1999) and even sleep related conditions (Fenwick 1999).

Three further areas of ‘natural risk’ are eyewitness testimony, children’s’ testimony and so called recovered or repressed memory.

The problems of eyewitness testimony have been long established and recognised in law by the Turnbull rule (see page 60 below). The issues are closely related to the problems of memory generally as outlined. In short eyewitness testimony can be distorted by social perceptions (prejudice, stereotyping etc), by situational factors (illumination, duration or complexity of event, emotional arousal etc), by individual factors (age, gender, race, experience etc) and by interrogative situations such as ID

parades and photo-fits (Hollin 1989). Research into ear witness testimony suggests that this is even more unreliable than eye witness testimony (Bull and Clifford 1999: 195).

Children are especially vulnerable to suggestion and compliant responding and are at particular risk of “going along” with “up-down relationships”. That is relationships based largely on questions and answers from the “superior” adult position to the “subordinate” child position (Mortimer and Shepherd 1999: 59). Even the repeated asking of a simple question may be enough to push children to meet presumed expectations (Boakes 1999: 114). This consideration can be crucial, for example in cases where there are accusations of sexual abuse, especially where professionals may be over zealous in questioning children. According to Boakes (1999: 114) surveys show that 25% of demonstrably false allegations of sexual abuse made by children are iatrogenic (created by the process where professionals have an investment in discovering abuse and are driven by a strong belief that certain behaviours are signs of abuse). This process of over zealous probing was graphically illustrated by the later testimony of children taken into care, and by video recordings of the processes used, in the Rochdale ‘satanic abuse’ investigation in the early 1990s. The whole creation of the satanic abuse myth was shown to be entirely iatrogenic by the testimony of the “victims” themselves both in film of their distressed confusion as children in recorded “therapeutic” sessions and by their angry reflections as adults on the unjust removal from the family home that they had experienced (BBC1 Real Story 11/1/06). In the Rochdale case the children had not made false accusations but other things they had said were interpreted in bizarre ways by professionals. Their distressed confusion in the “therapeutic” sessions was clearly derived from being separated from their parents but was interpreted as the signs of ‘satanic abuse’. In this case the frailty of testimony was from adult professionals not from the children. The same process was occurring in 1991 on the Orkney island of South Ronaldsey with falsely created accusations of satanic sexual abuse. Fortunately the case was thrown out when it reached court but not until considerable trauma had been caused by the forced removal of children from their families. A trauma that again had to wait until 2006 to receive a full documentary recognition (“Accused” BBC 2 22/8/06). Even in 2006 at least one social worker continued to support the “catch 22” position that denial equals confirmation: -

“They don’t use the words we use. They don’t say ‘my Daddy fucked me last night’; ‘they say my Mum doesn’t understand me’. You don’t get the right story from a child.”

Janette Chisholm (Social Worker involved in Orkney abuse investigations) speaking on “Accused” BBC 2 (22/8/06)

The issue of ‘recovered memory’ is both curious and controversial and may similarly be promoted by questionable ‘therapeutic’ and investigative techniques leading to suspected or demonstrable injustices (Webster 2005). Following early work by Loftus (1993) in which subjects were persuaded to believe in and recall fictitious childhood events as true ones it has been suggested that: -

“Subsequent studies have used this technique with larger, more representative groups of subjects and a range of fictitious incidents and have reported that around 25% of adults will begin to recover ‘memories’ of non-existent events after three sessions devoted to intensive reminiscence”

(Davies 1999: 26)

The recovery of memories that result in accusations dating back many years must therefore be regarded with great caution.

This inherent unreliability in the evidence of people is considerably more complex and extensive than many people may realise. However people on juries do perhaps appreciate the problems of witness accuracy at least to a certain extent, probably from general life experience. Consequently they tend to give considerable attention to physical or scientific evidence on the basis that this may be more reliable. This however is not always the case.

Physical and Scientific Evidence

The risk inherent in dealing with scientific evidence has been referred to above in the discussion of the complexity of investigations generally and the problem of potential contamination is illustrated by Appendix 2. Townley and Ede (2004) note not only that: “A certain level of contamination will be caused to the scene by everyone who enters it” (p 183) but also when dealing with delicate samples such as DNA “Accidental

contamination is, however, most likely to take place in the laboratory” (p 206). Contamination may be one factor in reducing the quality or reliability of scientific evidence along with the danger of making false assumptions about the presence or significance of the evidence. DNA for example is easily transferred between people and objects they handle, thus: -

“...the fact that a DNA match has been found between a crime scene sample and an individual does not necessarily prove that the individual was present at the scene, let alone that the individual committed the alleged crime”

(Townley and Ede 2004: 211)

Secondary transfer can similarly occur with other materials. Fibre evidence from a jumper on a car seat for example can be transferred onto the clothes of another person sitting on the same seat (Townley and Ede 2004: 186). The second person committing an offence might then leave fibres at the scene that could be linked to the innocent previous occupant of the seat.

Physical/scientific evidence (and also medical or psychological evidence) is frequently disputed in serious criminal cases with defence and prosecution experts giving differing explanations and interpretations. While partly an artefact of the adversarial system this also reflects the nature of science which is not a static body of facts but a constantly refined, revised and developing body of knowledge, ideas and theories. The context and meaning of physical evidence is open to interpretations based on experts' different experience and perspectives and especially in relation to the current state of scientific knowledge.

The notorious miscarriage of justice cases of the Birmingham six, the Maguire seven and Judith Ward are famous examples of the use of a scientific procedure that was both disputed by experts at the original trials and later shown to be completely misleading. The so called Greiss test used by Dr Frank Skuse to give positive results for the presence of nitro-glycerine on the hands of some of the accused was accepted by the juries involved as confirming that they had been handling explosives. Some years later it was established that the same results could be obtained from a whole range of sources including playing cards, cigarettes, shoe polish, soap and even the swabs that were used to perform the tests (Walker and Stockdale 1999; Rozenburg 1992; Nobles and Schiff

2000; May Report 1990). In a more contemporary example, recent expert opinion publicised by BBC's 'Panorama' ('The Murder of Jill Dando: The New Evidence' BBC 1, 5/9/06) has thrown considerable doubt on the scientific evidence used at trial in 2001 to convict Barry George of the murder of the television presenter Jill Dando in 1999. The alleged single particle of fire arms residue found on a coat belonging to Mr George might it seems have resulted from other substances or equally from cross contamination resulting from proximity of the coat to police firearms during the investigation. In 2008 the Court of Appeal ordered a retrial after an original prosecution expert conceded that the gun residue evidence was of no evidential significance [EWCA Crim 2722 (2007)]. Mr George was acquitted at the re-trial on 1st August 2008.

Similarly former lorry driver Kevin Callan, convicted of killing his girlfriend's four year old daughter, Amanda, in 1991, studied neurology in prison and recruited the help of Dr Phillip Wrightson, a neurosurgeon from New Zealand, to produce newly developed neurological evidence that was accepted unopposed at his appeal in 1995 (Callan 1997). The prosecution case had been based on 'shaken baby syndrome' when in fact Amanda's head injuries had resulted from the numerous falls that she experienced as a result of cerebral palsy. Experts, recruited by Mr Callan himself, following his own wide reading on the subject, supported this view. Two more experts recruited by the prosecution agreed that the evidence did not support 'shaken baby syndrome' and that the prosecution pathologist at the time of the trial had breached procedures and compromised objectivity by drawing false conclusions and asserting them with certainty (much as Dr Skuse had done in the mid 1970s). Amanda's death had in fact been a tragic accident "an accident that 'science' called murder" (Bayliss 1998). The recent problems over the conviction of mothers, notably Sally Clarke, Angela Cannings and Donna Anthony who have lost children in cot deaths (Norman 2000) have demonstrated the danger of making the assumption that because science cannot explain something under the current state of knowledge or information, then the conclusion of guilt can be drawn.

As with other evidence and other people, scientists and other experts are fallible. Stephan Kisko served 16 years for a murder he did not commit due to the suppression of irrefutable evidence of innocence by a police officer and a forensic scientist (Rose, Panter and Wilkinson 1997). Forensic tests are not undertaken "blind", there is

discussion and debate about the results between police investigators and scientists. The bizarre ear print evidence that wrongly convicted Mark Dallagher was originally rejected by some experts but eventually all agreed (wrongly) that it was a match after a group meeting (BBC 1 Rough Justice 29/9/04). Dr Alan Williams, a Home Office Pathologist failed to disclose evidence that Sally Clarke's second child was suffering from an infection that could have caused the cot death (this was the key factor in clearing her of murder at her second appeal in 2003 - R v Clark EWCA Crim 1020). The combination of the uncertainty of much scientific 'knowledge' along with possible corruption or incompetence has contributed to many known wrongful convictions and probably many unknown ones: -

"The Clark case revealed glaring incompetence and, for now, incomprehensible actions on the part of experts. But no one involved in the criminal justice system will be in doubt that there are numerous other cases where inept and biased expert evidence has consigned many a defendant to prison"

(Mahendra 2003: 297)

Probably the two most trusted types of scientific evidence are fingerprints and DNA and both have developed in sophistication over the years. Fingerprinting however has frequently been misunderstood as an exact science when again it is predominantly a matter of expert judgement that can be open to error or interpretation: -

"Fingerprinting – dactyloscopy – is not an exact science but involves judgement as to what is a 'match' between images which may be incomplete, indistinct, contaminated or distorted through the pressure or angle of the finger"

(Walker and Stocklake 1999: 147)

The cases of Danny McNamee (EWCA Crim 3524 1998), David Asbury, cleared of murder conviction based on false fingerprint identification in 2002, (appeal case unreported) and Shirley Mckie (McKie v Strathclyde Joint Police Board and Others Scot CS 353 Dec 03) have illustrated not only the possible variations in interpretation of fingerprints by experts but also, in the Mckie case, how some experts will refuse to admit that they are wrong even in the face of large bodies of expert opinion disputing their view (Panorama "Fingerprints in the Dock" BBC1 22/5/06). These cases involved misinterpretation of prints, but it is also possible to fabricate prints by removing them from a legitimate surface and claiming that they originated from the crime scene

(Townley and Ede 2004: 260) or placing them incriminatingly, as implied in the case of Alan MacNamara (BBC1 Panorama 19/5/02).

Cole (2001: 274-5) describes examples of fingerprint forgery dating back to 1913. Furthermore the level of trust in fingerprint evidence has declined, while DNA evidence, hotly contested in terms of reliability in the early 1990s, has become the new element of certainty: -

“At the turn of the twenty-first century the relative positions of fingerprinting and DNA seem to have reversed. DNA typing has become much more widely trusted than it was a few short years ago. Meanwhile, longstanding fissures in the reliability of fingerprint identification have become visible cracks”

Cole (2001: 5)

DNA evidence has proved a massive step forward in criminal investigation and in establishing the innocence of wrongly convicted people. This has been most dramatically illustrated by Scheck, Neufeld and Dwyer (2000) in the USA who found that 62 murder convictions (many on death row) had been cleared by DNA evidence. (Significantly 15 of these had been convicted at least in part on the evidence of informants). DNA, first used by Leicestershire police in 1986, is a good example of a developing science. The accuracy of early measures of DNA resulted in surprisingly frequent false matches. A study undertaken in 1991 for the Royal Commission on Criminal Justice for example discovered that 38% of defence lawyers who obtained an independent analysis of the DNA evidence stated that their conclusions differed from those of the prosecution's expert (Stevenson 1992). It was in the early 1990s that the first tests known as multi locus probes (MLP) and single locus probes (SLP) were replaced by a process of amplification of DNA known as short tandem repeat analysis (STR) which can gain results from much smaller samples. The development of a new profiling system called 'Second Generation Multiplex (SGM) Plus' has enabled matches to be made that can claim a match probability range of one in ten billion to one in 100 trillion (Townley and Ede 2004: 208).

While such claims sound impressive the relevance of DNA to actual guilt, rather than simply its presence in a certain place and the possibility of error in such sensitive tests must be carefully considered (Townley and Ede 2004: 204). Moreover the quality of the sample may not always be sufficient to gain reliable results. If DNA is degraded it

may only be possible to obtain mitochondrial DNA (mtDNA) rather than DNA from the nucleus of the cell (nuclear DNA). mtDNA is maternally inherited and thus shared only by the descendants, male and female of a particular female line. Hence its discriminating value is much more limited. In short while DNA may have immense probative value it also runs risks of contamination and false association and in the majority of crimes the perpetrator's DNA may not be present in any usable form. It is also worth noting that the National DNA Database (NDNAD) is run by the Forensic Science Service (FSS) but the data is the legal property of the police force that submitted the sample (Townley and Ede 2004: 200). Given past instances of unethical practice in the handling of scientific evidence some might argue that control and ownership of the NDNAD should be much more independent.

Cole (2001: 301) stresses the importance of close scrutiny of DNA evidence by defence experts especially in the areas of recovery of evidence, laboratory procedures and proficiency and statistical arguments. Redmayne (2001: Ch 3) explores the question of statistical information, arguing that judges and juries need to have some understanding of probabilities and statistical chance when dealing with impressive claims of DNA, or other trace element, probability matches. Describing the 'Bayesian' approach (based of Bayes theorem), Redmayne explains the need for an understanding of how probabilities may be influenced by the many variables that may or may not be taken into account. If information is disputed or if there are multiple hypotheses presented, the Bayesian approach suggests that there will need to be multiple likelihood ratios presented in court.

“When a car seat is examined for fibres matching the suspects clothes, the number of foreign fibres on the seat must be taken into account, rather than just those that match – the more foreign fibres there are, the weaker the evidence”

(Redmayne 2001: 52)

In the case of Mike Attwooll (see Chapter 10) the jury may have been impressed by firm probability figures indicating the presence of traces of the victims' blood in his car, but were not able to assess the probability that the traces were left by the victims on previous occasions or innocently transferred, or that similar traces may have been found in the other cars belonging to the same taxi firm. Redmayne discusses some approaches that may help, for example using frequency rather than probability. Rather than stating probability figures of one in so many millions courts more often take the

approach of presenting the question along the lines of ‘there are only 4 or 5 males in the UK from which this evidence could have come – the defendant is one of them, was it him or one of the others’ (Redmayne 2001: 71). However once again it is inherently uncertain that a jury will understand the complexities of these arguments, eliminating these uncertainties is probably beyond the realm of practicality with the present jury system: -

“Familiarising jurors with probability theory may no longer be the dream of eccentrics; perhaps it is now a necessity”

(Redmayne 2001: 58)

McCartney (2006) similarly warns of the inherent dangers and fallibility of science and technologies where criminal evidence is concerned. Furthermore she argues that it is the perceived infallibility of such evidence that increases the risk of error. The desire for certainty can lead to a disproportionate and potentially dangerous embracing of scientific evidence that lacks adequate regard for the inherent uncertainties. Roberts (2002: 262) thus warns that scientific evidence “seems to be especially prone to encouraging the fantasy of perfect proof”. Roberts goes on to discuss five principle limitations of science as evidence: Firstly science never tells the whole story. Secondly science in courts is applied not ‘pure’, with scientists working in partnership with investigators and with limited material samples. Thirdly some expert evidence does not meet validity standards. Fourthly the quality of some experts is questionable and they may be pushed into discussing areas beyond their expertise. Fifthly scientific evidence is presented to and evaluated by non-scientists (Roberts 2002: 262-271). On this last point there have been concerns expressed at the lack of scientific knowledge or training provided to lawyers and law students, despite the increasing need for them to deal with this type of evidence (House of Commons Select Committee 2005, McCartney 2008).

To take further Roberts’ third limitation above, some commentators have asserted that not only is there interaction between scientists and investigators that leads to a negotiated construction of scientific evidence in criminal justice, similar to the construction of other types of evidence, (Jones 1994: 273), but also that natural science is in itself subject to interaction and construction – “the entity interacts with our knowledge of it” (Redmayne 2001: 8).

Part 3 of this thesis deals in detail with the notion of case construction and much of the thesis uses examples from cases focused upon in the study. It is significant that all of these cases, with perhaps one exception, involved some scientific evidence. This evidence however was not in itself probative but provided a hook on which a case could be constructed. It may be that the ‘modern’ miscarriage of justice relies not so much on false confessions or fabricated evidence but more on case constructions built around an element of scientific information which has been given disproportionate or inappropriate significance – that has been treated as quenching the thirst for certainty rather than in the light of the uncertainty principle.

Conclusion

Physical evidence therefore can be strongly probative but like human memory is very often much less reliable and much more interpretive and questionable than most people might think. Furthermore it can be seen that people and their use of physical evidence are constantly and complexly interacting. There is an interaction, for example, between forensic scientists and investigating officers as they communicate verbally throughout the investigation process. They do this, no doubt in the main with integrity, but nonetheless in an adversarial context. Roberts and Wilmore (1992) for example found that prosecution forensic reports could be selective and often did not reveal uncertainties or limitations. This suggests that some scientists might see their function as helping the police rather than being objective (similar criticism might be levelled at defence experts). If scientists are increasingly seen as part of the investigating team there is clearly little independence. Trust is the only safeguard: -

“The scientists’ professionalism is the guarantee that their findings are not compromised by their involvement in the process”

(Townley and Ede 2004: 89)

Evidence itself then, whether it is the direct evidence of people or the handling and interpretation of physical evidence by people, is inherently problematic and potentially misleading. Thinking on these issues should be framed by an acute awareness of potential uncertainties.

The Legal and Adversarial Context

Adversarialism

Edwards (2007) has argued that the adversarial process, and in effect the trial, begin at the point of arrest or even before, as evidence is being developed for use at trial. This process is well described by Batt (2005) in relation to the Sally Clarke case. The decision about whether to prosecute is made in an adversarial context. In all but the most serious cases the decision is taken by the CPS since the Criminal Justice Act 2003, but in close consultation with the police. The Code for Crown Prosecutors (2004) requires that prosecutors 'charge defendants if there is a greater chance of conviction than of acquittal - the 'Evidential Test', and only then if it is in the 'public interest' to charge. Sanders and Young (2004: 200-202) question the ethics of the Code given that it allows prosecutors to charge people who they believe may well not be guilty and in the adversarial context they argue that prosecutors sometimes in practice allow supposed 'public interest' to override evidential weakness (this would certainly be argued by some of the convicted participants in this study). Moreover although the Code rules against seeking conviction "by all means" (para 2.3) barristers and solicitor advocates are prohibited from refusing prosecution cases however misconceived they may be (Sanders and Young 2004: 195). Seen in the context of the role and power of the police and the CPS, the practice of plea bargaining and the political and media pressure for prosecutions, it is suggested that the interpretation of the Code is in practice primarily prosecution orientated rather than independent: -

"The system is deliberately set up to create pressures to prosecute innocent and acquittable people. Its values are predominantly orientated towards crime control rather than due process, human rights or freedom"

(Sanders and Young 2004: 209)

The Code thus allows considerable latitude from any notion of certainty about guilt when defendants are charged. In accordance with adversarial tradition it relies on the trial to establish 'truth' notwithstanding the inevitable stigma that the charge itself carries with the defendant whether guilty or not.

According to Re (1983: 679) the criminal trial is: -

“a product of history rather than deliberate design.....It developed gradually from medieval trial by battle – a factor which accounts for its adversarial characteristics”.

Furthermore: -

“No attempt was ever made to fashion a procedure which would present the relevant facts in their most accurate form”

(Re 1983: 679)

The rhetoric, and frequently the belief, about the trial process is that rules have been developed to create what is generally referred to as “a fair trial”. Arguably however the trial remains a battle, the rules have become more complex, but the essential game remains the same: -

“However, many advocates of the adversary system argue that partisan manipulation of evidentiary materials, under equality of arms, is the most effective way to place an independent tribunal of fact in a position to determine the truth – an assumption at best unproven and at worst highly implausible”.

(McEwan 2004: 63)

Langbein (2003) describes the historical development of the adversary trial in similar terms noting two major defects that he terms ‘the combat effect’ and ‘the wealth effect’ (p.1). The trial is about winning, and part of the success of the ‘combat’ depends upon the wealth of resources available to the respective parties. These are the ‘truth impairing incentives’ of the adversary system.

The development of adversarial procedures notably in the eighteen century replaced a system where those accused gave their own accounts in their defence against official accusations. A system of paying lawyers developed from the use of lawyers originally in the main “to help aristocrats fend off trumped-up charges of treason” (Langbein 2003: 3). While the “lawyerisation” of the trial may have been well intentioned given the unfairness of previous procedures, Langbein suggests that in the longer term it established and institutionalised a system designed to distort the truth: -

“The older procedure had been merely neglectful of the truth. When the adversary system allowed the lawyers to gain control over gathering and adducing evidence, the responsibility for the conduct of the proofs passed to persons who became professionally skilled at techniques of defeating the truth”

(Langbein 2003: 333-4)

As has been described above, adversarialism permeates the process from the outset feeding the need for case construction and even adversarial science and expert evidence. Similarly the trial requires continuing case construction; the presentation of a selective version and interpretation of information that is carefully controlled: -

“Advocates prefer strictly controlled interrogation, without the risks of unexpected adverse evidence.....It is not the practice after a witness has been questioned to invite him to add anything further which he thinks may be helpful. As a result vital facts may slip through the net”

(Stone 1988: 50)

Stone nonetheless (albeit writing in 1988) argues that the best way to attain the truth is through testing and challenging through cross-examination and that credibility cannot be assessed through a body of psychological knowledge. Understanding, he argues, must be “based on common sense and experience of life and the courts” (p 44) and if psychology could throw light on the issue of credibility “the legal profession would have seized on it long ago” (p 43). The first assertion is debatable but the second assertion that the legal profession would seize upon a body of knowledge that might question its traditions is particularly hard to evidence.

It has of course long been argued, not without considerable foundation, that the legal profession is based on fundamental and noble principles. Parker (1999: 88-106) sums these up as follows: The *advocacy ideal* means that there is devoted and aggressive support for the client regardless of personal opinions, ensuring they receive the most rigorous and hence fair representation of their position. The *social responsibility* ideal suggests an ethical commitment to the law and to justice rather than to governments or other bodies. The *justice ideal* reflects some lawyers who take a social justice/public service approach, for example, doing pro bono work, reduced fee legal aid work or fighting miscarriage of justice causes. The *collegiality ideal* reflects the tradition of courtesy, co-operation and self regulation within the profession.

Parker acknowledges that the profession is fragmented and “professionally ambiguous” and that self interest, paternalism and self justifying ideologies can be equally prevalent (p 117). The highly traditional legal profession is characterised most obviously and dominantly by hierarchy (Sells 1994). Moreover power and social status do not sit entirely comfortably with self regulation: -

“Traditionally the idea of collegiality has itself been relied upon to bring legal ethics into effectAn ethical regime of communal self regulation on its own is clearly an insufficient means of operationalising justice norms.”

(Parker 1999: 106)

It will be argued in Part 5 of this document that such traditions may create a resistance to change that maintains inherent dangers of excessive adherence to those traditions even in the face of wider knowledge about potential flaws. Moreover that adversarialism has an inherent propensity to push the ethics and rationality of the legal process into dangerous areas: This in a profession that is entirely self regulating and has undertaken little internal self examination in relation to miscarriages of justice. The adversarial trial creates a win/lose situation where the question of ethics can easily be sidelined and the finding of truth can be sublimated to the artful control of information: -

“The barrister is like a stage manager or director.....He decides which things to highlight, the level of lighting on the actors and witnesses, which actors to spotlight, which aspects to play down, almost what words to put into their mouths.....you are directing the performance”

(Morison and Leith 1992: 142)

It is argued that the debate is balanced by the defence although in terms of investigation and resources the defence starts from a much less advantageous position (Walker and Starmer 1999: Ch 7) and the quality of initial and ongoing legal advice can be of poor quality (McConville, Hodgson, Bridges and Pavlovic 1994). The ‘battle’ therefore is not even fought under ‘equality of arms’. However, whether from a defence or prosecution point of view, there must, in this competition to ‘prove truth’, be inherent risks that the wrong team will win, especially given a starting point based on investigation and evidential processes that themselves have inevitable inherent risks. This is not necessarily to say that a more European inquisitorial model would necessarily be better. The adversarial approach does at least give some degree of resistance to the inherent risks posed by evidential issues and investigation processes. Inquisitorial processes can be equally liable to become prosecution oriented and permeated by case construction (see for example Hodgson 2005).

Adherents to legal traditions might argue in response to criticisms of the adversarial approach that it is for the judge and jury to safeguard any risks involved in the process.

Once again this is not without foundation. However neither is it without substantial risks. Before examining these risks it is necessary to consider the additional risk to witness testimony that the adversarial legal system itself might bring.

Witnesses and Demeanour

Crown Court or Appeal Court proceedings are steeped in tradition, a tradition epitomised by titles, custom, costume and hierarchical deference. The pressure on witnesses giving their evidence in public, on matters of great seriousness under cross-examination from professional advocates who may be seeking to undermine their testimony, has received little consideration. While children or vulnerable witnesses are now sometimes allowed to give testimony by video, for most witnesses the situation appears to be made as uncomfortable as possible. Testimony on the stand may last a number of hours in some cases, yet even the most basic courtesy of a seat is not automatically offered. Given the inherent problems of human memory, the potential fears and nervousness of giving evidence and the need to think clearly, sometimes about complex issues with very serious consequences, it might be thought that making the witness as comfortable and relaxed as possible would be much more of a priority. This may be especially relevant in relation to research findings that suggest cross-examination may be effective or destructive towards weak or timid witnesses rather than dishonest ones (Choo 2006: 408).

In addition the mode of communication is not a 'normal' one but one tightly controlled and restricted by the cross examiner, a mode of communication which ironically may prevent the witness telling the whole truth. A frustration that even the paediatrician Professor Sir Roy Meadows, a very experienced expert witness, has expressed in his own defence to the General Medical Council: -

“As soon as you get to court the barrister will say ‘I will be questioning you on this but not on that’. When you say ‘But this is how I arrived at my diagnosis’ they say ‘you cannot mention it’ “

(Meadows quoted by Laville; The Guardian 2. 7. 05)

Witnesses are charged to answer the questions asked, not to tell the court everything they know or believe to be relevant. They thus continue to be part of an ongoing case construction and information manipulation over which they have limited control (see Chapter 8 below). The selective narrative being employed by the barrister may be a development of that originally constructed by the police, there may be multiple case constructions in play at different stages.

Within this, arguably disadvantageous social interaction, the 'performance' and demeanour of the witness is under the scrutiny of the arbitrators of 'fact'. Demeanour, as an indicator of credibility, is commonly cited as the premise for the general requirement for live testimony, the hearsay rule and the right of confrontation (Wellborn 1991: 1077). What gives this consideration further weight is that appeal courts frequently defer to the decisions of judges or juries in lower courts largely because those courts have had the opportunity to assess the demeanour of witnesses at the trial: -

"The opportunity of the trier to observe the demeanour of witnesses is a principle basis for the deference accorded by reviewing courts to factual determination of trial court and hearing officers."

(Wellborn 1991: 1077)

As Wellborn neatly summarises, there is little or no experimental support for the probative value of demeanour assessment: -

"In effect social scientists have tested the legal premise concerning demeanour as a scientific hypothesis. With impressive consistency, the experimental results indicate that this legal premise is erroneous.....on the contrary, there is some evidence that the observation of demeanour diminishes rather than enhances the accuracy of credibility judgements"

(Wellborn 1991: 1075)

This latter point is sometimes referred to as the 'Othello Error'. Desdemona in Shakespeare's play is falsely accused of infidelity. Realising that she cannot prove her innocence she reacts with an emotional outburst that appears to verify the accusation. In the same way when people are suspected of deceit they may exhibit deceptive-looking behaviours (Bond and Fahey 1987: 41). The truth teller's fear of disbelief may resemble the liar's fear of detection. In pressured situations, such as police questioning

or questioning in court, people may exhibit the behaviours and reactions that confirm the expectations or intentions of the questioner. Wellborn (1991: 1080) also notes research findings suggesting that not only does interrogation cause stress which can result in behaviours likely to be interpreted as deceptive but also that suspicious interrogation itself distorts the perception of observers. This is a very pertinent finding in relation to juries observing cross-examination who may be influenced by the ‘apparent certainty’ of the cross examiner.

Wellborn also suggests that many lawyers know this to be the case but to question such issues might threaten the dominant legal discourse and doctrine, hence “published expressions of scepticism on the matter have been strikingly rare” (Wellborn 1991: 1104). Advocates may in fact exploit those very aspects that research indicates are misleading. They may select and highlight witnesses who appear attractive and/or confident or of high social status, factors that have been shown to be highly influential to juries and in all walks of life, but no indicator of honesty or accuracy (Fife-Schaw 1999: 254-5; Elwork, Sales and Suggs 1981). Similarly cross-examiners may try to lead witnesses into errors or confusion or suggest that witnesses are lying. Again there is little or no experimental support for the notion that people can detect lying with any significant intuitive reliability, in fact lies are sometimes believed and truth is often disbelieved (Bond and Fahey 1987; Vrij 2004). Despite this wealth of psychological research, court procedures and legal process have changed little over time. Legal rules have developed to try to safeguard against some of these inherent risks, but how robust are these and how effective are they likely to be?

Judges, Juries and the Rules of Evidence

“I have been a juryman three times and the experience, although rich in civic insight, has been tedious beyond belief. The best that its defenders can say for it is that some people like it and ‘juries probably get it right most of the time’. Anyone who ran a hospital, a school, a railway or an army on such a basis would be thought insane.”

(Simon Jenkins ‘The Sunday Times’ 12 Feb 2006)

The task facing a jury in a major case can involve the balance of complex scientific, psychological or financial matters that often experts cannot agree on, as well as intuitive consideration of witness truthfulness and logical reasoning on such matters as the

timing and chronology of events. Some of the personal and psychological factors that might mislead juries have been referred to above. Summing up by judges of lengthy major trials can take many hours and when transcribed constitute very complex and lengthy documents involving considerable intellectual dilemmas for the jury to resolve. As Simon Jenkins asserts, research into the correctness of jury decisions suggests overall that the jury is “reasonably reliable” (Hollin 1989). This may not be entirely reassuring for an institution whose decisions the legal system charges with finality. Research for the Auld Report (2001) summarises the many problematic issues known about juries (as well as many positive ones). These include evidence that juries struggle with the interpretation of the burden of proof, with making sense of the evidence selected by lawyers and with legal directions including considering evidence they have been told to ignore. In addition they can become distressed and confused, led by influential characters and even make hurried decisions due to the ‘Friday afternoon effect’ (Derbyshire, Maughan and Stewart 2001).

There is a common misconception that the jury hears all the evidence. As described above, the content and format of cross-examination is to a considerable extent controlled and the evidence that is presented is selective both on the prosecution and defence sides. In their study for the Royal Commission, Zander and Henderson (1993) found that judges stated that in 19% of cases at least one important witness was not called by the defence or prosecution. Moreover the content and format of trials depends greatly on the judges’ discretion and interpretation of the rules of evidence. Jackson (2002) describes how the idea of a judge as merely an umpire is misleading. Not only have there been instances of judges commenting adversely on the evidence (see for example Wood 1999: 226-8; Foot 1986: 135) but they have the discretion to admit or exclude evidence, call and question witnesses, amend indictments or withdraw cases. It is not surprising that barristers in one study put considerable emphasis on ‘knowing the judge’; the character and approach of the particular judge being a major factor in the barrister’s strategy (Morison and Leith 1992: 148).

Judicial control exists in part to rationalise and make workable the proceedings but also to try to ensure fairness and address some of the problems described above. The interpretation of the rules of evidence is based largely on the precedents of case law.

These precedents are often subject to obscure shades of interpretation (McBarnet 1981), sometimes reflected in more case law to refine the interpretation. Nonetheless the end result of both this common law and statutory law is frequently a general rule open to the judge's discretion and interpretation. Consequently judges' discretion, albeit often within complex rules, permeates innumerable areas of the proceedings. For example:-

- Admissibility generally in terms of whether the evidence is relevant and whether its probative value exceeds any prejudicial effects.
- Admission of confession evidence and/or discretion about warnings to juries about risks. Confessions obtained under oppression or in circumstances of 'potential unreliability' should be subject to mandatory exclusion under Section 76 of PACE, but even this may be subject to interpretation. Decisions about a warning on convicting solely on cell confessions remain discretionary as a result of the decision in *R v Stone* (2005) EWCA Crim105.
- The authorisation and use of Public Interest Immunity certificates.
- Admissibility of bad character evidence in line with provisions of Section 101 of the Criminal Justice Act 2003 which eases the restriction on informing the court of defendants' previous convictions by admitting this information if "relevant" rather than "probative" as previously allowed.
- Admissibility of hearsay evidence, also more easily admitted "if in the interests of justice" under Section 114 (2) of the same Act. While the Act gives more detailed guidance, concepts like 'relevant' and 'in the interest of justice' inevitably remain open to individual judicial interpretation.
- Decisions about separate trials for joint defendants or multiple charges.
- Decisions about the use of special measures such as video evidence or live links.
- Decisions about 'no case to answer' submissions.
- Inclusion of expert evidence (assessment of necessity and reliability)
- Exclusion of evidence obtained in breach of the rules.

(Choo 2006)

This last point may be especially significant given that to be excluded breaches of rules by investigators must be substantial enough to actually disadvantage the defendant. This it seems is very conservatively interpreted: -

"It seems clear however that even serious breaches would not lead invariably to exclusion"

(Choo 2006: 47)

The law as it stands effectively gives discretion to judges to decide what level of investigative malpractice can be allowed. This position was summarised in a recent appeal case: -

“As a matter of English domestic law, relevant evidence unlawfully obtained is admissible (*R v Sang* [1980] AC 402). The court in its discretion may however refuse to allow such evidence to be given under the provisions of section 78 (1) of PACE if, having regard to all the circumstances, including the circumstances in which the evidence was obtained, it would have such an adverse effect on the fairness of the proceeding that the court ought not to admit it”

(*R v Button and Anor.* EWCA Crim 516 [4 March 2005] Para 12)

Depending therefore on the degree of effect the individual judge deems the malpractice to have had, the law allows convictions based on investigations that break the law. The tension between pragmatism and principle is thus illustrated: -

“Finally, the willingness of judges to admit improperly obtained evidence at trial sends out important messages about what is acceptable police practice. These decisions are not the neutral application of law to facts, by learned experts in the Court of Appeal. Their jurisprudence reflects an ideology which permits police officers to abuse their powers and continue their function of social control”

(Belloni and Hodgson 2000: 209)

Judges also have considerable discretion about whether to warn juries about the dangers of confession evidence generally, including where vulnerable suspects are concerned, and other evidence that may or may not be at risk of jury misinterpretation such as the drawing of inferences from a defendant's decision not to give evidence or answer questions. The so called Turnbull Warning [*R v Turnbull* QB 224 (1977)] requires judges to warn juries of the dangers of eyewitness testimony (only of people, not of clothes, types or colours of objects etc) when a case rests wholly or substantially on the correctness of one or more identifications of the accused, and this is usually extended to include voice identification evidence (Choo 2006: 99-104). The case of *R v Hanson* [EWCA 824 (2005)] established the requirement for judges to warn juries not to convict on bad character evidence alone but to consider other evidence. Given the secrecy of jury deliberations, the potency in many peoples' minds about bad character and eyewitness accounts and the extensive and sometimes complex research evidence that is summed up in a few words, the value of such judicial warnings is open to question.

The whole approach is based on the “assumption that juries will actually comprehend and take cognizance of warnings” (Choo 2006: 103). Furthermore: -

“No amount of exhortation effectively safeguards against a mistake, because no amount of care can discern a mistake”

(Zuckerman 1991: 495)

Three other issues warrant brief consideration here: The Collateral-Finality Rule, the admission of expert psychological evidence and police collaborative testimony.

Firstly the Collateral-Finality rule (established by Section 4 and 5 of the Criminal Procedure Act of 1865) means that where cross-examination goes solely to a collateral matter, typically the credibility of the witness, the witness’s answers are to be treated as final. Only in exceptional circumstances (see Choo 2006: 412-416) can evidence be admitted to rebut what they are saying unless this is directly related to a fact in issue (directly related to the case). This can be frustrating for defendants who wish to evidence the general unreliability of witnesses, for example by showing that they are lying about other issues. The rule is designed to prevent waste of time, prejudice and the danger of misleading the jury. Some have argued that this rule can underestimate the ability of the jury to weigh the evidence or deprive them of a holistic picture: -

“Sometimes it may seem to the jury that the whole case turns on the answer to some collateral question and yet it may not be pursued. The failure to tie up loose ends may be just as confusing as the laborious unravelling of all the threads.”

(Newark 1992: 169)

A significant exception to the collateral rule was established by the case of *R v Edwards* (WLR 207 1991) which established the right to cross examine police officers on previous misconduct in order to discredit their testimony. This is only allowed however where previous misconduct has been ‘proved’ through criminal or disciplinary proceedings or in circumstances where a previous jury acquittal logically indicated that the jury had believed evidence to be fabricated.

The second issue, relating to expert psychological evidence, takes the opposite approach, directing responsibility for weighing evidence onto, rather than away from

the jury. The Turner Rule (R v Turner QB 834 1975) is based on the assumption made by Lawton LJ in making the judgement: -

“Jurors do not need psychiatrists to tell them how ordinary folk, who are not suffering from any mental illness, are likely to react to the stress and strains of life”

(R v Turner QB 834, 1975)

Therefore unless a person was deemed to be suffering from a definable mental illness or disability, expert evidence on states of mind were generally excluded and the jury deemed to understand the nature of situations and reactions within their realm of ‘common understanding’. In fact increasing awareness of the complexity of human responses and states of mind has led the courts to backtrack somewhat in later judgements especially in relation to domestic abuse and provocation, but in other cases dealing with for example low IQ, suggestibility, alcohol or drug induced states or sexual abuse in childhood, the courts have refused to admit expert evidence on the basis of the Turner Rule (Mackay and Coleman 1996; Choo 2006). The law remains somewhat confused on this issue with the Turner Rule still influential but again largely subject to judicial interpretation. In the light of current knowledge there is a case for the open admission of any expert evidence that might throw light on the peculiarities and infinite varieties of human reactions: -

“The supposition that only mentally disordered behaviour transcends the common knowledge and experience of ordinary people is not supported by the evidence”

(Mackay, Coleman and Thornton 1999: 325)

The third issue is a curious anomaly established in R v Bass (1All ER 1064 1953) that sees police collaborative testimony as a logical safeguard in presenting the police version of events. Such action by other witnesses would be considered grossly inappropriate, but is generally welcomed by judges even if police officers accounts are identical. Research suggests that there are considerable dangers of suppression of information and ‘reconstructive errors’ (Clark and Stephenson 1999) and moreover the rule is indicative of a general faith in police evidence exhibited by the courts over and above that of other witnesses: -

“The willingness of courts in England and Wales to accept the collaborative testimony of two or more police officers as being both reliable and fair, whilst refusing to accept collaborative testimony from civilian witnesses, suggests that the judiciary views police officers as in some way immune to the potential dangers that apparently are inherent in the collaborative testimony of civilian witnesses”.

(Clark and Stephenson 1999: 208)

While statutory law may lay down many rules, common law and individual interpretation by judges permeates almost every aspect of court process.

In a criminal trial or appeal so much depends upon the interpretation of the rules and the priorities and assumptions of judges that not only is witness assessment and scientific evidence frequently a matter of opinion rather than fact: The law itself becomes to a significant extent, a matter of opinion.

Conclusion

“Expert witnesses have been penalised far more publicly than the judge or lawyers in cases where expert evidence has been called into question. These cases represent a system failure. Focusing criticism on the expert has a detrimental effect on the willingness of other experts to serve as witnesses and detracts attention from the flaws in the court process and legal system, which, if addressed, could help prevent future miscarriages of justice”

(House of Commons Science and Technology Committee 2005)

The criticisms of Professor Sir Roy Meadow and Dr Alan Williams in relation to the case of Sally Clark, who was cleared on appeal in 2003 (EWCA Crim 1020), and other cot death cases, resulted in internal action by the medical profession. However the fallacious statistics about cot death provided by Sir Roy Meadow (that the chances of two cot deaths occurring ‘naturally’ were 73 million to 1) were challenged at trial and were certainly shown to be totally misleading by the time of Sally Clark’s first appeal in 2000 (Norman 2000; Thompson 2006). The judge at the trial told the jury that “however compelling you may find those to be, we do not convict people in these courts on statistics” (Thompson 2006) and the Appeal Court decided in 2000 that “the point on statistics was of minimal significance and there was no possibility of the jury being misled” (R v Clark EWCA Crim 54 2 Oct 2000: Para 256). It was the eventual

discovery that Dr Williams had failed to disclose evidence that the second child had an infection that was crucial to the success of the second appeal.

The point of this example here is that it graphically illustrates, firstly the judiciary's apparent belief that simply stating a brief warning of caution to a jury will ensure that they disregard expert evidence of quite overwhelming power (73 million to one) and secondly that the appeal court will stand by the jury decision even in the face of further discredit of such statistics. The mental gymnastics required is to believe that the judiciary actually believed that the jury were not influenced by such staggering estimates of probability provided by an eminent professor. Moreover that they were sure that there was "no possibility" that they might have been. This remarkable telepathic insight into the minds of jurors thus ensures that proof remains established beyond reasonable doubt, yet such 'magical legalism' as a form of logic and reason might struggle in any other profession?

The unique status and independence of the legal profession and its self regulatory nature creates, as the Commons Committee (above) cautiously imply, a state not only of immunity from censure but also an absence of realistic pressure to look at internal flaws and responsibility, especially where long standing traditions and 'sacred cows' such as deference to jury decisions are concerned. The 'institutional logic' of the legal process is protected by its long established traditions and powerful self regulatory hierarchy. Arguably this facilitates a resistance against a growing body of knowledge about human behaviour and social systems that might threaten these traditions.

The history of miscarriages of justice is littered with criticisms of the police, of expert witnesses, of corrupt witnesses and personality traits of defendants (suggestibility, dishonesty etc) but almost entirely devoid of criticism or analysis of the legal process and the judiciary (with the exception on occasions of defence inadequacies). Legal rules and legal decisions, in fairness, struggle to balance practicalities with principles but are inevitably open to interpretation, manipulation and misunderstanding. Like the investigation process and the nature of evidence, the legal process, sometimes despite its own best intentions, has an inherent, and perhaps inevitable, propensity to create distortion and hence injustice. This propensity is built into the history, social structure

and vested interests within the system. The danger lies not only with the inherent risks but more profoundly with the failure to realistically acknowledge them.

Overall this chapter has looked at inherent risks in policing and investigation, in the nature of evidence and in the legal system itself and it is argued that these risks are potentially substantial and ongoing in terms of creating wrongful convictions.

Lord Justice Auld (in his Review of the Criminal Courts), while discussing the issue of defence disclosure, acknowledged the argument that revealing the defence case might allow “the prosecution the chance before trial to strengthen or change a weak case or to fabricate or falsify evidence to overcome it” (Auld 2001: para 154). Auld however justifies the situation on the basis that “a criminal justice process cannot sensibly be designed on a general premise that those responsible for law are likely to break it” (Para 154). Similarly Niblet (1997: 233) concludes: -

“No disclosure regime can ever be perfect, but the prosecution must be *presumed to act fairly*” (Emphasis added)

On the contrary, whether in relation to disclosure or the multitude of other complex issues, it may be that a safeguarding mentality that assumes that some people will inevitably break the rules or make mistakes and one that recognises the mass of inherent dangers within any system is exactly what is required. Moreover, that confidence in the criminal justice system as a reliable and safe mechanism is unfounded and dangerous. The sensible approach is to accept that things will go wrong rather than assume they will not.

“For now, we are, in fact reduced to consoling ourselves that, perhaps the price of justice, like that of Liberty, is eternal vigilance.”

(Mahendra 2003)

PART 2

METHODOLOGY AND QUALITATIVE ISSUES

“The sociologist who favours officialdom will be spared the accusation of bias”

Howard Becker 1967: 243

CHAPTER 3

JUSTIFYING THE RESEARCH POSITION

The Rationale for the Study

“Sally and Steve’s behaviour has the hallmark of innocence. Their belief and their knowledge that they have not harmed their babies is their protection. It is much to be admired and it is naive. Many non-lawyers believe that if you have committed no crime you have nothing to fear from the English criminal justice system. The adversarial system makes this the opposite of reality”

John Batt “Stolen Innocence” (2005: 65)

Chapter 1 attempted to illustrate that the occurrence of miscarriages of justice remains significant in terms of numbers. The human cost of any one miscarriage of justice however can be devastating in social, psychological, physical and financial terms (see, for example Naughton 2007: 165-178, Grounds 2004). Both of these factors suggest that this is an area that justifies research interest on grounds of human concern and on purely pragmatic functional or financial grounds. In every respect, on the surface at least, wrongful convictions are a waste that serve no useful purpose to society and which every reasonable person would want to avoid. There is however, as John Batt’s insight (above) into the Sally Clark case suggests, another more obscure reason why this issue needs greater understanding and revelation, namely that miscarriages of justice reveal modes of thinking about the criminal justice system which may be contradictory, naive or even irrational. Perhaps there is a need to explore whether there are some respects in which wrongful convictions serve a social or institutional function for some parties; perhaps there is too much faith in the comfortable notion of a fair and benign system that ensures that the innocent have nothing to fear.

There is substantial research and awareness of the traditional causes and, to a lesser extent, perpetuation, of wrongful convictions, but less on the wider social and

institutional aspects of human behaviour in this area (see Introduction to Chapter 2). Broadly this leads beyond the question of how injustice occurs to consider why it occurs and why it might continue, despite an increased state of knowledge. This study attempts, albeit in a rather broad and limited way, to explore attitudes, experiences and perceptions that somehow allow injustice to continue. While the traditional problems and causes are addressed to some degree, this study also seeks to look at the current situation – have wrongful convictions changed in nature or causation, have we cured past ills and/or created new ones and in what respects do current modes of thinking offer hope or risk? There is a danger that a study such as this will offer more than it can deliver on such complex questions, the rationale lies in attempting to make a small contribution to the widening view of miscarriages of justice and the criminal justice system.

Academically the subject is attracting increasing interest, perhaps most notably with the growth of Innocence Projects in UK Universities. Innovations like the Criminal Cases Review Commission are being assessed in terms of effectiveness (the CCRC discouraged involvement of its members in this study because of other ongoing academic research), media interest appears to be declining, policing practices are developing, changes in legal aid provision are causing concern for many members of the legal profession and many traditional legal safeguards have been reduced in a new political climate – most notably in the Criminal Justice Act of 2003. These matters are discussed in some detail later in this thesis. All of these factors indicate the need for research in this area. Notwithstanding the wealth of past insights, the social context of the criminal justice system is changing and the potential effects of this on wrongful convictions needs exploration.

The case study approach taken in this research has been little used in academic work in this area. The combination of this with the attempt to explore the perspectives of different groups of people, who might be involved, is arguably a new approach. Thus alongside the views of various professionals, the study gives a voice to those who have, or may have, been wrongly convicted. The Government's rhetoric of "re-balancing the system in favour of the victim" (Home Office 2002) conveniently ignores this group of victims yet their perspective is essential to a holistic understanding of how the criminal justice system performs. Inevitably the numbers of victims and professionals who could

be interviewed has been limited; the views expressed give a flavour of the kinds of ideas that are held rather than any generalisation of perspectives.

One issue that might be controversial is the inclusion in this study of some cases where the convicted person has not been cleared by the Court of Appeal and remains 'legally guilty', albeit cases where there has been a great deal of legal and media concern about the safety of the convictions. It is appreciated that in some respects this weakens the argument by making assumptions about innocence which have not been officially recognised. Furthermore there is a risk that an argument might be presented which is in fact a false version of events or a misleading interpretation. It might open up the research to the accusation of bias or to making assumptions in favour of one group. These matters were carefully considered but on balance the decision was made to include this group for a number of reasons: -

1. As discussed in Chapter 1, defining a miscarriage of justice is inherently problematic, a successful appeal or the lack of such, cannot necessarily or inevitably be equated with guilt or innocence.
2. The system for review of miscarriages of justice has limitations – there is no guarantee that a wrongful conviction will ever be overturned or that new evidence will ever be discovered.
3. Major miscarriages of justice take years, sometimes decades, to be corrected (if they ever are). Consequently any study that did not include people who remain convicted would have two major limitations: Firstly it would inevitably be, in some senses, a historical view which might miss current causes or reflections on current post-conviction procedures and secondly it would give a one sided perspective – that of those who have successfully appealed a wrongful conviction but not those who continue to fight the case or who fail to meet the criteria of the Court of Appeal. In so doing it might miss one of the most important questions – not why are wrongful convictions overturned but why are some wrongful convictions not overturned.
4. The people involved in this study who remain convicted have all been the focus of serious concern in legal, media and campaigning circles about the safety of

their convictions. Their current situation in many ways mirrors the previous situation of those who have now been cleared. Most importantly from a research point of view their accounts raised relevant issues which often paralleled those given by exonerated victims and some professionals. As far as could reasonably be ascertained they appeared to give honest accounts and certainly accounts which were coherent, consistent and under the circumstances remarkably balanced.

5. People who remain convicted of serious crimes are the people with the least voice; their story is rarely heard or given credibility. As such they take the research into a more revealing area, giving a perspective from a situation that most people will fortunately never experience.

Miscarriages of justice research therefore has a role to play not just in analysing the past but in creating awareness of the current context and future possibilities. Qualitative research of this kind cannot establish statistical truths, but it may identify recurrent or significant patterns in social phenomena. It may also identify “multiple realities” which illustrate that ‘truth’ can take a very different shape when viewed from different angles.

The Objectivity/Subjectivity Debate

“We provoke the charge of bias in ourselves and others by refusing to give credence and deference to an established status order in which knowledge of truth and the right to be heard are not equally distributed”

Becker 1967: 241-2

Howard Becker’s much referenced essay “Whose side are we on” refutes the notion of value free research but more importantly alerts the reader to the often subjugated truth that the established order of society in itself sets up a bias in the sense that, that is the order by which we are socialised and expected to view things - it is the established order. To view social situations from the position of society’s underdogs or outsiders flies in the face of “what everyone knows” (p 243) and disrespects the “hierarchy of credibility” (p 242) that the social order has defined.

The whole notion of miscarriages of justice is an uncomfortable one for the established order and a justice system which supposedly works on the principles of due process and proof beyond reasonable doubt. In studying miscarriages of justice we are studying something that has gone seriously wrong with the system's publically purported intentions. In theory therefore everyone, whatever their position, should support the plight of those genuinely wrongly convicted. Sympathy or identification with these victims therefore should not be a problem as everyone should support this. This however is too simple an analysis, people and their institutions rarely like to focus on, or even accept, that the systems in which they trust have created suffering for innocent victims. The uncertainty of what is true can sometimes set up a feeling of rivalry between those who support people maintaining innocence and those representing the established order.

Becker is clear that researchers should acknowledge their position and that research has the important function of reflecting the plight of marginalised groups. He argues that as long as methods and techniques are applied rigorously and impartially then this will reveal the political truth. That is not to say that accusations of bias will not be made anyway.

Liebling (2001) critiques Becker's article in the context of prison research and describes as "sociologically naive" Becker's assertion that officials and responsible individuals have sufficient power and credibility to define reality. There is a need not only to understand the underdog but also to understand those in power and the conflicts and constraints they face – how they use or decline to use their power.

There is a body of research which appears, perhaps as a result of its funding sources, to simply re-enforce the message required by the established order and such work is often similarly open to accusations of bias (Norris 1995). On the other hand Hammersley (2000) notes an increasing trend for researchers not to pretend to be anything other than partisan; consequently there may be a danger of replacing notions of value neutrality with those of political purpose. Research should state its truth honestly and fairly whatever the political implications but should not pre-empt outcomes through a pre-ordained position: -

“To frame a whole approach to social research as critical is to render what in an appropriate context may be a virtue into an abstract programme that cannot be but a vice”

Hammersley (1995: 44)

Travers (1997) makes a similar point: -

“There is a tendency for authors to preach to the converted in their own political camp, rather than supply a balanced or objective account of the criminal justice process”

Travers (1997: 359)

Travers goes on to stress that in order to be persuasive in criminal justice research it is necessary to acknowledge different perspectives, hear different voices, try to understand how individuals understand the situation of others and to be cautious of chasing facts to support an argument (constructionism).

These are points well made, although qualitative research involves either a description so powerful that the data speaks for itself or some form of interpretation and analysis. It is in this respect that the qualitative researcher might be open to some accusation of constructionism however balanced he or she tries to be. For this reason an open statement of the researcher's values, concerns and motivations is important.

Gouldner (1968), responding to Becker's article, makes a number of criticisms which include warning of the tendency to see underdogs as “exotically different” or passive victims unable to react to the actions of the establishment. Whether this is a fair criticism of Becker is debatable but such a view would contrast sharply with an approach that sees ‘governmentality’ in the sense used by Foucault as an ongoing negotiation or struggle between different groups in areas such as justice campaigns (Naughton 2007). Gouldner stresses the existence of a parallel hierarchy of academic liberalism which like other establishments “can reward those who tell the right lies and suppress those who tell the wrong truths” (1968: 112). Gouldner also takes exception to Becker's rejection of sentimentality towards research subjects suggesting that emotionality can help social scientists reach the real world (Gouldner 1968: 105).

This question of sentimentality or sympathy towards research participants has been explored in other areas of research. Some feminist writers in particular have largely rejected notions of objectivity or impartiality and have argued that objectivity is in

practice really about power. This relates closely to Becker's 'hierarchy of credibility'. For some researchers experience is essential to understanding and values and emotions are essential sources of knowledge (Stanley and Wise 1993). This view has been taken further to suggest that objectivity and detachment from the research participants could even amount to deception and that the researcher should have an honest, open and reciprocal relationship with participants: -

“The field worker shares the emotional pains, secrets, fears, hopes, insecurities strengths and accomplishments of those in the setting.....s(he) might offer support, companionship encouragement, advice and even love”

Bailey (1996: 13)

Liebling's view is similar although more restrained in terms of boundaries. Empathy and sympathy are important in order to understand meanings and emotions which are some of the most important insights that qualitative research can provide: -

“The more effective the research in terms of shared feelings and experiences, the better the field work gets done on the whole”

Liebling (2001: 475)

Where then does this research position itself in relation to these debates? The researcher's position as a long term campaigner on miscarriage of justice cases was made clear from the outset to all participants in this study, along with an explanation that concern about the issue was the motivating force behind the study (see Appendix 4). This position assisted an empathetic relationship with wrongly convicted participants and some professionals who have particular concerns about this issue, all of whom have very good reasons to need to be sure that they can trust the person they confide in. For professionals who had less direct concerns about the issue a clear statement of the researcher's background and motivation, with assurances of an open minded approach hopefully reduced any fear of hidden agendas. The attentive process of interviews and willingness to empathise and engage with the experience of all interviewees whatever their perspective or background was a clear ground rule for the interviewer.

The stories of wrongly convicted people and their families are distressing and highly emotionally charged; they often evoke sympathy and a wish to give support. This does not necessarily create blindness towards other positions or perspectives, although one

may share some of the anger that arises in the face of unreasonable or unreasoned resistance towards addressing the problem. Wrongful convictions are ethically wrong, they cause unnecessary human suffering. In the same way that medical researchers hope to relieve human suffering, the ultimate and primary aim of miscarriage of justice research should be to reduce the likelihood of suffering and injustice. The answer to the question 'Whose side are we on' is on the side of people who suffer as a result of an unjust situation, it follows if the reality of the injustice is accepted, that one is also on the side of every reasonable and humane member of society.

Given this position how can research best achieve its aims of advancing knowledge and sympathy that might contribute towards more resolution of wrongful convictions? As Travers (1997) rightly suggests, not purely by preaching to the converted but as Liebling (2001) suggests by establishing empathy where appropriate with participants and by understanding the experience, pressures and rationales of all groups who may be involved in a professional or other capacity. There is a hierarchy of credibility as Becker suggests and nowhere, it might be argued, is this more apparent than in the legal system. What this study aims to do, to the degree that it can, is not to hear only the voice of the underdog or the oppressed but also the voice of the powerful or those with varying degrees of power and credibility. In so doing it is hoped that the influence of the hierarchy of credibility can be minimised and that all voices will be given equal consideration. Given the need for analysis and interpretation which is inevitably selective, such a claim might in the event be open to criticism; it should be born in mind however that the analysis does not depart from the aim of the study. In other words the analysis maintains its focus on how can we address a problem that causes unnecessary human suffering, it does not become distracted on to the needs or problems of other groups except where these impact on the research questions of the study. That apart the emphasis on fairness and balance is crucial to the credibility of the analysis.

This therefore is not 'value free' research but founded on clearly stated values, it is subjective in that the personal concerns and motivations of the researcher will inevitably influence, to some degree, the editing and interpretation of material and the selection of participants. Hopefully there is balance and rationality; if there is objectivity it lays in the attempt to appreciate the different ways that situations are experienced and the different interpretations of reality

CHAPTER 4

METHODOLOGICAL ISSUES

This chapter considers the methods used to obtain data for the study and the issues arising from this. Firstly the nature of the participants involved is considered along with the process and limitations of accessing this group and the validity and reliability of the approach taken. Secondly the research methods used are discussed and thirdly some ethical issues relating to the research are considered

The research design aimed to address the research questions as stated in the 'Introduction' (page 2 above). These are re-stated here for convenience: -

- Why have wrongful convictions continued to occur despite systemic reforms and a well established body of knowledge about the causes? (Parts 1, 3 & 5)
- What are the underlying experiential, interactional and institutional processes involved in the creation and sustaining of wrongful convictions? (Parts 3, 4 & 5)
- How might the current social and political landscape affect the potential for wrongful convictions to be created and sustained (Part 5)
- What changes might help prevent or rectify wrongful convictions? (Part 6)

The Professional Participants and the 11 Case Studies

In addressing the research aims, analysis of documents, broadcasts, court observations and ongoing voluntary work experience provided important insights for this thesis (see

‘Methods Used’ below). In addition the interviewing of people cleared of, or maintaining, wrongful conviction, and of professionals involved in the criminal justice system, was a crucial element in understanding the processes that had caused or sustained wrongful convictions and in obtaining a contemporary and experiential picture of the issue. This section describes the participants involved and how they were selected and accessed; the following section then considers further the validity and reliability of the approach.

The ‘Professional’ Participants

The interviews with professionals were accessed initially by means of a ‘convenience’ sample; people known to the author from previous contacts or associations with research supervisors. Such an approach has strengths in ease of access and good response rate but clear limitations in that findings cannot be generalised (Newburn 2007: 913). Convenience sampling can be a valuable starting point in qualitative research despite the limitations: -

“The data will not allow definitive findings to be generated because of the problem of generalisation, but it could provide a springboard for further research or allow links to be forged with existing findings in an area”

(Bryman 2004: 100)

The convenience sample was then expanded by ‘snowballing’ – building on the initial convenience sample participants by using their recommendations and contacts to access others. Both Bryman (2004: 101) and Newburn (2007: 914) quote Howard Becker’s 1963 study of marijuana users as an example of a ‘snowball’ sample, where Becker used initial contacts within the music business to make further contacts with their associates. These techniques are in no sense random and the findings are not representative. One cannot draw generalised conclusions from a small sample contrived in this way. However they are prominent in many organisational studies (Bryman 2004: 100) and provide a useful qualitative tool that can reveal individual experience and the potential for certain interpretations and events to be examined. Furthermore the linking of interview data to existing findings in literature or from other data gathering sources provides a basis for referring data collection and analysis back to each other and building any theoretical constructs inductively from the data. Convenience and

snowball sampling was on a limited scale but was backed up by some targeted formal approaches to relevant people or organisations (see below)

Requests for participation were accompanied by provision of general information on the project in the form of the Participant Information Sheets (Appendix 4) along with the relevant Interview Schedule (Appendix 5). In the case of some professionals a number of repeat requests were made on the basis that no response had been received. In some cases people agreed to take part but then failed to respond to further requests to actually enact the process. In other cases no response was received. In only one case, apart from the formal negative response of the CPS and indirectly the CCRC (see below), was the request for assistance actually declined, while non-response was a common occurrence.

Interviews with lawyers, journalists, police and experts were accessed partly through similar existing contacts, along with assistance through academic channels and the ‘snowballing’ of contacts giving links to others. These latter two channels of contact were important for accessing professionals who were not in any way specialising in miscarriage of justice work. One of the police interviews came about through a formal approach, while some formal approaches to lawyers received no response. In two cases only a telephone interview could be accommodated and one police interviewee declined to be recorded or address the questions directly. With the majority of professionals however extensive face to face interviews were conducted and recorded, the shortest lasting around 45 minutes and the longest about three and a half hours, with most being around one and a half to two hours.

Informal approaches to Crown Prosecution Service (CPS) employees were met with a consistent response indicating that any research had to be centrally approved by the CPS. A formal approach was made including completing the standard form. However the CPS declined to take any part in the project (see Appendix 6). This was a setback in that it left out a crucial “voice” in the landscape of miscarriages of justice. The Criminal Cases Review Commission (CCRC) advised their employees not to participate on the basis that academic research had already been commissioned into the CCRC. This was despite the fact that the request had been made on a personal basis in relation to certain employees’ previous legal experience rather than their CCRC experience.

The ‘professional’ group that derived from this process consisted of 29 participants. Reference to these people in the thesis is indicated by the abbreviations in brackets: -

1 Legal Academic (LA 1)

3 Barristers (B1, B2 and B3)

2 Judges (Judge 1, Judge 2)

7 Solicitors (S1 – S7)

(All were experienced criminal solicitors with experience of serious cases and appeal work)

9 Police Officers (P1 – P9)

Most of these officers were of senior rank (P1, P7 and P9 were now retired from the police)

5 Journalists (J1 – J5)

(These journalists had worked in both newspaper and broadcast media)

2 Expert Witnesses (EW1 & EW2)

(EW1 was a retired pathologist; EW 2 was a working paediatrician)

B3 and J5 were not specifically interviewed according to the interview schedule (Appendix 5) but they offered specific advice and/or comments on certain aspects of the research.

One police officer gave a general overview of police procedures and safeguards in interview but declined to address the interview schedule as such. Thus it could be said that of the 29 professional participants, 26 undertook the full, recorded interview schedule. Two of these undertook the interview over the telephone.

Four of the solicitors, one former police officer, one expert witness and all five journalists had some direct professional involvement with one or more of the “focused cases” in the study.

Case Studies

The case studies in this thesis are formulated using direct interviews, documents, broadcasts, court observation and voluntary work to obtain information (see 'Methods Used' below). Case studies provide an intensive examination of events and the social context of those events and may be, as is perhaps the case in understanding wrongful convictions, the only way to understand the research in the area concerned (Newburn 2007: 911). Case studies also provide a narrative flow that can be lost in the coding process that takes place with other forms of data analysis (Coffey and Atkinson 1996: 52). It is often necessary to tell a detailed story in order to understand the complex processes that are involved in creating and sustaining wrongful convictions.

The eleven case studies in this thesis are described as “focused” cases, meaning that they have been specifically part of the research; in most cases involving direct contact. The focused cases are the main examples used in the study but many other cases are referred to as appropriate to illustrate certain matters.

Only three are described in full case study form: Jonathan Jones (Ch 5), Mike Attwooll and John Roden (Ch 10) and Sion Jenkins (Ch 14), others are drawn upon to varying degrees to illustrate certain issues. Their cases are summarised at Appendix 3.

Bryman (2004: 51) describes four kinds of research case study: -

- (1) *The Critical Case* – that defies certain beliefs or established ideas (The Sion Jenkins case study, it will be argued, falls into this category)
- (2) *The Unique Case* – in the sense that it may be an extreme or unusual example
- (3) *The Revelatory Case* – that reveals previously inaccessible phenomena.
- (4) *The Exemplary Case* – that examines usual phenomena or usual systems and how they function.

All three full case studies are in their own sense *unique*, yet all share parallels. They may be extreme examples although they are not necessarily atypical; in fact they demonstrate common features of wrongful convictions. At the same time they are *revelatory* often exposing the hidden nature of what lay behind the conviction – the true weakness of the evidence and the manipulation required to sustain belief in the conviction. They are also *exemplary* in showing how the system can function or malfunction in practice.

In seeking to access various case examples the author considered a number of potential participants known personally (or with a known source of contact) through previous research or voluntary work. The majority of these people had been convicted of serious crimes yet had no previous convictions or record of violence, dishonesty or instability. A decision was taken to build on this type of sample and this led to the inclusion of three cases where direct contact with the person convicted could not be obtained (see below). These cases however were well documented and considered highly relevant and in some ways comparable to the rest of the sample. Thus eleven cases, all involving homicide, were given special focus (“focused cases”) in researching for the study. One of these cases involved two co-defendants, thus the eleven cases involved twelve people, eight men and four women. Only one of these had a criminal record at the time of the “focused” conviction and that was for non-violent theft and drug offences. As discussed above, not all of the focused cases had been officially recognised as miscarriages of justice. Five of the eleven cases concerned people who remain convicted at the time of writing. It should be emphasised that all five of the ‘still convicted’ cases have been the focus of a great deal of concern in legal and media circles; they have all for example been the subject of supportive television programmes and all are actively seeking further appeals to clear their names.

The rationale for the focus on people with previous ‘good character’ requires some discussion. If one were to construct a typology of victims of wrongful conviction, based on literature, experience and media constructions, it might include the following groups: -

- ‘Usual suspects’ – people with significant criminal records who are convicted of crimes they did not commit (example “The Bridgewater Four”)
- ‘Terrorist Suspects’ – people who due to circumstantial factors and origin are wrongly convicted of terrorist offences (example “The Birmingham Six”)
- “Fallback Misfits” – Failure to solve the crime leads to a fallback onto individuals who are considered socially different in some way, perhaps through disability or social disadvantage, (example Barry George)

- “Racial Stereotyping” – Where, as with “terrorist suspects”, investigations are tainted with elements of racial bias (example M25 three)

However while such groups have certainly suffered wrongful convictions it is misleading to overemphasise such categories. Wrongful convictions clearly happen to all kinds of people – the ‘whole new genre of miscarriages of justice’ in relation to false accusations of historical sexual abuse identified by the Home Affairs Committee (2002) for example, and, as in the focused cases in this study, the many people convicted of often serious offences who would, up until that point, have been considered members of the “decent law abiding public”. The decision to focus on this mainly ‘good character’ group does not imply that wrongful convictions of people who might fall into the somewhat superficial typology above are any less serious or any more acceptable. What a focus on people with no previous history of criminality or violence does provide is an illustration firstly that typologies are misleading and that it is dangerous to assume that only certain groups are prone to wrongful conviction; and secondly, more importantly, it demonstrates the power of the process of wrongful conviction and the fact that in the face of such a process, personal integrity, honesty and reputation may count for nothing.

Many people might agree that the groups in the typology above might be at some risk of wrongful conviction, perhaps fewer people would expect it to happen to the “ordinary people” in this sample (solicitor, RAF officer, businessman, teacher, post office worker, housewives and carers etc). The cases selected therefore may not be typical, in a sense they make a point by being atypical. There is no typical victim of a miscarriage of justice; if it can happen to the people in these ‘focused’ cases then clearly it can happen to anyone. Comparisons can however often be drawn from examination of the evidential problems identified in such cases.

This group were more than willing to participate, being keen to get their side of the story across. This was especially true of those participants who remain convicted (6 of the 12) and continue their campaign to clear their names. In three of these latter cases the participant was ‘at liberty’ on life licence and thus available for interview. In a fourth case the person was in open prison conditions and employed outside; the employer was happy to allow time for the interview to take place. The other two, still convicted, participants were visited on numerous occasions through the standard prison

visitor arrangements. Due to the restrictions of that system it was not possible to record or take notes of discussions contemporaneously. In all other interviews the discussions were recorded with the permission of the participant. Interviews with this group were in all cases lengthy and in depth, on average lasting around 3 hours.

This group were happy to be named in the research with one exception, referred to by the false initials AN, who feared that any publicising of his case might be interpreted as a breach of his licence conditions. Discussions had to take place with this participant about how much detail could be revealed without revealing the case to people who might be familiar with it.

In three of the ‘focused’ cases the wrongly convicted person was not directly involved (Sally Clark, Sheila Bowler and Sion Jenkins). The different reasons for this all related to the sensitivity of their situation at the time. Consequently the wrongly convicted person in these three cases did not, unlike those interviewed, sign a consent form. However all three have written, or had books written about, their case and all information used was in the public domain in some form and is referenced accordingly. In addition discussions took place with journalists or lawyers who had worked closely on the cases of Sion Jenkins and Sally Clark.

Table 4 on the next page summarises the main areas of evidential concern in the eleven “focused cases” as identified by the people convicted: -.

U = Conviction upheld on appeal. Q = Conviction quashed on appeal

NA = “Close perpetrator assumption” not applicable because the defence position was that no crime occurred therefore no alternative suspect could be considered. This was also the position at Sheila Bowler’s second trial although not at her first (see case summary at Appendix 3)

KEY DATES AND OUTCOMES				MAIN EVIDENTIAL PROBLEMS IDENTIFIED BY PARTICIPANTS							
Focused case	Date of alleged Offence and Conviction	Appeals	Re-trials	'Close' Perpetrator Assumption	Co-accused Confession	Falsified police evidence	Other suspects 'missed' or downplayed	Scientific evidence disputed or not properly treated	Unreliable or adversely 'influenced' witnesses Incl. Eye witnesses	Disclosure Problems	Selective Interpretation of circumstantial factors
Mike O'Brien	1987 1988	1990 (U) 1999 (Q)			*	*	*	*	*		*
AN	1987 1998	1990 (U) 1999 (U)				*	*	*	*	*	*
Ian Thomas	1990 1992	1994 (Q) 1996 (U) 2002 (U)	1995 Re-convicted	*			*	*	*	*	*
Sue May	1992 1993	1997 (U) 2001 (U)		*		*	*	*		*	*
Sheila Bowler	1992 1993	1995 (U) 1997 (Q)	1998 Cleared	*				*			*
Jonathan Jones	1993 1995	1996 (Q)		*		*	*	*	*		*
Mike Attwooll John Roden	1994 1995	2008 (U)		*		*	*	*	*		*
Nick Tucker	1995 1997	1998 (U)		NA				*			*
Annette Hewins	1995 1997	1999 (Q)				*	*	*	*		*
Sion Jenkins	1997 1998	1999 (U) 2004 (Q)	2005 2006 (both hung juries -acquitted)	*			*	*	*	*	*
Sally Clark	1997/8 1999	2000 (U) 2003 (Q)		NA				*		*	*

Table 3: Summary of Significant Dates and Main Issues in Focused Cases

Validity and Reliability

There are considerable limitations that can be identified in this research project some of which are often common to qualitative research: -

- The sample of interviewees is selective and very limited in numbers.
- As a result of the limitations of access the sample tended to reach out to those who were available or accessible rather than always seeking the most relevant or balanced sample.
- In particular with this project the focus was very broad, taking a snapshot of a few people from a number of different perspectives or professions, thus in one sense diluting the sample still further.
- There is inevitable selectivity in question setting, editing and evaluation.
- Access to documents was limited to what could be found or made available.
- Access to all relevant people was not feasible – while there was an attempt to interview people who had been involved in some professional sense with each of the focused cases, to interview all the key players in a case (an ideal scenario) presented unassailable access problems.
- The case study approach faced major problems in dealing with the complexity of a number of cases in a way that did justice to the dilemmas and detail of the case without this complexity becoming overly turgid.

On the positive side there was some success in linking some of the key cases by interviewing key professionals who had had some involvement with the cases. Most importantly the in-depth interviews and use of case studies produced insights about how some different people interpret aspects of the legal system and justice, how they rationalise outcomes and processes and how things work in practice as opposed to in theory.

Is this kind of data and analysis reliable and transferable to the wider setting? Perhaps the best answer to this kind of question is reflected in one of the responses made by McConville and Sanders (1995) following critical debate about their book “The Case for the Prosecution” (1991). The question is not how often things happen, which would be impossible to quantify anyway, but that qualitative observations can illustrate that systems and people have the capacity to make certain things happen or interpret matters

in different ways and that this capacity can be shown to be used in certain instances. Moreover even in a small sample, such as this study, it is possible to observe certain parallels between cases and situations which may be significant or alarming. These tendencies or dangers may not be universal or measurable but their existence can be reliably identified and the meaning of them explored. Qualitative research therefore: -

“Is not an experimental science in search of law but an interpretative one in search of meaning”

Geertz (1973: 3)

No interpretation of meaning can be entirely reliable or indisputably valid, what can be done however is to support the interpretation with reliable evidence from numerous sources. This study has attempted to do this by drawing not only on interview data from various perspectives but also by examining documents, previous research studies and observing processes in action. Perhaps the strongest claim to validity in this study is that it focuses on events that have without question happened and had an impact on individuals and the society and values that surround them. Moreover it reflects the voice of a number of people directly involved in those events whose direct experience has validity to them and a message to others.

Methods Used

The Semi-Structured Interview

The research questions (see page 75) required participants to address a wide range of issues and to have the freedom to expand into areas that they felt to be important. The interview questions address both matters of detail and more general perspectives in order to achieve this. The semi-structured interview was deemed the most appropriate approach to obtain this contemporary data.

This type of interview is sometimes referred to as a “focused” interview. The researcher has a set of pre-planned questions but is usually looking for the respondents to expand and individualise their experiences in detail. This may lead the interview

along different paths to those planned but the presence of structure allows the interviewer to guide the discussion back to the key research questions by asking “funnelling” questions. Equally the interviewer can assist the respondent to expand or elaborate by asking “probing” questions (Payne and Payne 2004: 131). Kvale (1996: 133-135) describes numerous varieties of question types that might serve these purposes:-

- Probing questions that ask for more detail or example
- Specifying or direct questions to get to a direct or crucial point
- Indirect questions referring to how respondents think about the attitudes of others
- Structuring questions to move on to different topics
- The use of silence or pauses to encourage continued elaboration.

The question used below for illustrative purposes is an open question that aims to avoid suggesting a manner or type of response or implying an answer of a certain kind. The question tries, albeit unavoidably within the context of an emotive subject, to request a description of feelings about the appeal process without any suggestion or categories of what those feelings should be. The question is kept short and clear to minimise the influence of the interviewer. Responses might bring surprises or lead naturally towards the research questions. If necessary the probing questions of a closed or open nature can be used to guide responses toward more specific research questions about the nature and understanding of the appeal process : -

Open Question:

Can you describe the experience of going through an appeal? (Question 27 on Miscarriage of Justice victim’s questionnaire)

Probing questions: -

Did anything surprise you about the proceedings?

Did you understand and follow everything?

How long did they take to announce a decision?

How did you feel after the appeal?

In using probing questions caution must be taken to avoid questions that might imply certain answers or “come close to turning them into closed ones” (Foddy 1993: 129). The third probing question above is a specific one but the others, although probing, are again kept short, clear and open. Probing questions were not always necessary when, as was often the case, the respondents elaborated sufficiently to cover the research questions. The unnecessary insertion of probing questions might prove counter-productive if used in a way that interrupts the flow of relevant information.

Care was taken at an early stage to achieve the sound construction of open questions and probes that might follow (some probes were listed on the interviewer’s questionnaire which were not included on the participant’s questionnaire as a reminder should the initial answer not cover the desired areas) and the aim was to support the process by clear framing of research questions, good interviewing technique and careful reflective analysis.

The degree of structure applied may depend on the aims of the research and the semi-structured interview can reasonably be seen as located at various positions along a continuum between a structured and unstructured interview design. In this study the position on that continuum in the course of the interview varied according to how forthcoming the participant was. The interviewer may just have a rough guide of topics or as in this study a more detailed sequence of carefully worded questions (Kvale 1996: 129). The more unstructured the interview the more the direction of the interview is determined by the respondent and the greater detailed knowledge of the subject is required from the interviewer if he or she is to be able to ask relevant probing or clarifying questions (Payne and Payne 2004: 132). The use of a quite detailed interview schedule in this case promoted consistency across different interviews so that key issues were included in each interview. However participants were encouraged to develop the interview in the way that they felt to be most relevant and important both verbally and in any written advice about the project (see ‘Time Considerations’ section of the Participant Information Sheet at Appendix 4). The semi-structured interview therefore has the advantages of providing structure for comprehensiveness and consistency along with the flexibility to expand into areas not necessarily predicted by the researcher.

Analysing semi-structured interview data.

Analysis involves transcription of tapes, and some method of coding and retrieving of information in order to construct general themes and categories for analysis (Hammersley and Atkinson 1983). Initially coding related to quite specific issues, for example comments on, ‘changing witnesses statements’ or ‘alternative suspects’, information under these sub-categories could then be grouped into wider categories relating to ‘Case Construction’ for example – the wider concepts that developed to address the broad research questions. As can be seen from the chapter structure that emerged, sometimes initial categories of material grouped under a wide general heading were broken back down into sub-headings that formed chapters or sections of chapters within the wider framework. Thus ‘Case Construction’ for example became a ‘Part’ of the thesis containing a number of chapters identifying certain themes.

Coding of data for this study was undertaken partly by a manual listing and sorting of transcribed information into headings and themes and partly through the coding facility of the NVivo 2 qualitative data analysis software. Training in the NVivo package was undertaken at a relatively late stage in the project making its application to the majority of the data problematic. However it was used in a subset of interviews notably those undertaken with journalists.

Apart from the inherent risks of misinterpretation and overlapping in coding there are other risks that must be considered in analysing interview data derived from open questions. There is no guarantee that respondents have said what they really feel or what is most important to them (Foddy 1993: 138) and the relationship, rapport and interactions of the interviewer can influence responses. In the worst case scenario the influence of the researcher could turn the informants account into “a projection of the researcher’s preconceptions” (Payne and Payne 2004: 131). Additionally there is always the possibility that people do not reflect their memories or feelings accurately. There may also be a “contrast between what people do and what people say they do” (Atkinson, Coffey and Delamont 2003: 106).

Inevitably analysis of a large quantity of data taken from over 30 interviews lasting between just under one hour to over three hours each, depending on the responses of the participant, requires a substantial degree of editing and selectivity. Every effort was made to be aware of pitfalls of the kind described above and where feasible to back up

ideas and information with reference to relevant documents. Furthermore the editing process endeavoured to reflect alternative perspectives in line with the stated aims of the project.

Use of Documents and Broadcasts

Wherever available interview material was backed up by reference to relevant documentation and relevant television and radio broadcasts. Documentation included case documents such as witness statements, Judges' 'Summing Up' documents, CCRC Statements of Reasons, defence and prosecution summaries, police enquiry reports and psychological reports where these were made available by participants. Relevant submissions by campaigning organisations and transcripts of conference speeches were also accessed where available. Considerable attention was paid to Court of Appeal judgement documents available via University Libraries or websites. The limitation of this is that only a small proportion of Court of Appeal Judgements are "reported" and thus available to public viewing. Most of the key judgements required for this study were reported with a few exceptions perhaps the most notable unreported appeal being the second appeal of Sion Jenkins.

An effort was made to scan for and record any relevant television and radio broadcasts relating to miscarriages of justice, a number of which related to cases featured in the study.

Court Observation

Court observation was undertaken where relevant and feasible. The biggest disadvantage being the extremely time consuming nature of this. At various points Magistrates Court, Crown Court and Court of Appeal (Criminal Division) proceedings were observed and some of these observations are referred to in the document. Note taking appeared to be tolerated in Magistrates and Appeal courts at the time but not in the Crown Court, thus in the latter notes were written up soon after. Details of the "Cardiff Newsagent Three" Appeal were drawn from notes taken at the appeal which was some time before the present project was undertaken.

Ongoing Voluntary Work

Ongoing work in supporting victims and families affected by possible miscarriages of justice provided a backcloth to the more formal research methods and maintained awareness of the ongoing issues and traumas faced by this group. While this was not a “data gathering” exercise in the sense of the above methods it continued to provide useful insights into ongoing issues in this area.

Dissemination

A number of conference papers were given presenting aspects of the study and inviting peer review. Material from the extensive interviews undertaken with Annette Hewins was developed into a play which, with her permission, used her words and an additional narration part, to describe her story. “The Nettie Hewins Story” has been performed on three occasions, in the Law and Social Science faculties of Cardiff University and at the Norwegian Church Arts Centre on Cardiff Bay.

Ethics

Due to the sensitive nature of this research requests for interview access offered reassurance of a fair, balanced and objective approach that guaranteed anonymity where desired and respected participants’ right to undertake interviews or give information on their own terms. In a small number of cases the interview was spread over two different occasions for reasons of time, pressure and/or fatigue.

The researcher’s long standing concern with miscarriages of justice was acknowledged and the aim of joint working to advance justice rather than apportion blame was emphasised. The possibility that past problems or current concerns would be identified was openly acknowledged and issues of confidentiality with regard to individual cases were fully discussed and agreed with participants. Equally the research identified positive contributions that different professions make towards enhancing the positive aspects of the system and acknowledged these both in interviews and in the thesis.

Sensitivity was required when dealing with victims of injustice who may experience distress in re-living some traumatic events. This does not necessarily mean that they would choose not to discuss them. However every effort was made to ensure that they were aware of their option not to discuss any issues that they did not wish to discuss, to terminate interviews or withdraw from the research if that was their wish. Furthermore it was stressed that the time, place and pace of any interview was on their own terms and that the researcher would be sympathetic to any needs they may have in relation to the conduct of the research (see Appendix 4). In reviewing perspectives across different social and professional boundaries a sensitive and tactful approach was needed when dealing with issues that challenged the effectiveness or integrity of certain professional roles at certain times or in certain respects.

There was a possibility that participation could be viewed as inappropriate by others and/or be detrimental to an individual's interests in some other way. For example: -

1. The case of an employee who speaks beyond what is considered to be their remit or without the full agreement of his/her employers. The right to anonymity is clearly important here, but also efforts were made to ensure that participants were aware of the nature of the research and again their right to limit the scope of what they discuss or withdraw their involvement.
2. Some victims of miscarriages of justice could have felt, and did in one case, that their participation could jeopardise their welfare with prison authorities or probation officers if they are either in custody or on licence. This is unlikely given that the research is academic rather than journalistic and there is no reason why the authorities should object or even be aware of their participation. The legal basis of any such objection would in any event be dubious; however the potential for harassment cannot be ignored, even for those cleared of any offence. This problem again requires sensitivity, respect for any concerns and choices around issues of anonymity and degree of involvement.
3. The use of case papers could result in loss or misuse. Careful handling of material provided was needed to ensure confidentiality and secure safe keeping. Case papers and interview notes or tapes contain sensitive data in terms of

alleged offences and possibly mental or physical health or personal matters. The researcher's duty to ensure informed consent had been gained and to treat the information with due sensitivity was closely observed. In line with the principles of the Data Protection Act participants were assured that any data collected would be securely stored and not distributed or used for any purpose other than the thesis without their permission.

All participants had the option of remaining anonymous, although given that cases may have been in the public arena and more importantly the fact that most wrongly convicted people are desperately keen to 'promote their case' and convince others of their innocence, being named in the research was the preferred option for all but one of those interviewed in this group. Some may be aware that naming participants does have the advantage of enabling participants to check that they have not been misquoted or misrepresented.

Some professionals involved in the research also expressed a preference to be identified or were happy to leave the decision to the researcher, while others requested anonymity. The decision was taken in the case of professionals to retain anonymity unless they were happy to be identified and also that there was some value in making the identification, for example, to clarify their role and involvement in a case or the particular significance of a comment given an identified experience. Some names have been used when these are already in the public arena or in public documents; these include for example people involved as witnesses or professionals in certain case studies.

The assurances given to participants in all these respects were summarised in the Participant Information Sheets which were provided prior to interviews with participants (Appendix 4) along with verbal assurances at the time of the interview.

The ethical and practical problems, including access difficulties, were substantial. However wrongful convictions remain a major and disturbing social problem with vast costs in terms of resources, finances, public safety and human suffering. There is a clear and apparent need, and an ethical argument, for developing empirical research that gives a direct voice to the parties involved in this socially and ethically important topic.

PART 3

CASE CONSTRUCTION

“You can’t elaborate on the truth you can only build on a lie”

John Roden (Gartree Prison 30.6.07)

CASE CONSTRUCTION - INTRODUCTION

Chapter 2 in Part 1 examined a wide range of literature, identifying a host of potential risk factors that could contribute to the creation of wrongful convictions. Part 3 uses the study data to focus in on the complexities of how some of these risk factors might interact to construct wrongful convictions. An extensive case study (Chapter 5) is used, along with interview and other data from this study (Chapters 6, 7 and 8), to illustrate the social context in which various risk factors can interact to create misleading pictures. The core concept of ‘case construction’ is illustrated not just in the context of the police investigation but as a process that comes to permeate the whole of the prosecution process. Later parts of the thesis will then illustrate how resistance to rectifying wrongful convictions remains predicated on the case construction on which the prosecution was based – a process of ‘magical legalism’ that re-frames inherent uncertainty into proof and finality.

The notion of ‘case construction’ is usually associated with McConville, Sanders and Leng (1991) and their major study of police practices and investigation entitled “The Case for the Prosecution”. The concept essentially involves the interpretation, addition, subtraction, selection, manipulation and re-formulation, or in some cases creation, of information to form a prosecution case (McConville et al 1991 Ch. 1). It is self-evident that the preparation of any case or argument, sound or unsound, will in some sense require a case construction. Used in this context however case construction implies that the argument is built not on a balanced and open minded weighing of evidence and alternatives but on underlying assumptions or pressures which create a leaning towards a biased or prejudiced interpretation and selection of evidence.

The existence and importance of case construction has been recognised and described by numerous writers (for example Green 1997; Sanders and Young 2000; and Innes 2003). The subtle manipulations of case construction help to put the more blatant “causes” of wrongful conviction into the context of a social and institutional process. In so doing they illustrate why, as argued by McConville et al (1991), reforms such as the protection of suspects established by the Police and Criminal Evidence Act 1984 may frequently be circumvented by more obscure manipulations.

Some common features of investigations and prosecution/trial processes that might support potentially erroneous case constructions are as follows: -

- Witness manipulation/changing statements
- Manipulating interview content
- Selective use of physical evidence
- Downplaying evidence/alternatives that 'don't fit'
- Portraying the normal or coincidental as suspicious
- False associations,
- Speculative motives and character assassination
- Selective cross-examination and court evidence

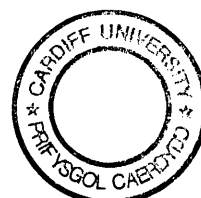
(Eady 2003: 40-44)

Significantly such subtle processes are highly unlikely to be considered as acceptable grounds of appeal, often being very hard to substantiate and, even if this is possible, they are normally regarded as issues that were considered by the jury ("jury points"). The Court of Appeal is highly unlikely to consider such matters as significant abuse of process or their revelation as constituting new evidence. Unlike the forced confessions and gross abuse of process of the past they arguably form the basis of the new "appeal resistant" formula for miscarriages of justice (Eady 2003: 69-70).

Innes (2003) in his book "Investigating Murder" makes numerous references to the process. As the title suggests the book is not about miscarriages of justice but about the way murder investigations operate. There is a strong implied suggestion that aspects of case construction, in its negative sense, can occur in murder investigations whether or not the outcome is a miscarriage of justice: -

"On some investigations detectives were observed to follow a line of enquiry even though they were in possession of material suggesting the defunct nature of the guiding theory"

(Innes 2003: 185)



“Certainly once a suspect was identified, there was immense pressure to discontinue previous lines of enquiry which were now seen as unproductive and costly”

(Innes 2003: 261-2)

Other people who maintain that they are victims of miscarriages of justice describe this process precisely without any previous knowledge of the idea, for example: -

“The police did not collect, obtain or record any evidence that was available that could have assisted the defence...They fished around for trivial and irrelevant information and then pieced together a scenario that fitted their theory....they weren't bothered with authenticity, accuracy or reliability....it was a clear case of 'we have a theory do not confuse us with the facts'”

(Nick Tucker quoted in Eady 2003: 41)

Similarly the idea is familiar to some lawyers: -

“Make your decision first and then find reasons for it....it seems that it may well be a situation whereby an individual has been selected and then every aspect of evidence, however irrelevant it might be, is put into the pot to add to the poison. There's a concern that this might have happened in this case”

(Barrister John Cooper speaking on BBC2 'Newsnight' 9/2/06 in relation to the Sion Jenkins case)

These comments show how case construction is related to, and promoted by, the way the adversarial system operates.

“The Case for the Prosecution” (McConville et al 1991), and hence by implication, the notion of case construction did invoke some critical responses largely argued on the basis that the study itself was selective in its approach: Morgan (1995) argued that incidents or comments in the narrative were selected to illustrate the basic 'case construction' premise but that these were not shown to occur with any statistical or comparative significance. Consequently comments and actions are attributed to some police officers but the reader is not told how many or how often this occurs. Thus points are made on weak evidence and counter evidence is downplayed. A similar criticism suggested this method was used to support an argument that pre-dated the research and that the book was not a research monograph at all but an “impassioned presentation of a single argument” (Davis 1992: 323). It was also argued that the narrative made misleading generalisations, not least by attributing “motive and

intention in a way which oversimplifies complex and sometimes inscrutable processes” (Dixon 1995: 217)

In response to these criticisms McConville and Sanders (1995) stressed that statistical data had been used in the study and that their figures were reflective of national figures. However, more important was the need to explain those figures and to understand processes from a theoretical perspective that is about social construction not statistical ‘facts’. Further they argue that research in this area needs to be interpretive not just descriptive, there is a need to assess the significance of certain issues. It is not how often the rules are broken or manipulated, which would in any event be impossible to quantify, but the fact that the system enables this to happen and that the police have the capacity to take advantage of this.

This last point is crucial where miscarriages of justice are concerned; it is the potential for things to go wrong (and not just in policing this study would argue) that creates the opening for tragedies to happen. Dixon’s view (above) that social and interactive processes are “complex and often inscrutable” is certainly true: It is the very complexity and inscrutability of case construction as a process that makes it so potentially dangerous. This study suggests that the notion of case construction is widely recognised as to some extent a necessity but also as a risk. Participants in this study universally recognised the risk, even those who felt miscarriages of justice were very rare in current times and those outside the legal profession who recognised it in their own practice as well: -

“But case construction, yes, and it’s easy and journalists are prone to this as well, get an idea and you become blinded to things that don’t fit, so it’s not malicious and in murder cases in particular, as I say there is no motive for getting a murder case wrong but there is a hell of a motive to clear it up and I think it’s probably the case that you are more likely to get miscarriages of justice in notorious cases.” (J1)

Much of the following discussion relates to the complex, sometimes subtle process of case construction and goes beyond the investigation process to attempt to illustrate how, within the adversarial context, the process continues through trials and post conviction procedures.

Initially the case study example of Jonathan Jones' wrongful conviction will be presented to demonstrate case construction in action. The concept is then further explored using data derived from this study in chapters on "Corruption and the Merging of Moral Boundaries", "Misleading Information and Human Error" and "Assumptions, Interpretations and Selectivity". This is followed by a brief concluding summary. Part 4 then uses the study data to reflect on how case construction may influence and perpetuate wrongful convictions through the workings of post conviction procedures.

CHAPTER 5

THE LLANHARRY MURDER MYSTERY: FISHING IN A SHOAL OF RED HERRINGS

On 26th July 1993 two pensioners Harry and Megan Tooze were shot through the back of the head at their isolated farmhouse in Llanharry, South Wales. Their bodies were dumped in the cowshed and buried under bales of hay and a large rolled carpet. In December of 1993 Jonathan Jones was charged with the murders and, in April 1995, convicted of double murder by a 10-2 majority. One year later in April 1996 Jonathan was cleared at the Court of Appeal.

Jonathan lived with Harry and Megan's daughter Cheryl in Orpington, Kent. They had been in a long term relationship but were not engaged as often reported in the media. The prosecution case purported a curious scenario; that Jonathan, motivated by potential financial gain or some perverse form of jealousy, had travelled by train from Orpington to Llanharry on 26th July, committed the murders around 1pm and then travelled back to Orpington by train to reach the flat in the early evening. The journey would have involved four different train and London underground links. What might have created initial suspicion in the minds of investigators was the undisputed fact that Jonathan travelled by car from Orpington to the Llanharry farmhouse, late the same evening, arriving in the early hours of the morning around an hour before the bodies were found. The explanation given by Jonathan and Cheryl for this car journey was that Cheryl had become very concerned about her parents not answering her phone calls that day, especially after phoning a neighbour who called round to check and reported a light on but no sign of anyone around. Harry had recently been in hospital and it was very rare that both he and his wife went out in the evening. Following discussions with Cheryl, Jonathan decided to go to Wales to check what had happened. Naturally enough on making this journey Jonathan stopped on occasions to phone Cheryl to check if she had been able to contact her parents thus hopefully avoiding having to complete a long and perhaps unnecessary journey. Jonathan's arrival at the farm soon after the police had arrived to investigate the neighbours' concerns may have appeared somewhat surprising,

especially as no bodies had been found at that stage, the police were simply checking out the absence of two pensioners.

This chapter examines some of the aspects of “case construction” used to build a fallacious case against Jonathan Jones: Specifically how irrelevant and misleading observations were re-constructed as evidence. The chapter further suggests that the case construction was fuelled by what might be termed as “The Close Perpetrator Assumption” – the notion that many murders are apparently committed by those close to the victims. It is suggested that this notion may have unduly influenced the thinking of investigators. The consequent outcome in this case was a curious “stranger than fiction” murder mystery scenario constructed by investigators, embraced by prosecutors and accepted by 10 out of 12 jurors – an outcome termed here for effect “The Agatha Christie Syndrome”.

The “Close Perpetrator Assumption”

Innes (2003: 30) examining the 1997 Crime Statistics for England and Wales highlights that, of homicides committed between 1988-1997, 79% of female victims and 56% of male victims were killed by someone who had a close relationship with the victim. Even taking into account the possibility that some of these convictions might be miscarriages of justice, it is clear that the term ‘assumption’ might be unfairly used in this context. This pattern has also been identified by other writers, for example Brookman (2005). It is entirely logical for investigators to consider previous patterns of offending in any line of inquiry. In this case however it is suggested, inevitably somewhat speculatively, that this pattern may have unduly influenced investigators and fuelled the creation of a case construction lacking in any sound basis. (The history of miscarriages of justice includes a number of other homicide convictions of those close to the victims, for example, Sheila Bowler, Ryan James, Donna Clarke, Sion Jenkins, and many others that, while not yet cleared, have received widespread concern, for example; Nick Tucker, Susan May, Ian Thomas and Jeremy Bamber)

It is suggested here that the statistically well founded “close perpetrator” idea may have been a factor that unduly influenced the approach of investigators to the point of becoming more akin to an assumption that evidence was created around, rather than a conclusion based on sound evidence.

The “Agatha Christie Syndrome”.

In an article on the case of Sion Jenkins the journalist Bob Woffinden (1998) quotes Lord Devlin, asserting that defendants should not only have the right to the presumption of innocence but also where appropriate: -

“The right to the advantage of the initial incredulity”
(Lord Devlin quoted in Woffinden 1998)

In other words investigators and juries should take into consideration the likelihood of previously caring, law abiding, up-standing members of the community with no apparent mental health or personality problems (Sheila Bowler, Ryan James etc) suddenly inventing complex, devious plans to commit and then cover up brutal pre-meditated murders for financial gain or out of jealousy or previously unapparent hatred. It is not to say that this could never happen, but surely to prove such an unlikely turn of events should require very strong evidence indeed.

Jonathan Jones had no criminal record, no history of violence or mental health problems, no knowledge of or interest in firearms, only a background as a caring family orientated man who had a close and positive relationship with the victims, often assisting Harry with work on the farm. Harry and Megan’s daughter Cheryl knew this and has never doubted Jonathan’s innocence even in the face of her parents’ murder. For Cheryl it was an act that her partner would not be capable of contemplating.

Did certain circumstances, some slightly unusual and others entirely normal, get interpreted in a way that created a fictional “Agatha Christie Syndrome” fuelled perhaps

by an underlying assumption about a “close perpetrator”? The nature of the case construction in this case will now be considered to support this theory.

The Case Construction: A Sample from the ‘Shoal of Red Herrings’.

Financial and Jealousy Motives

While the prosecution is under no obligation to provide a motive, to do so is obviously advantageous in convincing a jury. The financial motive was promoted by numerous suggestions about Jonathan and Cheryl’s interest in starting a business (Jonathan’s alibi was that he was in Orpington on the day of the murders looking for a suitable office to rent) and about their occasional viewing of houses for sale. In addition to portraying such basically ordinary activities as suspicious there was a general misrepresentation of their financial position. According to Jonathan all previous employers consulted by the police understated his salary “by at least 20% - how did that happen?” He and Cheryl were wrongly described as being in difficult financial circumstances and witnesses had to be called at trial to testify that a book found in their flat entitled “Write Your Own Will” was bought in 1991 and used to advise Harry and Megan on specific issues following the death that year of Megan’s mother.

Despite an extensive investment in such “evidence” the prosecution had abandoned almost all the financial motive claims by the end of the trial. Similarly suggestions about a jealousy motive could not be substantiated, founded as they were on dubious interpretations of witness statements: -

“Cheryl Toose was clearly a devoted daughter and the closeness of her relationship to her parents was, in the eyes of the defendant, an obstacle to their relationship.....There is evidence that the defendant became tired and frustrated by this devotion.”

(Prosecution Case Statement Para.38. 22/4/94)

Even if such frustration was to be believed, unlikely as this is given Jonathan’s own closeness to Harry and Megan, the notion that such frustration could lead a non-violent

man to commit a brutal pre-meditated double murder would probably be considered too absurd to feature even in an Agatha Christie scenario.

While the prosecution eventually conceded at trial that neither motive could be proved, they had nonetheless invested a great deal of time and energy into sowing the seeds of suspicion in the minds of the jury. The Court of Appeal eventually acknowledged both the unlikely nature of the prosecution case and the failure to show any motive: -

“First, if the appellant was the killer there were several extremely perplexing features. In particular, a man of good character with no experience of shotguns had, for weeks, meticulously planned the execution of his girlfriend’s parents towards whom for over a decade he had shown no sign of hostility. No motive was shown for those executions”

(Court of Appeal Judgement R v Jones [1996] EWCA Crim 397 page 7)

Speculation about motive is a necessary feature of misleading case constructions.

Taking an Extra Hour to Travel back to Wales

The prosecution maintained that Jonathan’s journey back to the farmhouse from Orpington took much longer than it necessarily should have done. This claim was untrue for a number of reasons: -

- The weather was bad with heavy rain.
- Jonathan was stopping to phone Cheryl to see if she had heard from her parents.
- Prosecution claims that he had phoned Cheryl from the Severn Bridge Services at 1am (Prosecution Case Statement Para 44) were shown to be wrong by BT records (Trial exhibit GADW1) which showed he had phoned at 1am from Leigh Delamere Services, some distance before the bridge, where, by his own account, he stopped for about 20 minutes.
- The police record log (exhibit RE1) showed that Jonathan arrived at the farm at 3.30am. In fact the BT records (exhibit GADW1) showed that he had made phone calls from the farm well before that time, confirming Jonathan’s own estimate of his arrival well before 3am. It was established that the police officer who wrote

the log was not even present at the farm at the time of Jonathan's arrival and the log was written the following day (Evidence and statement of PC Donovan).

What however was the significance of this had it been true: -

"The reason is, say the prosecution, that by delaying for as long as he could, he had hoped that by the time he arrived the search for the bodies, which he knew would be underway, would have located them."

(Prosecution Case Summary Para 44)

The Prosecution document however fails to explain how or why such a delay would have assisted the perpetrator, what difference it would have made whether the bodies had been found or not, or indeed why a perpetrator would wish to return to the crime scene on the same day? There appears to be an attempt to create suspicion on the basis of statements which lack any rationale. Slightly more rational was the prosecution's later speculation that Jonathan had returned to hide evidence that he had left in the area and had spent time doing this. However no evidence of any kind was ever produced to support such speculation.

Creating the Hour and a "Lie" in Witness Statements

Case construction as described above can involve subtle methods by which support can be developed for the prosecution case, even in the case of such a total 'red herring' as the delayed journey. The subtle manipulation of witness statements is an example of such a process. Jonathan was interviewed numerous times as a witness, officially at least, before becoming a suspect. Unsuspectingly he was doing his best to help the police with their enquiries. The result was, according to Jonathan's later reflections, not only the reinforcing of the erroneous story of the delayed journey but additional ammunition for the police to suggest he was lying to them: -

"Police 'What time did you leave Orpington?'
Jonathan 'Oh between 9 and 11'
Police 'About 9.30 would that be fair?'
Jonathan 'Yes'

A couple of weeks later, same question same answer ‘between 9 and 11’

Police ‘About 10.30 would that be fair?’

Jonathan ‘You’re happy to go along with this not wanting to be difficult and correct everything they say so - Yes’

A third policeman looks at the summary and says ‘In this statement you said 9.30 and in this statement you said 10.30?’

In fact you haven’t said that, you just haven’t taken issue with the summary, but it gave the appearance of changing a story.....these things I’m afraid I believe were done deliberately and I really wouldn’t go into a police station now and report a missing dog – no seriously – without a formal record of what was said”

(Jonathan Jones Research Interview)

The Thumb Print on the Saucer and the Changing Police Statements

The prosecution claimed that Jonathan left an incriminating thumb print on a saucer in the kitchen at the farmhouse when he arrived to commit the crime.

“It was carefully planned, said Mr Pitchford, but he made one fatal error – he forgot to wipe the saucer”

(The South Wales Echo Fri 7th April 1995 quoting Christopher Pitchford QC for the Prosecution)

When the police, and soon after, Jonathan, arrived at the farmhouse they found the table in the small kitchen laid out with the best china, normally only used for special visitors. The killer(s) had callously sat and had tea with their victims before committing the crime. When he arrived in the evening Jonathan remained in the kitchen while the police searched, he recalled sitting at the table, writing addresses for the police and touching one or two items. Although he did not specifically remember touching the saucer, it is certainly possible that he did.

According to Jonathan, and a Defence Summary Document provided by him, the partial thumb print found on one of the saucers was examined by two fingerprint experts in the aftermath of the crime and found to be of no evidential value. Five months after the murder Jonathan was charged, largely it seems on the basis that experts had confirmed that the print was definitely his. During this time Jonathan had had numerous witness interviews, no doubt furnished with cups of tea, and his flat had been searched. Although

this is somewhat speculative, the possibility that the print had been lifted from somewhere other than the saucer in the Tooze's kitchen may not be inconceivable given the historical examples of "noble cause corruption" that have been perpetrated by investigators in the past, who may have been mistakenly convinced that their hunch had led them to the perpetrator.

The Defence Summary Document also describes how six months after the murders, officers present at the farm on the night were interviewed by senior officers and asked to write new statements. These statements effectively created a continuous observation rota of Jonathan in the kitchen (in fact he was often left on his own) – as such they could claim in evidence that he did not touch anything on the table. Even had this been true it would not prove that he had left the print earlier in the day as he had often cleared the table and assisted in the kitchen at the house on other occasions.

Despite the collusion of officers, their previous statements and lack of honesty were apparent under cross-examination at the trial, such that the judge called their evidence to a halt and commented that: -

"It is clear no officer knows where he was, where any other officer was or where the accused was at any time"

(Mr Justice Rougier at the trial quoted in the Defence Summary Document)

It is in this context that Jonathan can justly claim: -

"The police lied in court, there's no doubt about that, it's a matter of public record"

(Jonathan Jones)

Nonetheless the prosecution had fed the jury a substantial red herring with the crucial thumb print but they needed a smaller red herring to explain why Harry and Megan would have got out their best china, used only on special occasions, for Jonathan who was considered so much "part of the family" that he even had his own mug at their house. Harry and Megan, purported the prosecution, had been led to think that Jonathan had arrived, curiously without Cheryl, to announce an engagement, hence the special occasion

china. Like so much of the prosecution case this bizarre speculation was not supported by any shred of evidence.

The Trench Coat – The Prize Red Herring

The trench coat issue is an outstanding example of how evidence can be constructed and interpreted as relevant at all levels of the criminal justice system, when in fact it has no logical basis whatsoever. Three issues were falsely related to each other and then linked to the murder on the basis that they supported each other, even though none could be directly related to the murder.

Firstly, two witnesses who saw Jonathan on TV at Harry and Megan's funeral claimed that he resembled a man they had seen, when passing in a car together, in a lane near to, but not in the immediate vicinity, of the farm. This man was "acting suspiciously" and wearing a beige trench coat and, they thought, possibly a wig and dark glasses. (It was only after the trial that the defence were able to discover that the person they had seen was a local character who dressed in this way and tended to drink from a bottle of cider hidden under his trench coat – presumably this constituted "acting suspiciously"). The prosecution claimed that this was Jonathan, who as it happened, was in Wales at that time, and that he was doing a "dry run" for the murder. It was a month before the murder that the witnesses had seen this man so it is hard to understand how such a link could be made, especially as the notion of a dry run is absurd. Jonathan already knew the farm and the area, he could if necessary have walked around the area without creating the suspicion that might be caused by dressing up in disguise. One thing that could not be disguised is Jonathan's height, 6'4", and the original witness statements giving estimates of 5'9" reached 6' 0" in later statements (Court of Appeal Judgement 1996 - R v Jones EWCA Crim 397 p.3).

The second element of the trench coat scenario involved two railway workers who originally gave statements that on the day of the murders that they saw a man in a trench coat (described in the prosecution statement as a raincoat) pass immediately between them on the platform of Pontyclun Station (the nearest station to the farm). Incredibly it was only just before the trial, when they arrived at court, that they saw Jonathan, at which

point they both stated that the man they saw was definitely not Jonathan (Court of Appeal Judgement p.4). Their evidence therefore was not used as part of the prosecution case but had clearly fuelled the case construction up to that point especially in relation to the third issue.

The third point was that Jonathan admitted that some years earlier, when he worked in the City of London, between 1986 and 1992; he had possessed a beige trench coat. When Jonathan was arrested the police embarked on house to house calls in Orpington to try to find witnesses prepared to support the idea that he possessed such a coat at the time of the murders. Eight witnesses (described in the prosecution summary as “A whole mass of witnesses” Para 48) claimed that they thought he had, and gave evidence to that effect, creating also the impression that Jonathan was lying about the possession of such a coat. This evidence disregards the 200 or so people who could not recall him having such a coat at that time, including close neighbours. It also disregards the frailty of human memory for eyewitness testimony and estimation of time. Further more it hides the potential for manipulation of witness testimony: -

“Our private detectives spoke to people in Orpington who had had the police knock the door and say ‘We’ve got this bastard we’re holding him in custody, we’ve got him for murder and we want you to help us keep him there’. You know if you prefix what you say with that, you get a very different response to the response you get in other circumstances when you’re asking an open question”

(Jonathan Jones)

None of these ‘trench coat’ issues could be shown to have anything other than at best a purely speculative relationship to the murder. Neither in reality could they be shown to relate to each other. Moreover all three were at best inaccurate. Nonetheless the extent to which they contributed to a picture of guilt created by a false case construction is perhaps illustrated most dramatically by the learned judges of the Court of Appeal who considered the issue not only significant but **the only strong evidence in the case**: -

“On reviewing the whole of the evidence it seems to us that there was only one matter on which, in isolation, there was strong evidence against the appellant, namely his wearing of a beige trench coat in the summer of 1993”

(Court of Appeal Judgement R v Jones [1996] EWCA Crim 397 p.14)

Fudging the Alibi

The prosecution stressed that no-one could remember seeing Jonathan in Orpington that day, whereas in fact he had viewed an office in a business centre and left an envelope with details of the kind of property he was looking for at the reception desk. The police suggested he had planted this note; in fact there was documentary evidence that the receptionist had received the note (Defence Summary Document). The fact that no-one saw him in the Llanharry area that day (a rural area, where individuals are more visible than in a busy London suburb like Orpington) was not an issue for the prosecution.

Jonathan described watching part of the cricket coverage on the television that afternoon and was able to describe details, confirmed by the BBC, including an occasion when four specific commentators were in discussion together. The prosecution made various suggestions that he had watched this the day before or even seen it at the farm. However the BBC confirmation of the detail that he gave, refuted both these suggestions by identifying the time and day that certain events were broadcast. On the surface this seemed a strong alibi but the fact that the prosecution were able to fudge the issue, by focusing on some other details that he had not given, illustrates how trial procedures can continue to successfully create a misleading case construction even in the face of strong defence evidence. One of the successful grounds of appeal was the judge's misdirection of the jury on this issue (R v Jones EWCA Crim 397 1996 p 13-14).

Another crucial issue that was fudged at the trial was Jonathan's claim that he spoke to a lift engineer at the flats where he lived in Orpington, at about 1.30 pm on the day of the murders. Despite providing significant detail, including describing a specific engineer working in a specific position and place that he worked only on that day (crouching, mixing cement in the basement), the prosecution were still able to maintain that this was part of an elaborately constructed false alibi. Firstly they stated that the lift engineer could not remember Jonathan asking him when the lift would be ready and secondly maintaining that the lunch break times given by the engineers would have meant that they would not have been working in that location at the time Jonathan claimed. Thus the portrayal of Jonathan as a liar was again promoted. The Defence Summary Document describes how the lift engineer did not in fact say he had not spoken to Jonathan but that he could not recall him specifically from a number of people spoken to at various times

about the lift. The discovery of new evidence after the trial, of timed and dated invoices supporting the assertion that the engineers would in fact have been exactly where Jonathan described at the time he described it, formed another successful ground of appeal (Court of Appeal Judgement p.13). The caution and reluctance of the Court of Appeal to challenge verdicts is illustrated however by their comment on this new evidence: -

“In itself the fresh evidence alone would not, in our view, render the verdict unsafe. But it is a matter which has to be taken into account together with the other successful grounds of appeal”

(Court of Appeal Judgement p. 13)

Other Assorted Red Herrings

Planting the Key

The police asked Jonathan, when he arrived at the farm, to locate a key to the kitchen door which had been left locked by the killer(s). When he immediately located the key for them the prosecution were able to suggest that he had taken the key with him at the time of the murders and simply replaced it when asked to locate it (Prosecution Case Statement para 45). Meticulous examination by the defence of crime scene photographs and police evidence however established that the spare key was hanging above the mantelpiece before Jonathan arrived at the farm.

Burglary of the Shotgun

The fact that a shotgun had been stolen from the farm two years before the murders was raised in court to increase suspicion of an “inside job” even though there was no evidence that Jonathan had been the burglar or that that particular shotgun had been used in the murder two years later. The Court of Appeal conceded the ground of appeal that this should not have been admitted as evidence. (Judgement p. 8)

Stacking the Hay

The prosecution suggested that the hay bales covering the bodies had been stacked by someone “familiar with the rudiments of stacking bales” (Prosecution Case Statement para 46). Jonathan was able to describe this method of stacking hay, perhaps because he

had worked on the farm and also, as he stated, there is a logical way that most people would stack hay.

Custody Confessions

As has often occurred in weak cases, the prosecution sought to use prison informers to bolster their case by claiming Jonathan had confessed to them while on remand. Fortunately this evidence was dropped by the prosecution at a late stage when it was discovered that the two informers had both copied passages from the Western Mail newspaper, including typing errors, in order to provide details of the murder (Jonathan Jones Interview).

‘Treating the Bodies with Respect’

Paragraph 46 of the Prosecution Case Summary makes two extraordinary points to imply that Jonathan was the perpetrator. Firstly that hiding the bodies and leaving the light on in the kitchen were ways of making things look normal and prevent discovery, so as to give the perpetrator “enough time to put a considerable distance between himself and Llanharry”. It hardly needs saying that any perpetrator might want to do this whoever they were. Secondly the following statement appears to imply that the respect Jonathan had for Harry and Megan somehow re-appeared after the murder: -

“Further, the dead bodies were treated with respect – the spectacles and penknife of Mr Tooze were placed neatly near his body, and the broken dentures of Mrs Tooze were placed in her shoe, again near the body”

(Prosecution Case Summary Para 46)

Whatever the motivation for this arrangement (probably just a case of ensuring these items were hidden with the bodies) the notion that it implies respect is absurd given what had just been done to these people. To then imply that such “respect” points to evidence against someone close to the family illustrates the degree of extrapolation and wild speculation that can be employed in fallacious case constructions.

The Existence of Other Leads

There were numerous people who, according to the Defence Summary Document, were not adequately investigated, including two men named by a police informer. In addition Harry had visited a solicitor the day before the murders with a man who was never identified. Fingerprints were found around the farm that fitted none of the known visitors to the farm and a black jeep style vehicle seen by witnesses in the lane leading to the farm at the time of the murders was never traced. In addition the police lost certain items of potential evidence. Most remarkably, the police scene of crime video shows a large carpet being lifted off the bodies by two policemen, suggesting that probably two people would have been needed to put it there. According to Jonathan Jones' solicitor, this carpet, that might have contained vital scientific links to the perpetrators, somehow disappeared as an exhibit.

Much of this case construction therefore was built around character assassination, speculative implications and the contrived interpretation of every event or minor coincidence as sinister. The close perpetrator assumption linked with a few unusual circumstances may have led to a distortion of thinking which created a belief that the evidence was of high quality and perhaps even prompted "noble cause corruption". The momentum of the inquiry focus on the wrong man meant that the lack of an obvious alternative explanation justified believing an absurd one.

According to Jonathan the prosecution were aware of the weakness of their case and needed the jury to get a sense of a sinister underlying 'reality': -

"I'll be the first to admit that there is no direct evidence against the defendant but sometimes it's what we don't know rather than what we do know that's important – That's pretty much exactly what he said, inviting the jury to speculate about what hadn't been tendered as evidence!"

(Jonathan Jones recalling the prosecution barristers closing speech)

The Judicial Responses

The Trial Judge

On conviction Mr Justice Roush made the following comment to Jonathan: -

“This was a planned and pitiless execution of a harmless couple who should have had nothing but your affection and respect. It is an evil that is outside the contemplation of all of us.”

A few weeks after the trial he took an unprecedented action in writing to the defence barrister with the following statement which was, soon after, released to the media: -

“I am bound to record that the verdict caused me some surprise.many items of evidence on which the prosecution relied as pointers of guilt had fallen decidedly flat. But most important of all (although this must always remain a matter for the jury) was the contrast between the total ruthlessness and pitiless determination of whoever killed Harry and Megan and the man stood in the dock and for four and a half days in the witness boxI found myself thinking that if I were the tribunal of fact, despite many suspicious circumstances, I should be conscious of significant doubt.”

(Mr Justice Roush quoted in ‘The Western Mail’ 4th May 1995)

The Court of Appeal

The defence were granted leave to appeal and submitted 19 grounds of appeal, six of which were accepted to allow the appeal. One of the successful grounds was the new evidence concerning the lift engineers’ timing which supported the alibi. The other five successful grounds related to errors or misdirection in the trial judge’s summing up/direction to the jury, in fact 17 of the 19 grounds were concerned with such errors.

Given that the Court of Appeal is extremely reluctant to re-visit evidence heard by the jury, trying to find gaps or inaccuracies in a judge’s summing-up is perhaps the only way by which a defence team can try to question the jury’s interpretation of the evidence. It is an indirect and uncertain route but in some respects can give the Court of Appeal a route

they can perhaps accept for examining how the jury might have interpreted or misunderstood the evidence. That said the Court is not over keen to be critical of fellow judges. In this case they accepted 5 of the 17 grounds relating to misdirection but made a point of praising their colleague nonetheless: -

“The summing-up came at the end of almost ten weeks of evidence and a week of speeches and was, in many respects, a tour de force in relation both to the law and the numerous and detailed factual issues. It was admirably succinct, scrupulously fair and, save for the very few blemishes to which we have referred, entirely accurate.”

(Court of Appeal Judgement R v Jones EWCA Crim 397 1996: p14)

Perhaps the real error that Mr Justice Rougier made was to allow the prosecution case to go to the jury at all, given that, as the Court of Appeal admit, it was “a prosecution case which was by no means strong” (Judgement p14). This was a missed opportunity for the Court of Appeal to send a clear message to prosecuting authorities that murder convictions should not be sought on the basis of such weak evidence and to encourage judges to declare no case to answer when this happens, something they are very reluctant to do. While the Court of Appeal quashed Jonathan’s conviction, the judgement was constructed in legal terminology and no such ethical point was made. In fact they gave exactly the opposite message, despite their admission that the case was by no means strong: -

“The limited function of the trial judge in relation to the question of guilt is to decide whether there is, in law, sufficient evidence for the jury to consider, that is whether the evidence is such that a reasonable jury, properly directed, could convict. This trial judge, **rightly in our view**, decided there was such evidence”

(Court of Appeal Judgement p.14 – emphasis added)

This amounts not only to an admission that the judiciary believes that it is acceptable for juries to be presented with weak cases in trials concerned with the most serious offences but also demonstrates a failure to appreciate the significance of Mr Justice Rougier’s post trial comments which clearly show that he did not believe that the evidence was sufficient to reasonably convict.

In fairness to Mr Justice Rougier he may well have realised his error and compensated with his unprecedented post trial comments about the verdict. This was presented as a ground of appeal (apart from the new lift engineer evidence the only one that did not refer to summing-up errors). While it may have had some influence on their overall view, the Court of Appeal rejected this as a ground of appeal, re-stating their constitutional commitment to the sanctity of the jury and the independence of the judge; over and above, one might argue, the welfare of an innocent man: -

“The question of whether he would himself have convicted the defendant did not arise. His view was, and is, of no more relevance or materiality than that of an intelligent bystander in the public gallery who saw all the witnesses, heard all the evidence and understood the issues in the case”

(Court of Appeal Judgement p.14)

While this may make sense in terms of rules and roles, the cost in this case was the imprisonment of an innocent man for nearly two and a half years. In many other cases that time span may be much longer and the injustice may never be rectified. Jonathan had a committed legal team, strong family support, massive support and concern within the media and his own considerable intellectual ability – advantages that many in his position do not have. These factors however should not downgrade the trauma and seriousness of what happened. The following comment is one of reflection and characteristic understatement, yet none the less poignant: -

“All experiences change people but this is an extreme and bizarre experience and a very threatening experience. I thought, and most people think as they grow up, that they gained understanding of the world and they knew the way things work. We grew up with the platitudes of the British justice system and we believed these things because they’re true.....and suddenly you’re thumped with the realisation that none of these things are actually true....You realise that some policemen are corrupt, that policemen lie in court – they do it deliberately, that judges are far from perfect, that the judicial system is very badly flawed – and you know that all these things have happened to you....It was never part of the plan, never part of your education – never part of the way you saw yourself” (Jonathan Jones)

CHAPTER 6

CORRUPTION AND THE MERGING OF MORAL BOUNDARIES

The discussion in Chapter 2 illustrated the myriad of uncertainties and potential distortions that can occur in investigations and trials. The preceding outline of case construction and the case study of Jonathan Jones illustrated how case construction is not purely about falsification but about interpretation and modes of thinking. The traditional view of miscarriages of justice perhaps goes back to the examples of convictions quashed as a result of gross violence or oppression in custody, blatant fabrication and suppression of evidence (Guildford four 1989, Birmingham six 1991, The Tottenham three 1991, Judith Ward 1992, Stephan Kisko 1992, the Cardiff 3 1992, the Darvell brothers, 1992, the Bridgewater four 1997 and many others). As Chapter 2 sought to illustrate, the boundaries between corruption, error, interpretation, selectivity and pragmatic workability can be very hard to define. All the participants in this study who maintained wrongful convictions were critical of the methods used by the police to convict them, yet all were convicted after the implementation of the custody safeguards in the Police and Criminal Evidence Act 1984 (PACE) which in the view of virtually all the professionals interviewed in this study had, along with changes in police training and culture, all but eliminated traditional blatant corruption. Most of the following chapters will consider aspects which may be open to interpretation in terms of their integrity; initially however it is necessary to consider a few instances where clear cut accusations of corruption have been claimed.

“The Cardiff Newsagent Three”

In December 1999 the Court of Appeal quashed the convictions of Michael O’Brien (a participant in this study), Ellis Sherwood and Darren Hall for the murder of a newsagent, Mr Phillip Saunders, in Cardiff in 1987 (See Appendix 3– Case Summaries). This case

had all the elements of the traditional miscarriage of justice; a case constructed on a false confession by a vulnerable young man, claims of admissions from a notorious police officer, witnesses admitting that they gave false evidence under police pressure and widespread abuse of the then recently introduced PACE codes.

Mike O'Brien had, through peer pressure, committed his first criminal offence on the night Mr Saunders died. He had stolen a car with Ellis Sherwood and another young man. Mike had met Darren Hall that same evening and gone with Ellis and Darren to look for a 'suitable' car to steal, Darren however left the group before the others were joined by the fourth man with whom Ellis and Mike did then steal a car. Darren and Ellis were questioned about the murder of Mr Saunders as a result of their petty criminal records and tendency to hang around the kiosk where Mr Saunders worked, Mike came into the frame having been with the others that night. As a terrified nineteen year old who had never been in police custody before he was subjected in total to 11 police interviews, only two with a solicitor present (Ct of Appeal Judgement 1999: 12-13).

"I was shaking like a leaf; I'd never experienced anything like this before"
(Mike O'Brien)

He maintains that he was denied access to his family, denied food and water for long periods and left alone for long periods, sometimes handcuffed to a hot radiator (evidence of this practice was given by witnesses at the Court of Appeal in 1999). Mike described how it was frightening to see these officers at work; employing a good guy, bad guy routine, one officer continually accusing, then another officer intervening to try to use Mike to blame the others – "Listen Mr O'Brien, we know you never done it, we know Ellis done it" (Nettie Hewins, in interviews for this study, described similar attempts to try to persuade her to support the case against her co-defendant). Soon Mike was made aware that the process was working on Darren Hall who began to make statements incriminating himself and the others.

Although PACE had become operational in 1986 the police stations in Cardiff in 1987 had not instituted the tape recording of interviews but were recording hand written records. Mike O'Brien recalls some occasions when he refused to sign the notes as he felt they did not reflect what had been said but what the officers wanted to say. One such occasion is noted in the Court of Appeal Judgement (R v O'Brien, Sherwood and Hall EWCA Crim 3 25/1/2000 p.13) when he refused to sign notes recording an alleged

incriminating confrontation which the police had contrived between himself and Darren Hall. The Court of Appeal also expressed “disquiet” (p. 26) that by the time of the appeal in 1999 none of the original interview notes could be located and only typed copies were available. This of course prevented any examination, such as ESDA testing (Electrostatic Document Analysis), which could have checked for any manipulation of the content, as had happened in a number of “classic cases” (Birmingham six, Guildford four and Bridgewater four for example).

In 1998 Detective Superintendent Alan Partridge of Thames Valley Police produced a lengthy report into the police inquiry and the treatment of suspects in this case. The report was commissioned by the CCRC under section 19 of the Criminal Appeal Act 1995 and contained many serious criticisms including unjustified denial of access to solicitors, “hard to resist” evidence of “off the record” interviews, and the neutralising of a potential defence witness by imposing thinly evidenced charges in relation to the murder and robbery which were later discontinued (Thames Valley Police 1998: 64-67). The missing interview notes were described as “important pieces of evidence” and their absence as “suspicious and might have significant consequences” (p.65). Another issue that concerned Mr Partridge was the absence of the original note taken of an alleged incriminating conversation between Ellis Sherwood and Mike O’Brien while held in the police cells. Inspector Stuart Lewis, lurking outside the cells, claimed he had recorded the following conversation on an expenses form he had with him at the time: -

O’Brien “They’re going to charge me and you”

Sherwood “No, they’re not. All they have got is Hall, he’s grassing us”

O’Brien “I can’t hold out much longer, I may have to tell them the truth”

Sherwood “Don’t do that we’ll be fucked”

O’Brien “I can’t hold out for much longer, I might have to tell them what happened”

Sherwood “You’re talking about life, being on remand means nothing”

O’Brien “I can’t hold out much longer, I’m scared, I will have to tell them what happened”

Sherwood “Just keep your mouth shut”

O’Brien “Why don’t you tell them what happened?”

Sherwood "I can't can I? If Hall hadn't opened his mouth we wouldn't be here"

Sherwood "I think there's someone listening. I'll catch up with you later OK?"

O'Brien "Yes OK"

(Aisling Byrnes Preliminary Advice on Appeal for Michael O'Brien 1997)

D. I. Lewis had been disbelieved by a jury at a trial in 1982 (The Welsh Bomb Trial) when he had claimed that one of the defendants had confessed to him. This opened up a ground of appeal, based on the later legal precedent in the case of R v Edwards (1991) (Cr App R 48 at pp 58-59), that the jury at the Newsagent Three trial should have been made aware of this. For Mike O'Brien it was not until the presentation of D.I. Lewis's note that his faith in the law and the police, who he regarded as his heroes when he was growing up, was finally shattered: -

"Even though I was seeing more and more evidence of what they were doing I still couldn't get my head round that they were actually doing it until that confession outside the cells. That really hit home when they confronted me with that, and I can remember that nightI can remember who was there and who said what, as clear as day light"

(Mike OBrien)

The Thames Valley Police Report (1998: 11) records that between 1978 and 1989 a total of 25 areas of complaint were investigated which concerned or included Lewis and a further three between 1990 and 1997. The outcome of these is not stated except for the fact that two were substantiated that might have had a bearing in the Newsagent Three case, one being the Welsh Bomb trial referred to above. Three other cases are referred to where there was suspicion of fabrication of evidence and bullying by Lewis (p 14-16), suspicions that were raised again in a report to the Home Secretary in 2004 urging a public inquiry into miscarriages of justice in South Wales (O'Brien and Hickman and Rose Solicitors 2004).

The intimidating approach of Lewis and others was eliciting a whole range of different versions of events from the most vulnerable of the three Darren Hall, his statements, emanating from 12 interviews, ranged from complete denial, to committing the murder himself or playing a minor role while others did it. Eventually he was to settle on a version that incriminated Mike and Ellis as well as himself, a version he maintained

throughout the trial and for 6 years afterwards. In 1999 the Court of Appeal was to hear from four different experts, including one commissioned by the prosecution, and while there was some disagreement about the nature of Darren's personality disorder and his levels of suggestibility, compliance, impulsivity and emotionality, all the experts concluded that Darren Hall's confession could not be relied upon. Furthermore it was apparent that Darren's original admissions often occurred late in the day after hours of interviews without a solicitor or following periods during which he was unaccounted for in the records, suggesting "off the record discussions" (Personal Observation notes at Appeal 1999). In September 2008 Mike O'Brien published a book "The Death of Justice" describing these events in detail including a full analysis of the police investigation methods and of how Darren's confession was gradually retracted and discredited (O'Brien and Lewis 2008).

In short, evidence produced for the appeal in 1999 supported the accounts of Mike O'Brien and the others of oppressive police interviewing, fabrication of evidence, and the inducement of false confessions. Furthermore in 1996 a BBC Wales Television programme (Weekin-Weekout 1st Oct 1996) had featured virtually all the original prosecution witnesses retracting evidence they had previously given. Most of these people were subject to police inquiries and claimed to have been put under pressure by the police. The Court of Appeal however gave little credence to this batch of retractions; "we are not impressed by them nor do we attach much weight to them" (Judgement p 24). Furthermore, despite the gross breaches of the PACE codes, the Court of Appeal made it clear that they were not prepared to demand accountability: - "we are not making any findings of deliberate misconduct against any police officer" (Judgement p 21). At one point during the appeal Bob Marshall Andrews QC for Ellis Sherwood pointed out that the police team on this inquiry was headed by Don Carsley who had been in charge of the thoroughly discredited investigation of the Darvell brothers case in 1986 (one of very few cases where officers faced prosecution for their actions). The Judge's response was to ask "What relevance has this" (Personal Observation notes 1999). Mr Marshall Andrews suggested that he should have been cross examined on his stewardship of this case, but the Judge's question was curious; it should have been self evident that an officer in charge of a case so seriously flawed as that of the Darvells might have some responsibilities in relation to the major question marks over his next major case – The Newsagent Three.

It is interesting to note at this point, although this issue will be revisited later, that virtually all participants in this study, both professionals and those convicted were keen to stress accountability and integrity as potential solutions to miscarriages of justice. When however the question of the conduct of Lewis and other officers during this period was raised with professionals in South Wales a number recognised that Lewis in particular was notorious for his approach. When asked why this was tolerated the responses were, if not a wall of silence, certainly a rapidly drawn curtain. In one case a “no comment” response was given, in another case a comment was given with the proviso that “this is off the record”. There is little doubt however that the tactics of a group of officers at that time were well known to be dubious to say the least: -

“One police officer was known to have a bionic ear because every time he walked past the cells there was series of confessions” (S2)

Moreover as one barrister at the time, now a judge, explained, there seemed to be no mechanism for tackling the problem at least until the PACE safeguards took effect: -

“Well you couldn’t nail them, you couldn’t get any proof. Your client would tell you what had happened, all we could do was go into court and cross examine them on that basis and this was done, but they would lie through their teeth and get away with it. But as soon as the simple expedient of recording testimony came in they couldn’t do it” (Judge 2)

The suggestion that the implementation of the PACE protections stopped these practices is not quite born out. The three ‘famous’ wrongful convictions relating to South Wales murder investigations in the 1980s; the Darvell Brothers 1986, The Newsagent Three 1988 and the Cardiff Three 1989 all involved false confessions by vulnerable suspects as well as other malpractice. The PACE Act of 1984 became operational in 1986, so it might be argued that PACE and in particular interview tape recording had not been firmly “bedded in”. Certainly there is little evidence of an immediate change of culture. Perhaps it was the fact that the Court of Appeal was prepared to overturn these convictions that brought home the message that things had to change, although the officers over whom the questions hung were usually allowed to take early retirement on full pensions, a practice that still today is seen by some as unacceptable: -

“I’ll have a jaundiced view from the sort of handful of things that I’ve looked at in detail. The biggest cases I’ve looked at happen to be in South Wales, but it’s the police, the police are incredibly inefficient, they’re badly led, their idle, they’re dishonest in the sense that if you look for instance a few years ago when I was in

South Wales I think 48% of South Wales police were retiring early through ill health. Now that is plainly dishonest, utterly dishonest.”

(Journalist 1)

If it is hard to legally prove corruption by police officers it is much more difficult still to prove corruption or collusion by lawyers. There was certainly a feeling among a number of people, including defence lawyers, at the Newsagent Three appeal in 1999 that Gerrard Elias QC went beyond his responsibilities as a prosecutor in trying to sustain the conviction against the body of evidence (Personal Observation Notes). One incidence in particular showed that his adversarial stance did not seem to prevent him protecting the approach of D.I. Lewis. The issue under discussion concerned a statement in the Welsh Bomb Trial when extra words had been added to a statement previously made. This came under discussion at the Newsagent Three appeal due to the role of Lewis in the two cases. Lewis prepared the statement yet Elias attempted to claim he was not responsible and at one point described the insertion of some 18 words as a typing error (Personal Observation Notes). The Court of Appeal did not swallow this somewhat implausible ploy: -

“It was his (Elias) recollection that it was thought that the improper copying of the manuscript notes was attributable to the West Midlands Serious Crime Squad, a group of officers who have since becomes notorious, and was not the result of any action by a South Wales Police Officer. Be that as it may, it is difficult to see how additional words could be inserted into a typed version of notes which were apparently made by D.S. Lewis without his having been aware of that happening”

(Court of Appeal Judgement 1999:26)

Suspicion of an unhealthy collusion between the police and the prosecution was hard to resist in this instance.

Other Examples from Cases in this Study

Both Sue May and Ian Thomas (see Appendix 3 case summaries) described interview tactics in 1992 that they experienced as bullying and intimidating despite the presence of solicitors, and which included the same nice guy/nasty guy routine described by Mike O'Brien (above). Ian described his experience as follows: -

“You’ve got one trying to be your friend and you’ve got the other one shouting at you at the same time....you don’t know who to look at or what to say, and if you do say something they cut right across what you’re saying so your focus is shifted to the next question rather than thinking about how you’re going to answer the last one.....One of them would get very angry, at one point he started swearing and being abusive and threw a chair across the room and stormed out. Then of course the other one is saying ‘don’t worry about him he gets a bit upset...but if you tell us what happened’.....At no point did I ever consider saying I did it and I don’t know where I found that inner strength.....but I can see why people buckle under the pressure because it’s horrendous and it’s consistent and it’s non-stop cos when your solicitor goes away, despite PACE and all the guidelines and however nice the custody sergeant might be, they still come knocking on your door and they still whisper what they want to hear through the door. Then they drag you out to the fingerprint room so they’ve got you in a little room away from everybody else and having a little word again....there’s just no let up”

(Ian Thomas)

In the case of Nettie Hewins (see Appendix 3 case summaries) crucial evidence was extracted from a sixteen year old girl on the basis that she could herself become a suspect if she did not co-operate as a witness by giving the information the police desired. Carly John was held for 32 hours as a suspect but the oppressive tactics that by 1996 had been to some extent addressed for suspects could be side stepped if she became a witness. Thus the old maxim of ‘say what we want to hear or make things worse for yourself’ was applied: -

“Will you please tell me the truth?” demanded one officer

“Yeh” replied Carly “but I don’t know nothing about it”

“You do Carly. If we could just get over this little hurdle of you being honest with us, then we are in a position to resolve this matter quickly as far as you’re concerned. The only little hurdle we have to overcome before we can help you is for you to change what you are saying”

(Interview Transcripts quoted in Woffenden 1997)

Aside from the “classical” features of the Newsagent Three case the most common complaint of overt corruption from participants in this study was that the police lied in their evidence construction and in court. Examples of this were illustrated above in the case of Jonathan Jones (see page 106) and asserted in the case of Michael Attwooll and John Roden (see Chapter 10). Both Sue May and AN produced evidence that suggested that forensic scientists had colluded with the police to distort evidence and that they maintained these distortions in court. In the case of AN investigations by a Channel 4

television programme illustrated how the records indicated that an item of clothing was transferred from forensic science to police custody at crucial times before the discovery of fibres in incriminating positions (Detailed references not stated due to confidentiality request). Some of the forensic exhibit issues in the Sue May case are discussed in the next chapter

Sue May (convicted in 1993 of the murder of her elderly aunt) has maintained that, like Mike O'Brien, she was a victim of police "verballing" – the attribution of statements to defendants that were never said. Sue May was unaware that she was a suspect and in fact the police disputed that she was at the time of the incident. She had been called into the police station for 'routine fingerprinting' apparently for the fourth time (according to one ex-police officer in this study {P1} this was likely to be a ploy to set up a situation for verballing). A female officer D.S. Rimmer claimed that Sue had made the following incriminating remark: -

"You know the scratches on my aunt's face will forensics check down my nails and stuff?" (Sue May interview)

According to Sue when the matter of the record of this bizarre remark was raised at the trial with D.I. Kerr, the Senior Investigating Officer in the case, he first said that a record would be on the police HOLMES computer. When this was not the case he said he had told D. S. Rimmer to record it in her note book. A photocopy of the record was then handed around the court. When Sue's barrister requested the original notebook for ESDA testing he was informed that the book was lost (Sue May)

There was among most professionals in this study a general view that these kinds of overtly corrupt practices are much less prevalent today. This view was particularly expressed by police officers who felt that the level of "checks and balances" (Supervision, internal reviews, CPS oversight, appeal potential etc) were such that such practices would be very difficult to sustain and would not be fostered within the current professional approach. At the same time there was often an acknowledgement that these practices did happen in the past: -

"The days, in this County and in my team, of planting evidence are long, long, long gone, long gone.....I'm not saying there's no dishonesty in the police service, probably always will be, but it's not like it used to be when evidence was fabricated.....You can't guarantee that a police officer hasn't influenced witnesses,

for example to give a certain car colour. I'm not saying that doesn't happen and that is a certain level of corruption I suppose. I can see that sort of thing happening, but planting evidence and fabricating evidence wholesale – doesn't happen" (P4)

The traditional "weak spots" based on discussions and descriptions outside of the regulated areas (Maguire and Norris 1992: 103-4) are acknowledged in this typical response as remaining potentially problematic, relying as they do on individual integrity rather than regulation and oversight. The emphasis on integrity and professionalism was paramount in police interviews - these cultural issues are explored further in Chapter 13.

Before considering aspects of investigation and trials where interpretation and error may perhaps be greater risk factors than blatant corruption, it is necessary to consider the responses of participants to the issue of the police informant system (see also pages 35-38 above). Corruption of investigations if not individuals is clearly a major risk in the grey areas where police investigations rely on the complicity of criminal informers.

Informers

The case against the Newsagent Three was bolstered by five witnesses who made incriminating statements; all of these eventually retracted, claiming police pressure, and most were either already in prison or potentially facing criminal charges. None were identified as official police informers. Prison informers made statements in the case of Jonathan Jones but these were not used because they both contained information word for word from the Western Mail newspaper including spelling errors (Jonathan Jones interview). In the case of Mike Attwooll and John Roden (see Chapter 10 above) three crucial witnesses were effectively prison informers, although one had been released by the time he gave his statements. Only one of these has been officially, and it seems belatedly, recognised as an official registered informant. All the participants in this study remain unsure who was and who was not a registered informant and in the Attwooll and Roden case it seems to this day that so are the police, the CPS and the CCRC: -

"Further discrepancies exist as to whether or not Mr Woodland was a registered informant and as to how he was handled. The initial information from South Wales Police appears to suggest that Mr Woodland was a registered informant and that D.C. Sutton (Gwent Police) was recorded as being one of his handlers. Conversely, a letter from the CPS as part of the pre-trial disclosure suggests that

the prosecution believed that Mr Woodland was not a registered informant. When the Commission sent a questionnaire to D.C. Sutton in 1999, he stated that he was not aware that he was recorded as being a joint handler for Mr Woodland. He thought the use of the term 'informant' was probably 'jargonistic' rather than indicating that Mr Woodland was formally registered as an informant"

(CCRC Statement of Reasons for John Roden 2004: Para 9.15)

Police officers interviewed were, in the main, keen to make two points about registered informers: Firstly, in line with the National Intelligence Model (ACPO 2005), registered informants are now dealt with by officers separate from the investigation (This was clearly not the case with D.C Sutton in 1994 who was integral to the above investigation). Therefore investigating officers do not have direct contact with the informant or their handler, they simply receive intelligence information. It was conceded however that some forces adopt this approach more rigorously than others and that there might therefore be exceptions to this rule (P4). Overall however the system was "massively professionalised" (P6) with "loads of checks and balances in place" (P9). Secondly intelligence sources have to be protected both for their own protection and to maintain the resource for the police. Consequently if a registered informant is to be used in court their status as such must be protected by Public Interest Immunity (PII). The judge, presented with a PII application will decide on the relevance of informing the court about a witness's informant status. The secrecy of this decision means that defendants can never establish whether or not certain witnesses were official informants, a situation often experienced by defendants as highly unfair and frustrating. Police officers described how they would never reveal informant status in court even if it meant dropping the case: -

"There will never be any disclosure by the police or the prosecution service that the person is an informant to the police, it would never happen. If a judge makes a decision that it should, then the case would always be pulled" (P2)

This situation might make judges reluctant to refuse PII if it means a serious case being dropped.

Concurring with the work of Dunningham and Norris (1996), the risks inherent with informers were openly acknowledged along with their motivations, one of the most common motivations being a letter from the police provided to judges stating that they have helped the police, thus providing mitigation when they themselves face charges : -

“They are the most devious people in the world.....They call it buying insurance so if they get caught committing crimes they’ve got their insurance policy in place” (P1)

More disturbingly still from a miscarriage of justice point of view: -

“You’ve got to eliminate them from having committed the crime themselves....if I’d committed a murder the first thing I’d do is go to the police and say there’s been a murder and Billy Bloggs told me he done it.....that’s what you do, that’s what any professional criminal would do – some of them actually set up mugs to take the fall for it” (P1)

The same ex-police officer described how as a young PC acting on an informant’s tip off, he was sent to a pub to apprehend a man with a stolen cassette recorder. It then transpired that the man had just been handed the item by the informer.

Money can also be a motivation: -

“The management of these people is always shades of grey because you’re not meant to pay them to get results but they get incentive payments and what’s the difference?” (P1)

“They’ll quite happily take money from the police to drop their mates in the crap if it gets them £50” (P2)

Two police participants made the point that most people with ongoing criminal lifestyles will be informants at some point in their ‘careers’ (P1 & P2) “in order to get the insurance policy in place” (P1). One Officer (P6) clarified the blurred boundary of who is an informer and when by explaining that giving information voluntarily or on request makes an individual a witness. It is when the person is asked to do more or find out more that that person becomes an informant and it is at that point that the rules and safeguards of handling should be established.

Of particular concern in relation to miscarriages of justice (including three cases from this study referred to above) is the use of prison informants who have been used to bolster weak cases through claiming that suspects have confessed to them while remanded in custody (classically for example Bridgewater Four, Cardiff Three, Dudley and Maynard and the still not over turned case of Michael Stone).

Each prison has a Security and Intelligence Department who use their own intelligence systems to facilitate police requests or gather intelligence from inmates. Inmates wishing

to give information are then directed towards the Security Officer who then informs the police: -

“That is the reactive, ethical way it can be done, but obviously there’s a proactive way whereby you put somebody in the cell who is there to elicit a confession from another prisoner” (P7)

Such prison informants are often treated as normal witnesses rather than being registered informants, although their status is often hard to establish given the protections of PII that govern prison intelligence. A number of officers recognised that, although undesirable, it would be “perfectly feasible and possible” (P9) to feed information and details of the offence to the informer and that forensically examining the process that has led to “a nice wrapped package presented to the CPS” (P7) is very rarely achieved by the defence, who would in any event find it very difficult to get disclosure about the context or any proactive element from which the informers evidence emerged.

The Surveillance Commissioners are judges tasked under the Regulation of Investigatory Powers Act (2000) (See pages 36-37 above) to oversee police intelligence gathering and PII issues. One participant questioned whether they are equipped to look beneath the paperwork: -

“There’s so much covert policing going on....when the Annual Review is done there needs to be a very rigorous review of what lies behind PII applications. The Surveillance Commissioners are not sufficiently staffed to do that” (P7)

The police work closely with the prison service on all issues of ‘intelligence’ so that, for example, the issue of informer selection can be considered, using or taking note of informers who are not obvious ones to other prisoners. The process can skirt the borders of ethical practice and certainly make transparency and accountability hard to identify: -

P7 “If I was to put a prisoner in to say A, B and C, that’s corruption, but if you put a prisoner in who you know is going to illicit information because you give him a set of questions that he needs to get answers to, then that’s good investigation practice. It’s when you give him the answers that it becomes corruption”

Interviewer “It’s a fine line though isn’t it?”

P7 “This is why you have to have a very good defence team to interrogate the whole process because none of this is written down in books, this is years of practice and experience and investigation knowledge and you’re dead right there is a very fine line.”

There was a view that the use of custody confessions in court was less common today primarily because judges, lawyers and juries were more aware of the unreliability of that kind of evidence. All lawyers interviewed said they would treat such evidence with great caution but few felt it should be inadmissible, largely on the basis that one could not rule out evidence from dubious witnesses, whether coming from prisons or elsewhere, primarily because the criminal justice system had, by its nature, to deal with such witnesses in many cases.

However as P7 explained this does not mean that the process is any less prevalent: -

P7 "It's continuing in an intelligence gathering manner....then there's another expertise in turning that intelligence into evidence"

Interviewer "That's fine I suppose as long as the intelligence is sound enough?"

P7 "Absolutely, because then you've got to get back to the problems of intelligence, it's an absolute minefield."

The same officer expressed concern that miscarriages of justice focused too often on serious cases and that the murky world of intelligence gathering and day to day investigation techniques gave potential for wrongful convictions in all sorts of cases. He also explained how other common practices did not always conform to public expectations of how justice is supposed to work, not least the voluntary miscarriage of justice agreements that enhance clear up rates: -

P7 "It's an interesting area because why would anyone admit 30 or 40 offences that they never committed.... I know why in the sense that I know what goes on, there's favours given....we're in a very complicated field here but petty villains who are locked up want to get out, so they're quite happy to come out and admit offences. Therefore the only way you can ensure that an admission is sustainable is to have him look at the crime report so that the villain actually tells you what happened?"

Interviewer "So that's fed to him?"

P7 "Yes"

Interviewer "Which officially never happens?"

P7 "Of course it doesn't – but he's admitted it hasn't he.....it's in this sort of low level invisible area....the villain doesn't care because it improves his credibility"

Interviewer "How does that get him out quicker?"

P7 “Well they come out to do the interview. You go and see someone in a prison and say how many offences you gonna clear up for us and he’ll say ‘well you let me out for two days and I’ll come and clear up some crime for you’. So the officer comes back to the station and says Joe Bloggs wants to clear up some crime can we write for him to come out for 2 days?”

Interviewer “But if he’s admitting it doesn’t he get additional time?”

P7 “No that’s the deal...they get time out, may see their family, may get rewarded... Yea that’s the deal with clear-ups - you can’t add to the sentence”

Interviewer “It’s a good deal isn’t it?”

P7 “Well of course it is.....it’s all driven by performance whereas they should be trying to get the crime level down”.

Conclusion

While the overwhelming message coming from police officers in this study was to stress integrity, transparency, professionalism and accountability in a context of a weight of checks and balances, it is clear also that, however genuine such intentions might be, the line between effective intelligence and dubious practice is one that can sometimes be ill-defined and far from transparent. A very high level of integrity may be required in the invisible areas and day to day realities that form the backcloth to the formal procedures and oversight. Integrity is rarely a certainty especially under the pressures of policing people and systems where uncertain moral and ethic parameters lie.

CHAPTER 7

MISLEADING INFORMATION AND HUMAN ERROR

Chapter 2 (pages 39-50) discussed the evidential context in terms of the evidence of people and in terms of physical and scientific evidence. This chapter draws on some examples of these problems from the cases featured in this study and the perspectives of different participants on these issues, considering firstly the problems of witnesses, secondly the issue of disclosure and thirdly the potential fallibility of scientific evidence and experts. The chapter further illustrates the inherent uncertainty of evidence and its treatment.

Problems with Witnesses

The previous chapter discussed the use of witnesses who might be seen as “inherently unreliable” due to their vulnerability or criminality, but as discussed in Chapter 2, even honest witnesses can give misleading evidence. One of the common complaints of those convicted was that witnesses changed their statements as the prosecution case developed, usually ending up with a more incriminating version by the time of the trial. It is rarely possible to prove or disprove whether the police influence such changes but most officers interviewed accepted that this would not be difficult to do in the first or in later statements. This might be simply suggesting the colour of a car (P9) or it might involve more subtle techniques: -

“There’s very clever ways of editing statements, one of the old tricks was you go and see a witness one day and you drop something into the conversation, and you can guarantee the next day they’ll put it in their statement” (P1)

In the main people want to help the police which can lead them to view issues in a certain way (P6). Given the nature of the Newsagent Three investigation discussed in the previous chapter, the change in the statement of the victim’s neighbour (VN) who saw a man leaving the crime scene at the material time might well be viewed with suspicion.

The morning after the attack, VN gave a statement including the following description of the man she saw: -

“This person had curly hair and he had a lot of it and this man was wearing a dark blouson type jacket and dark trousers....this person leaving the garden was white skinned of similar height to Phil (the victim) and appeared to be of slight build

(VN Statement 13/10/87)

Approximately 6 weeks later: -

“I have given thought to the description I provided and can definitely say that the person was white. I could see a dark silhouette and he had a reasonable amount of hair, but I do not now believe it was curly. I am sure the top clothing was of a blouson type but I cannot say if it was a jacket. I cannot be precise about the man's build or height because of the manner in which he went to the gate. At the time of the incident in addition to the fact I was not wearing glasses I can say that it was extremely dark at the rear (of the houses) and the weather was wet”

(VN Statement 24/11/08)

There is little doubt that the person VN saw was the culprit (one person not three) but by the time of the second statement the Newsagent three had been charged. None of them fitted the neighbour's original description from the morning after the attack, in particular none had curly hair and all were considerably shorter in height than the victim. The suggestion that the witness was encouraged to fudge a highly inconvenient original statement is hard to resist.

Police Officers interviewed generally accepted that these things can happen, and also recognised the dangers of perceptual distortion, but were keen to stress that interview techniques have developed and the level of training, expertise and integrity is much greater than in the past. Good leadership and proper verification of statements being the key to preventing this: -

“It's important to ram home to your staff that you're there to seek the truth and how can we check it –times, receipts, cashpoint machines, CCTV – these things are checkable” (P9)

P9 noted that resources could sometimes reduce the level of checking in less serious cases.

The police perspective was also that it is not just the police who might have an influence on witness statements. One officer (P3) flagged up the need to recognise witness

collusion creating a group of similar statements, and a number of officers stressed the influence of others who might threaten or pressurise witnesses to protect defendants.

All eleven of the cases focused on in this study described problems of some sort with witnesses (in seven cases this was felt to be very significant – see Table 3 page 83). These problems included changing statements, witnesses of dubious character and reliability, selective use of witnesses, witnesses who may have been confused or mistaken and witnesses who, it has been suggested, were influenced by the police. Examples of all these can be found in the three featured case studies, thus a couple of examples from the other focused cases will suffice here.

Ian Thomas, convicted in 1992 for the murder of his wife (and again in 1994 after the conviction had been quashed and a re-trial ordered – see Appendix 3 case summaries) described how he had asked the local refuse collector if he had come across any items that might belong to his missing wife. Later when items were handed into the police this man made a statement claiming that Ian had already named those items as being in police possession. Even though the items had not been found at the time of the conversation it was implied that Ian knew of them. The witness's statement was found to be identical in places to a later newspaper report and was strongly challenged in court. However it provided fuel to the entirely circumstantial case against Ian. What happened here may have been a classic case of “retroactive interference” (see Page 40 above) where gaps in the original, probably vague, recollections of a then fairly insignificant conversation are filled by new information coming from the police, the newspapers and/or others, thus reconstructing memory in a way that then seems accurate to the witness.

Some of the strongest witnesses the prosecution may use might be family members of the victim or the accused. These people are potentially vulnerable being close to often tragic events and experiencing personal loss. Moreover because of their closeness to the investigation, they may build a sometimes influential relationship with the police: -

“During the preparation for a big trial, which will take many months, the family of the victim are in close contact with the police and often come to see their side of the case to the exclusion of other options” (Journalist 4)

This may even happen when the person accused of the crime is part of the same family. This appears to have been a significant factor in the case of Sion Jenkins (see Chapter 14) and to a lesser extent in the case of Nick Tucker (convicted of drowning his wife in a car

crash –see Appendix 3 case summaries). Nick described how his daughter, distressed by hearing of her father’s previous affair and by the death of her mother, was brought to the trial from New Zealand. According to Nick she could offer no evidential value but proved an important “psychological witness” by displaying a loss of trust in her father. Nick also recalls that the prosecution, unable to get what they wanted from his daughter, did manage to make some play of one or two fairly insignificant comments. His daughter said at trial that her parents went out on the night her mother died with the intention of sorting things out. According to Nick the implication was not what it might be taken to mean: -

“Yes sort out what.....a new washing machine, about a holiday, about a house move!”

(Nick Tucker)

Lawyers interviewed in this study recognised that statements were frequently problematic. One judge described the tendency for the police to go back to witnesses to “think this through again” in the light of new information and the consequent changing of original statements as “one of the banes of the trial judge’s life” (Judge 1). One barrister (B1) had come across the same officer interviewing three witnesses and producing identical phrases:

“That’s just a stupid police officer basically, if he’s going to try and put words into people’s mouths he shouldn’t put police-speak into all three of them” (B1)

Other lawyers similarly reflected on the continuing potential for statement distortion: -

“You do get witnesses who say ‘Oh I didn’t put that in because the police officer told me it wasn’t worth putting in’. Then of course the police officer denies it and you don’t know if it’s true or not” (B2)

Where somebody’s giving evidence, in virtually every trial you have.....’I never said that’ – ‘But it’s in your statement’ – ‘I don’t remember that’ – ‘Have a look at it you signed it’ – ‘I don’t remember saying that at all’. So you’ve got to question the statement taking process” (S3)

One solicitor stressed that, despite the apparent trivialities of certain recollections, the adversarial investigation and trial process was sometimes prone to exaggerate the significance of minor inconsistencies: -

“Then you try and impose the artificiality of the trial.....months after the crime they ask things like what clothes were you wearing on the day.....and then the main protagonists are criticised because they say ‘well I could have been wearing a blue jumper but I’m not sure it might have been red I don’t know’...’Oh well

that's the sort of person you are , you said it was blue now you say it could be red, so you are obviously an unreliable, untrustworthy person....because you can't even remember what you were wearing". (S1)

Most lawyers interviewed, while concerned about the potential fragility of witness statements and their tendency to change, felt that these matters could be ironed out at trial and may even provide ammunition for the defence to undermine witness evidence. However the primacy of oral evidence at trial means that juries are urged by judges to treat the most recent statements made in court as evidence and it may ultimately be what people say at that stage that has most influence. Witnesses can usually refresh their memory by reading their statements before they give evidence but they are likely to read the most recent one. Furthermore challenging old statements in court as one solicitor (S6) pointed out, depends on whether and, at what point, those statements are actually disclosed to the defence and how much notice the defence takes of them.

As with all issues in the criminal justice system much comes down to how thoroughly people in the system do their job, usually under major time and financial constraints. Witnesses have to be located and sometimes encouraged to give evidence at all, this can be very problematic, as Judge 1 noted there can be "a certain laziness at times in actually contacting witnesses". Similarly one solicitor acknowledged the problem of finding witnesses and the need sometimes to obtain money to use an inquiry agent to do this. Even then the witness needs to be checked out to see if they 'come up to proof' to be used in court (S7)

Chapter 2 (pages 55-57) discussed the significance of witness and suspect demeanour in investigations and trials and how psychological research tended to suggest that people are frequently very poor at detecting whether or not people are telling the truth. Professionals in this study showed a very limited awareness of this research, although they did recognise and take account of the fact that people might be nervous or distressed in these situations. There was a recognition that the system relied to a great extent upon assessing demeanour and that the evaluation of witnesses was crucial in, for example, deciding whether they should be used in court. Thus demeanour is important not just in relation to what the jury hear but also in relation to what they do not hear.

A number of professionals stressed the significance of demeanour, especially where a witnesses evidence might be the only evidence (as often the case in sexual accusations) and where the witness was very eminent as in the Sally Clark case: -

“The fact that Sir Roy Meadow was the label impressed High Court Judges” (S2).

Participants who had been convicted had much to say about how they felt their demeanour or more specifically their character and identity was exploited or distorted in the investigation and trial process. This will be discussed further in Chapter 8.

The Problem of Disclosure

Non- disclosure of evidence has been a feature of many high profile miscarriages of justice (for numerous examples see Niblet 1997:18-28). In this study AN maintained that 160 pieces of evidence that should have been disclosed were not. The Court of Appeal judgement in 1999 (Reference withheld for anonymity) accepted that these included; results of forensic enquires, police note books, results of enquiries relating to crucial exhibits and other suspects and the statements of an alibi witness. All this did not sway the Court of Appeal who deemed that this information would not have made a difference to the outcome of the trial. Sue May also discussed the failure of the police to disclose information about a red car seen outside her aunt’s house on the night she was killed. It seems enquires into this car revealed that it belonged to a known burglar and had been linked to other similar crimes. This information however was never disclosed to the defence and only discovered much later during CCRC enquires. The late disclosure of an internal report into the practices of a forensic scientist in the case also prevented its use at Sue’s appeal (Sue May interview). Ian Thomas had a similar experience when evidence suggesting a body that might have been his wife’s had been seen about quarter of a mile away from where she was eventually found. Potentially this strongly undermined the case against Ian (see Appendix 3 case summaries) “but it was just brushed aside as having nothing to do with the case” (Ian Thomas) until unearthed during the investigation by Channel 4’s ‘Trial and Error’ team.

Some of these failings result from defence inadequacies in examining unused or undisclosed material and accepting too easily what the police are saying, sometimes the defendant discovers many years later what was never revealed to him or her: -

“Non-disclosure became evident from my own detailed inspection of police note books which showed who had been visited and when.....and yet there was often no evidence of any statement or exhibit being present”

(Nick Tucker)

Sometimes it is exhibits that seem to disappear and hence are not disclosed. Classic examples from this study being the large carpet that was covering the bodies of the two victims in the Jonathan Jones case and a half full whiskey bottle found at the scene of the crime for which the Newsagent Three were wrongly convicted (S4), both items that could contain vital scientific evidence. Further examples of non-disclosure of scientific evidence are referred to under ‘Problems of Science’ below.

The complexity and information overload of a major crime enquiry poses massive problems for both police and lawyers. Participants recognised this problem although many felt that technology such as the HOLMES computer systems and better procedures such as MIRSAP had helped enormously in improving the system. However in the end the material still had to be analysed and evaluated. The Court of Appeal, in the case of AN, in part justified its excusing of the serious non-disclosure by commenting on the complexity of this enquiry: -

“It involved interviews with 7,876 persons, enquires concerning 3,557 vehicles, over 3,000 streets and 6,000 houses. In the course of the investigation 4,914 enquires were raised, resulting in 3,685 statements being taken, 1,570 messages being logged and 876 officers’ reports being prepared and submitted.”

(Court of Appeal 1999 – Reference retained for anonymity)

Disclosure Rules

The law on disclosure has struggled, in the face of complexity and information overload, to strike a balance between openness and practicality and between the burdens and rights of the defence and prosecution. After a number of high profile cases the issue came to a head when the case of Judith Ward, wrongly convicted of an IRA coach bombing in the 1970s, came to the Court of Appeal in 1993 (96 Cr App R1 1993). As a result of the extent of non-disclosure of important evidence in this case, which followed numerous others, notably the Guildford Four, the Court ruled essentially that the prosecution should disclose all material to the defence. This situation created considerable practical

problems which prompted the Criminal Investigation and Procedure Act of 1996 (CIPA). This Act was not only a big step away from the full disclosure implied in Ward but a fundamental change to the principle that the defence should not have to reveal its case. A two stage process was introduced by which the prosecution, provide (Primary) disclosure of information it deems relevant to the defence, in practice usually a police disclosure officer has the main responsibility to do this. The defence then provides a Defence Statement of their case. At this point the prosecution are required to look again to see if further (Secondary) disclosure is necessary in the light of the defence case. The controversial nature of this was summed up at the time by the solicitor representing the long running case of the Bridgewater Four: -

“For the first time in our criminal history, defendants in all Crown Court cases will be expected to inform the prosecution of their defence prior to trial. The police should then search again to see if they have any material to help the defence. It is patently absurd to expect the prosecution, in particular the police, to be enthusiastic about destroying their own case.”

(Jim Nichol ‘The Observer 23. 3. 97’)

The Criminal Justice Act of 2003 replaced the formal process of secondary disclosure with a duty of ‘Continuing Disclosure’ on the prosecution to disclose any material that might come to light to assist the defence case. Given that there are time limits to do this (14 days originally) there is little difference in practice, although a statement should be provided informing the defence that no further disclosure is necessary, which perhaps puts less of a burden to search on the prosecution. More significantly the 2003 Act removes the original CIPA requirement for the defence statement to be in ‘general terms’ and demands that the defence provide more detail including of points of law, evidence admissibility arguments, pleas regarding elements of mens rea (level of intent or responsibility for the act) and the arguments and witnesses that are to be used by the defence. This latter condition raises the fear that the police might then interview and influence defence witnesses. These changes to disclosure rules can be seen as creating a fairer balance between prosecution and defence by encouraging earlier trial preparation and preventing late ‘ambushes’ using unexpected material. Alternatively they can be seen as a major erosion of the presumption of innocence and a loading in favour of the prosecution. (For a full discussion of disclosure changes in the 2003 Act see Taylor, Wasik and Leng 2004: Chapter 3)

Professional Views on Disclosure

It was clear in this study that disclosure remains not only controversial but still problematic in terms of workability. Moreover in the adversarial system it can become a battleground: -

“As soon as there’s a struggle for disclosure, what should that tell the defence team – you’ve got to ask the question why don’t you want us to see it?” (P7)

The Policy File maintained by the Senior Investigating Officer (SIO) records the reasoning and rationale of police actions in an investigation. In the Attwooll and Roden case (see Chapter 10) defence efforts to have this disclosed were resisted without explanation until about a week before the men’s appeal. Senior police officers in this study gave different accounts of whether the Policy File would be automatically disclosed in the pre-trial disclosure process. Some (P2, P4) said it would always be disclosed, others (P3, P9) said it would not automatically be disclosed as it is not evidence in the case (this was also generally the view of lawyers) but they would not have a problem with disclosing it as it could demonstrate a robust and thorough investigation. Another view was that in reality disclosure would be strongly resisted: -

“It’s the key to everything....The SIO would defend to the hilt his right to keep his policy book.....the defence have got to make a good case for disclosing it and you certainly never disclose your secret policy book” (P7)

The secret or ‘sensitive’ policy file contains intelligence material; likely to be subject to PII (see page 126) which all agreed would not be disclosed. One officer (P9) expressed some reservations about separate files as this disrupted sequential recording and involved “making subjective judgements about what is sensitive”. This officer felt that the only answer to the problems of disclosure was to revert back to full disclosure but others felt that the current system, of a trained police disclosure officer overviewed by the CPS, was appropriate. One officer, who worked on drawing up the Attorney General’s Guidelines in 2002, felt strongly that, far from the police failing to observe the rules, the problem lay with the defence: -

P3 “The rules say that the defence is supposed to provide us with a defence statement within so many weeksand if it’s a search for the truth ...then that gives us an opportunity to test the alibi or whatever. However they flout the rules completely....and they turn up on day one of the trial and say here’s our defence statement. And judges being judges, they want to be fair and not have an appeal,

allow it, so we're ambushed on day one with a defence statement.... sometimes it's alibis, all sorts of things.

Interviewer "How often does that happen?"

P3 "All the time, all the time. Yea it's a brilliant ploy.... I show you all my hand and you decide not to show your hand at all until day one of the trial."

Interviewer "The defence sometimes say that they have problems getting material off the prosecution?"

P3 "We must serve everything on the defence by a set date otherwise the case will be thrown out. We can't add anything after that date.

The same officer felt that the defence were at an advantage in that if the police obtained experts who said different things they would have to disclose all reports, whereas the defence can search numerous experts and only notify the prosecution of those that agree with their case.

The confused battleground and different experiences of disclosure were reflected in lawyers' views that, contrary to the view of P3, last minute disclosure was largely the preserve of the prosecution: -

"There are sanctions (for late defence statements) the court can invite the jury to draw inferences. Very often it's late because primary disclosure (by the prosecution) has not been made in the time it should. Anybody who's been involved in major trial will be familiar with the police serving material right up to the second week of the trial" (S6)

Similarly another solicitor found the idea of the defence statement coming in too late to be surprising given that this would deprive the defence of any further disclosure on the basis of the statement but also echoed the feeling that the problem tended to happen the other way round: -

"There are often delays, I think the general problem is that the police are not handing things over to the CPS, that's the fundamental problem, you're often waiting a long time for evidence to be disclosed and often they're not disclosing things until the day of the trial which can be a real problem and might lead you to ask for the trial to be vacated" (S7)

(For a contemporary example of this see Case of Mr Q Appendix 7)

Most lawyers saw non-disclosure as a continuing potential cause of miscarriages of justice. There were concerns about the level of CPS checking and scrutiny especially in less serious cases and occasionally this could be important (Judge 1). Also of concern was the level of expertise and the degree of rigour that solicitors put into examining

material, especially the unused material which they would have to proactively seek to access (S3, S4, S6) and in a similar vein the need to review items like the Policy file, notes of internal case reviews and police note books which are not always disclosed because they are part of the investigation rather than part of the evidence. The experienced solicitor would know that these kind of items none the less often revealed a lot about how evidence was obtained and constructed and hence its reliability. One Barrister explained that when defending “we battle all the time to get material from the prosecution” yet when prosecuting he personally would generally be happy to agree to any defence requests for disclosure. Some prosecutors are less accommodating but this was more often on the basis of cost, hassle or a strict interpretation of the rules rather than deliberate concealment (B1).

Some solicitors felt that any of these reasons might influence disclosure including deliberate obstruction and some favoured a return to full disclosure or, failing that, a need to ensure standards of practice that did not just leave case preparation to counsel, who often came in at a relatively late stage, (S3). The defence needs to look beyond the evidence, as seen and presented by the prosecution, in other words to look beyond the case construction. This need for attention to detail was expressed well by S4: -

“We never know if the prosecution have provided full disclosure or fully responded to the defence statement....To see the unused material is important in a serious case because there is a danger of editing ...I think there should be full disclosure, I think we should have that option in serious cases. Often in serious cases there is no direct evidence, just circumstantial evidence where the jury’s asked to draw inferences. Therefore evidence is usually quite tenuous but it may be enough to make a potentially serious case. Now how do you know that they haven’t just highlighted features of it and that there aren’t other features that might be important.....If we’re operating in a democracy then the court should have the maximum information to make a decision and therefore to have the prosecution use whatever material they want and to have the defence using what they are able to gain and reviewing and overlooking what the Crown have had. What’s wrong with that – nothing it’s helpful” (S4)

It should be noted that disclosure problems can continue right up to and beyond the appeal stage as in the Attwooll and Roden case, and they begin from the time of arrest. Solicitor 4 described frustrating experiences where the police refuse for long periods to tell him or his client why he was being held in the police station. While this seems ‘Kafkaesque’ to the defence and the defendant, it makes sense to the police: -

“There’s a reason for incremental disclosure.....what tends to happen is they say they’ve never been there, then their story changes as other evidence is disclosed”
(P3)

Disclosure reflects the dilemmas of the management and workability of the system as opposed to the need for the most conscientious approach to ensuring justice. It is perhaps one of the most challenging and often frustrating and confusing issues faced by both prosecution and defence. As many cases have shown however, information hidden away in unused material can be a major cause of wrongful conviction. There have been examples of deliberate and malicious concealment but as with witness problems, the possibility of human error, lack of insight or attention to detail or bureaucratic rule following are probably greater risks. Professionalism will reduce these risks but in the real world it is unlikely to eliminate such an intractable problem. This is clearly an issue where views and perceptions of reality vary considerably and one that legislation has not yet solved. Information management introduces yet another area of inherent uncertainty.

Problems with Science

The three featured cases studies (Chapters 5, 10 and 14) all involved problems relating to scientific information. In Jonathan Jones’ case the fingerprint evidence raises questions about propriety in handling exhibits, about potential contamination and alternative explanations and about conflicting interpretation of the prints over time. Similarly the Mike Attwooll case raises questions of process, contamination and failure to adequately consider alternative explanations in relation to blood traces. The Sion Jenkins case illustrates how debates about the causation of, in that instance blood spray, can continue for years among experts. In fact in one form or another, question marks about science affect all eleven cases that this study focused upon (see Table 3 page 83 and Appendix 3 case summaries). The cases of, Sue May, Nick Tucker and Sally Clarke, all hinged crucially on scientific evidence which has been highly disputed.

One of the initial findings that seemed to support a case against both Sally Clark and Nick Tucker was the apparent discovery of petechial haemorrhages in the eyelids of the

deceased. In the Sally Clark case the haemorrhages found in the eyes of her second baby following communications between two pathologists led the prosecution to claim that the baby had been shaken. The weekend before the trial experts agreed that these features had been misidentified on slides of the eyes and in fact the retina was completely free of haemorrhages. Consequently at the last moment the prosecution changed its case to smothering instead of shaking (Batt 2005: 140 and in interview, Channel 4 April 2000). Eventually the failure of a pathologist to give adequate consideration of a microbiology report indicating a widespread life threatening infection in the second baby was revealed, over-throwing the previous suspicious ideas about the cause of death. Similarly the prosecution made great play of petechial haemorrhages in the eyes of Nick Tucker's wife suggesting that they were evidence of strangulation. This despite all three pathologists at trial, and a further two subsequently, being unable to provide any supporting evidence of strangulation; no marks on the neck and no injuries that could not be associated with either drowning or the car having crashed into the river. Furthermore the pathologists all indicated that the petechial haemorrhages and other pathological evidence could be consistent with drowning (Nick Tucker interview and case notes).

In both cases the weakness of evidence about the haemorrhages was to be seen in the light of other disputed information: The disputes about the likely speed that Nick Tucker's car would have hit the water after specialist tests by the Cranfield Impact Centre contradicted the evidence given at trial, his state of concussion on being found and the presence of blood on the passenger door which suggested he had, after injuring his head in the crash, gone around to pull his wife out of the car and push her into the river after strangling her. In fact the man who rescued Mr Tucker from the car admitted to getting blood on him and then going to open the passenger side door. In addition around 30 people were at the scene which was open to all sorts of contamination being treated as an accident and not a crime scene. The handling of the blood exhibits was also shown to be chaotic, at one stage all the blood samples were given the same reference number and different samples were confused with each other (Channel 4 Nov 2000 and Nick Tucker interview). What these complex and specialised pieces of evidence often illustrate is that every incident, injury or death throws up a number of possibilities, usually disputed, inconclusive and open to interpretation and mishandling, even to the point in cases like these of potentially creating a crime when no crime ever happened. When a number of these kinds of issues are put together they may appear incriminating by number when the reality is that there

are always a number of uncertain, unexplained or partially explained phenomena surrounding the incidents some of which may be coincidences, exceptions to the norm or products of over-zealous attempts to construct a case.

The Susan May Case –Collusion and Confusion

The ‘blood’ evidence in another focused case in this study, that of Sue May, demonstrates again this state of confusion, especially where science and poor forensic practice coincide. Following the murder of her aunt on 11 March 1992 three stains were found on the bedroom wall approximately in a line about 4’ 6” from the floor. These marks could not be dated and were faint in appearance, one of the marks did not seem to be present in the original police photographs (Sue May). One of these marks contained Sue May’s palm print and another less conclusively a partial fingerprint. The prosecution case was that these prints were made after the murder when Sue May had blood on her hands. However the movement required in order to leave two such marks on the same occasion would require some explanation: -

“If the marks were made by the perpetrator as they left the room, then this would require them to place their right hand on the wall, turn to put their left hand on the wall. Although there are inferences subsequently drawn about the timing and donor of these smears, there is nothing in DS Abbott’s (Fingerprint expert) description of the physical evidence that would support such an inference.”

(Jamieson 2005)

Initial testing of the marks at the scene was undertaken by a forensic scientist Mr Davie. Mr Davie’s work has been criticised both for method (Jamieson 2005) and for integrity, the Court of Appeal noting in 2001: -

“QC for the Crown made it clear to us that Mr Davie was not a witness on whom he would wish to rely.....In his statement of 8th July 1992 he said that at the time of his examination.....he noted three small blood stains which appeared to be wet. In evidence he accepted that there was no wet blood at that timeIt was not until 1995 that Mr Davie completed the paper work”

(EWCA Crim 2788 Dec 2001)

The evidence that Mr Davie was changing notes at such a late stage suggests collusion with Senior Investigating Officer DS Kerr in order to support the prosecution case (Sue May).

Between the 19th and 24th March 1992 a forensic scientist, Mr Hussein, undertook work on these stains, enhancing them with chemicals and testing them for blood. His initial tests supported the notion that the marks were blood. Other testing located DNA of both Sue May and her aunt in different marks. However Professor Jamieson's Forensic Institute Report (2005: 9) points out "a failure in the initial evidence collection by failing to collect control samples." In interview Sue May demonstrated how she would lean with hands on the wall and talk to her aunt and also showed how her aunt might often have touched the wall. The DNA of both people would probably have been present on various parts of the wall; the substance that made the marks may have been superimposed on traces of DNA. Control samples are clearly required to establish whether DNA was present in various places along the wall.

The initial investigations also ignored a mark in the kitchen which was apparently similar to those in the bedroom but could not, because of its location, have appeared as a result of the murder. This, along with the presence of a paper bag with blood from a meat product on it, suggested that the marks in the bedroom were being viewed selectively in order to rule out alternative explanations: -

"The reasons for ignoring this staining behind the radiator, which clearly shows that a substance similar to the ones being used as evidence against Susan May, have never been expounded.....It would also be helpful to elicit the logic behind the assumption that this stain is not connected to the others"

(Jamieson 2005: 7)

Moreover doubt has been expressed as to whether the marks initially tested by Mr Davie and Mr Hussein were in fact blood at all. Testing in Germany by Professor Brinkman in 1995 indicated a negative result on one of the stains when tested for blood but in 2005 Professor Jamieson's report stressed that all the tests that had been undertaken were presumptive tests. Such tests should be seen as preliminary tests which may eliminate some substances as possibilities but should not be seen as reliable proof that the substance is what it is being tested for, in this case blood, as other substances may give similar results: -

"I consider it misleading to say, as Hussein did, that 'the material behaved exactly as I would have expected had it been blood', because there would appear to be many materials that would behave in the same way.....All this was compounded and summarised in his response to defence counsel 'I am certain in my opinion

that the material there was blood'. That may be, but his opinion is clearly and demonstrably flawed"

(Jamieson 2005)

It is highly likely that 'the blood' evidence was the major factor in convincing the jury that a woman who had shown nothing but loyalty and caring to her aunt for so many years would have brutally murdered her. The scientific evidence might often be taken to be the more certain element of a case. This example shows, as do all the others in this group of cases, that science is often a matter of dispute, a matter of opinion, a matter of technique and a matter of interpretation over time. While techniques and knowledge may have improved since 1992 the uncertainty principle remains: -

"The only certainty is elimination"

(Professor Jamieson's Talk to Innocence Network Training event Cardiff University 2006)

Professional Views on Science Issues

Most police officers interviewed for this study felt that miscarriages of justice were less likely than in the past and one of the main reasons for this was the increased use and effectiveness of science and technology. Furthermore, in some forces at least, most of the liaison with the forensic science laboratories would be undertaken by specialists rather than directly with Senior Investigating Officers (SIO) (P2), thus reducing the possibilities for the kind of dubious collusion alleged in the Susan May case. However there is, it was suggested, "a contract between the SIO and the Lab" via the liaison officer (P4) and certainly forensic strategies are discussed. The forensic scientist is not working in a 'double' or even 'single blind' test – they know what they are testing and why, thus they know what results or interpretations the police are looking for. Indeed the police have to pay for tests so they need to be specific about what they are looking for (P4). While expressing a lot of faith in the system and in forensic scientists generally, police officers did acknowledge that they relied on experts and those experts were not infallible: Some had come across obvious mistakes and the Sally Clark case was often quoted as one where the police relied on experts who provided misleading information that fed the investigation.

While generally accepting that there had been positive developments in the use of science, lawyers interviewed were nonetheless universally cautious about scientific evidence and particularly the uncritical use of experts whose quality was not always sufficiently interrogated. There were also concerns about how clearly scientific information came across at trials and how sometimes a lack of scientific evidence in circumstances where it would be expected, could be conveniently ignored by the prosecution. ‘Judge 1’ noted that juries were increasingly expecting to hear of DNA evidence when this did not feature in most cases. The same judge expressed some concern that experts were becoming increasingly cautious about committing themselves in the light of cases that have led to criticism of colleagues.

The interactions between the legal world and scientific experts can be problematic (Nobles and Schiff 2000) and a few observations from expert witnesses are relevant here. One expert (EW1) highlighted the dangers of selective use of experts who represent certain schools of thought and the potential use of elements of reports to construct questioning without disclosing the full report. Also she had experienced being pressed to expand on conclusions beyond what the evidence could really say. These potentialities exist both in defence and prosecution approaches. Crucially experts stressed that states of knowledge should not be confused with certainty:

“Doctors tend to fall back on ‘I’ve been doing this for 40 years and I’ve never seen this’. That may well be true but it may be that he never saw it because he didn’t recognise it when he did see it - that he didn’t know enough about it at that time to recognise it. There are all sorts of possibilities – something may have come up in the literature since then which took everybody forward and the fact that you haven’t seen it is not enough on its own to put somebody in jail for life” (EW2)

“Forensic medicine is still embryonic; in many areas what is knowledge today may be different in future” (EW1)

Conclusion

In considering how cases can be constructed in ways that may lead to wrongful convictions the previous chapter used examples from the study to show how malpractice could contribute to this. This chapter has used material from the study to show how,

while malpractice may be an element, misinformation of a crucial nature can result in wrongful conviction, and that this may derive from both human error and from the nature and state of knowledge that prevails. Witness problems, disclosure management problems and scientific complexities are just three areas that potentially impact directly, or in combination, upon the outcome of investigations, trial and appeals. The next chapter builds on these two preceding chapters by looking more specifically at the related issue of how the uncertain nature of case constructions may be enhanced through assumptions, interpretations and selectivity.

CHAPTER 8

ASSUMPTIONS, INTERPRETATIONS AND SELECTIVITY

“If miscarriages of justice are going to happen in murder cases then it’s much more likely to go on in low key non-visible cases. It generally goes on with those who are involved in criminality throughout their lives and they just accept it as part of the process, but there are still people who are found guilty when they’re not or people who allow themselves to admit offences that they’ve never committed.....the victim is being misled and the person who actually committed it is getting away with it, but it’s all about clear up rates” (P7)

This police officer’s response was not typical of police comments and different participants were split on whether wrongful convictions were more likely in high or low profile cases and on how likely they were to occur at all. Most of the featured cases in this study are serious cases where people of previous good character have been convicted. As discussed in Chapter 4 (pages 80-81) this is not to imply that this is more commonly the case or that it is necessarily a more serious injustice but it does provide an opportunity to assess how these convictions can occur in what seem on the surface to be the most unlikely cases – the “Agatha Christie” scenarios. This notion is discussed below – the chapter is subdivided as follows: -

- The ‘Close Perpetrator Assumption’ and the ‘Agatha Christie Scenario’
- Reversing the Positive: Re-constructing Identity
- Losing Control in the face of Case Construction.
- Coincidence and Case Construction.
- Selectivity.

The “Close Perpetrator Assumption” and “The Agatha Christie Syndrome”

Chapter 5 discussed these ideas in the context of the Jonathan Jones case. As Table 4 below suggests, other cases in this study, all of which involved homicide, also seem to support the notion that there may have been an undue focus on those close to the victims

and that there has been little consideration of the likelihood of previously caring, law abiding, up-standing members of the community with no apparent mental health problems, suddenly flying into homicidal paroxysms of rage (AN, SJ, SC, IT, SM) or inventing complex, devious plans to commit and then cover up brutal pre-meditated murders for financial gain or out of jealousy or previously unapparent hatred (SB, JJ, AH, MA, NT, SM).

Table 4: Participant Characteristics and Probable Main Reasons for Initial Suspicion

Person	Characteristics		Probable Reason(s) for <u>Initial</u> Suspicion in Investigation			
	Previous good character	Close relationship with victim	Physical Trace evidence	Suspicious act or coincidence	Witness statement	No alternative explanation or suspect
Cleared						
MO	*?			*		
SB	*	*		*		*
JJ	*	*		*		
AH	*			*		
SJ	*	*	*	*		
SC	*	*	*	*		
Still Convicted						
MA	*	*	*		*	
JR	?				*	
SM	*	*	*			
NT	*	*	*			
AN	*			*		
IT	*	*				*

Notes: -

- All of previous good character (no previous convictions) except JR past convictions for minor theft/cannabis and MO who admitted involvement in car theft (first offence) on night of murder.
- AH's co-defendant had had close relationship with victim's husband and AN knew the victim as a local acquaintance.

Even MO and JR who had committed past offences (albeit, MO first offence of car theft on the night of the murder) had no record or history of violence. The prosecution in the case of Sue May (SM) ran both the paroxysm of rage theory and the financial gain theory but her solicitor expressed in interview the difficulty many people had of accepting the 'Agatha Christie scenario' in her case: -

“I look at the case, the evidence and the law and ask was this person properly convicted.....that’s all I’m concerned about....but just occasionally a case will develop its own momentum where the circumstances are just so appalling – I mean the Susan May case, it’s just inconceivable, I mean I have the same prejudices as everybody else, I just find it inconceivable that a woman so caring in her dealings with everybody else, can have committed such a brutal murder. That’s on top of the concerns there are about the case.....and you know there are cases when you get involved and you get to know the person, you inevitably form a view”. (S6)

One cannot of course rule out the possibility that such extraordinary reversals of personality could take place or ignore the statistical evidence about close perpetrators in murder cases (see page 100) but assumptions that are over influenced by figures or by coincidence or perhaps misleading scientific traces can be dangerous. One Barrister (B2) felt that the police might “build a stronger case than there should be” on these kinds of assumptions but that there had to be something there for them to build on. One solicitor explained how it was often very possible to find something to build on and consequently he thought the close perpetrator assumption could be systematically prone to over emphasis: -

“The investigation of a serious crime, say a murder, starts with the victim in the middle, you then have a series of concentric circles going out. So the police will look at those closest to the victim for what information they can get. So, for instance, if it’s an elderly person they’ll look at the beneficiaries of the will and close family, family disputes etc, etc. And the next set of people is well people who had access to the house where the victim lived and then well neighbours and anyone else. But sometimes, rarely admittedly but sometimes, it’s just a random act of violence as a result of a burglary gone wrong say, That seems to be right on the periphery of this series of concentric circles and so quite often the police will not get past concentric circle number one containing close family members – ‘Oh by the way nephew John had just found out that Aunt Agatha was going to leave him £1.5 Million in the will and he was heard at a family party last week saying I can’t wait to get my hands on it and by the way he’s got a conviction for common assault from 10 years ago and so therefore he’s violent.’ And sometimes, yes, the police will look at the easiest answer, and sometimes the answer is the most obvious one but not always” (S3)

Police officers interviewed generally stressed that their training and professionalism would prevent them from making unfounded assumptions and moreover that they had to be aware that assumptions about good character should not be made either: -

We get referrals on an almost daily basis from the A and E departments on non-accidental injuries on children. So there 40 or 50 investigations of one sort or

another at any one time and probably 49 out of the 50 were by parents or close relatives. So I know from my own experience that parents can harm their children. Now parents do it for a variety of reasons, whether it's post-natal depression or other reasons in peoples' lives, and the fact that it's totally out of character doesn't mean they can't do it and I think it would be wrong of me to make assumptions" (P2)

Faced with these kinds of figures and experience it no doubt takes a great deal of professionalism to avoid being led to some degree by them, and thus to fail to identify what may be exceptions to the rule. This may be particularly so when coincidences or hints of suspicion such as those described in the above quotation from S3 arise (see further discussion of coincidence below). Furthermore a number of officers stressed their reliance on experts, often quoting the Sally Clark case, and suggesting that they should not be held responsible if they were given misleading expert information. One former senior officer however felt that professionalism required a greater scrutiny in investigation and that a deeper more proactive interrogation of expert evidence should be part of the police role: -

"The real one is Sally Clark; I mean that is the most outrageous case in my view. I know Professor Meadow got the blame but my personal view is that his mistake was to assume the police had done a proper investigation. I've investigated child deaths and the first thing you ask for is the microbiology report....if there's no overt wound then that is the most probable cause of death and the fact that the police don't appear to have done that is extremely significant....In my view it was an incompetent investigation because it's quite common for things to get lost in hospitals and the police aren't passive recipients they should be active investigators and unless there's a message somewhere that says 'I've spoken to the pathologist and he says the microbiology is negative' then I think the police should be held culpable." (P1)

Whatever the foundation of the charge, the prosecution may face an issue in convincing the jury that an apparently 'ordinary', previously non-violent person would commit such a crime. The evidence such as it is may therefore need to be enhanced with some rationale for the apparent change in character. This is one area where, in the cases studied, adversarial case construction seems to come into its own. This is by no means the exclusive preserve of the police but a proactive function of the prosecution at trial. To create the picture of a murderer, especially if the evidence is weak or contestable, requires in these cases a re-construction of identity, or as the victims of this process usually refer to it, character assassination. Depending on the development that the prosecution employ

at trial it may be that there are multiple case constructions operating as the case develops, or at least variations on the theme.

Reversing the Positive: Re-constructing Identity

Chapter 14 below describes in some detail how the re-construction of Sion Jenkins identity formed a major part of the case construction and persisted even after his acquittal. In other cases participants suggested that it was the attribution of motive (jealousy or financial or emotional gain) introduced on a largely speculative basis that contributed to the negative re-construction of identities (Sue May, Jonathan Jones, Sheila Bowler, Nick Tucker, Mike Attwooll). They described details of their lives which involved such matters as debts, personal relationships, unfulfilled aspirations and frustrations being brought into the prosecution case, entirely tangential to the evidence and often misleadingly or incorrectly portrayed. Motive therefore is elevated above character and portrayed as a force that over-rides good character, despite the absence of evidence of such motivations in previous times – a key move in the “Agatha Christie” scenario construction.

Throughout the trials and ordeals of Sheila Bowler the police and prosecution made much of her lack of emotion and apparent lack of open grief displayed at the death of her aunt (See Appendix 3 case summaries). Sheila baked biscuits immediately after hearing of her aunt’s death, she went out for a meal with her son after identifying the body, all much to the surprise of investigating police officers (Devlin and Devlin 1998: 66). Like Meursault, the anti-hero of Albert Camus’ famous novel ‘L’Etranger’ (1942), Sheila showed guilt because she did not cry but got on with her life despite the death of a loved one. In reality her reactions were more closely related to culture and generation, what to Sheila was a positive duty not to make a scene became to the legal system evidence of a callous and heartless individual: -

“Her octogenarian friend Helen Goodwin subsequently praised Sheila for it in a sworn statement to her solicitors: ‘I can say that in the time that I have known her she has never been emotional. She didn’t cry in my presence following her husband’s death and at the memorial service for Bob she *behaved fabulously*’ (our italics). Mrs Goodwin was later to tell the investigative journalist David Jessel

proudly in a television interview: ‘Sheila wouldn’t burst into tears in front of the police - not Sheila. Nor would I have done’”

(Devlin and Devlin 1998: 66)

The narrative picture that was forming in the minds of investigators could not accommodate this cultural and generational dissonance. Sheila’s reactions appeared admirable to her contemporaries yet heartless and suspicious to the police; a picture that would be further embraced by the court processes.

Nick Tucker was an RAF squadron leader with many years active and highly commended service. While serving in the former Yugoslavia he became emotionally involved with a Serbian interpreter. Although this relationship had effectively ended by the time of the accident in which his wife died (See case summary Appendix 3) the relationship was presented as a motive for his alleged staging of the accident.

From the outset of his cross-examination in court the prosecution’s attempt to reverse Nick’s image as a man of principle and credibility began. According to Nick (in interview) the prosecution’s cross-examination at trial began as follows, trying to throw immediate doubt on his credibility and honesty and put him on the defensive: -

QC “Are you a loyal person?”

Nick “Yes”

QC “You weren’t loyal to your wife were you”

According to Nick nearly two days of the trial were spent discussing the affair with the interpreter and “trying to insinuate things”, with further questions on this topic being directed at other witnesses. For Nick character assassination was the only way the prosecution could proceed “and that is exactly how they did proceed”: -

“The law books say that you cannot prove a crime on motive alone, well they didn’t prove it but if any case or verdict was secured purely on motive it was this one”

(Nick Tucker)

To counter this process Nick was able to call upon a number of defence witnesses to testify to his good character. Military colleagues all portrayed Nick in a highly credible

and complementary light but even this positive evidence was reversed by the prosecution. According to his colleagues Nick was meticulous, everything went to plan; the prosecution used this to suggest that minor inconsistencies in his account suggested he was lying about the events: -

“So the prosecution used that to say...’he was a meticulous person he would have known precisely what time he left the pub, he would have been able to recount because it’s his job’ – You know- they seem to lose complete track of the fact that in normal everyday life – well unless I looked at my watch now I wouldn’t know exactly what time it was”

(Nick Tucker)

The positive quality of being meticulous in a complex and risky job was thus re-categorised as an obsession that would dominate every action, an extension of argument to the point of absurdity. It seems however that this was a continuation of investigative aspects designed to bolster a weak case by trying to create a picture of a clinical killer. The police had examined Nick’s military record and made much of one posting that described him as a “Combat Training Instructor”. Nick pointed out that this was a generic title for all the instructors at the base “In civilian terms I was a Training Manager”. In a similar vein the prosecution tried to suggest that Nick had been a heavy drinker in the former Yugoslavia and that the fact that he drank non alcoholic ‘Kaliber’ lager on the night of his wife’s death was part of a devious plan to remain fully in control of the planned murder. His RAF colleagues however refuted any suggestions of heavy drinking: -

“No-one had ever seen me drunk at any stage whatsoever – you can’t get drunk over there you end up bloody dead, but they used the fact that I had drunk Kaliber that night as some kind of devious plan.”

(Nick Tucker)

Meanwhile the media joined in the word game. When Nick’s wife’s best friend gave supportive evidence saying that Nick was “on the point of madness with grief over the death of his wife” the headline of a newspaper report the next day read “RAF Officer on the Point of Madness” (Nick Tucker).

Looked at in isolation some of these points may seem trivial but it seems that they form pieces of a jigsaw designed to create a new picture of a formerly respected person as a callous and devious killer.

Ian Thomas maintains that he remained entirely consistent in his accounts of events around the time of his wife's death. He recalled how what should have been seen as something in his favour was reversed to suggest deviousness on his part. This is particularly ironic given that in many cases inconsistency is used as evidence of dishonesty. The "catch 22" according to Ian was that consistency could be used in the same way. Unusually on a murder charge, Ian was given bail before the trial, even more unusually he was bailed back to his family in the local area where he and his wife had lived. At trial the prosecution listed 128 witnesses mostly friends and neighbours. The fact that these people gave a consistent account of what Ian had said to them, before and after charge, was then presented as evidence that Ian was rehearsing a false defence (Ian Thomas).

"That's why there were so many witnesses brought to court, all to say Ian told me this, and Ian told me that - not 'I asked Ian what was happening'? As far as the prosecution were concerned that underlined their interpretation of events – that I was running round rehearsing my alibi.....none of them could give any direct information about the crime – just constant 'What did Ian tell you, when did you see him?'"

(Ian Thomas)

Natural reactions can also be negatively reversed: -

"One of the big arguments from the prosecution point of view was: 'Was he acting his normal self?' Well for a man whose partner had gone missing so obviously something's wrong, who'd had no sleep or food for 3 days, who'd had police involved in finding his partner and the whole neighbourhood asking the same questions constantly. I think anybody in that situation would be acting slightly differently to their normal self"

(Ian Thomas)

It takes only a small rearrangement of words or emphasis to create a substantially different impression. The prosecution were keen to suggest that Ian and his wife argued constantly. One witness was produced who suggested she had heard arguments at night; it was not until the second trial that she admitted that the voices she had heard were not those of Ian or his wife. Ian's testimony was that they very rarely argued but there had been one or two occasions over 10 years when his wife had lashed out at him, although he maintained he had never responded physically. This account of a good, non-violent

relationship was backed by numerous witnesses who knew the couple including his wife's own family. The Court of Appeal however noted that "they had rows at times sometimes coming to blows" (R v Thomas EWCA Crim 941, 2002: Para 10).

"A completely different set of images arises from that (the use of the word 'blows') and when I read that I was absolutely horrified, it makes me out to be some sort of monster and it makes the relationship out to be consistently violent either way and nothing could be further from the truth."

(Ian Thomas)

Participants consistently described how they were unfairly portrayed in court as devious and cunning. One solicitor summed up the role of this process as follows

"Character assassination.....fills the gaps in the prosecution case....it's all part of the propaganda war that goes on before and during trials" (S1)

Losing Control in the Face of Case Construction

It is often argued that defendants have their chance to put their case with the aid of experienced lawyers, thus they should be able to refute any misleading information the prosecution might present. In the main however this was not the experience of participants who found themselves in a situation over which they felt little or no control. Some participants expressed how they felt more in control at later appeal stages when they had learnt more about the system and how it works. Especially for those with no experience of the criminal justice system who were suddenly thrown into the horror of being on trial for murder the loss of control over their own destiny and in their view the loss of control over truth and reality was dramatic: -

"I was totally naive...I had never been in a court of law before, I had never dealt with the police, lawyers or anything. I didn't know what was going on - you might as well have sent me to Mars"

(Nick Tucker)

"I knew nothing about the system and it's a great leap of faith to put your life in someone else's hands.....If you're not a career criminal, if you've had no

involvement with the criminal justice system....you literally pluck a solicitor out of the air and say now I'm handing my life over to you"

(Ian Thomas)

"I had my freedom of speech taken away from day one...I wasn't allowed to say what I wanted to say, they wanted to do it their way"

(AN)

One of the most consistent messages from all parties in this research was that a great deal depended on the quality of defence made available to the accused person. Without a high level of scrutiny the case construction presented against the accused would be likely to be very difficult to refute. As the Sion Jenkins case graphically illustrates, character assassination can throw a mist over the actual evidence (see Chapter 14) and the defence must find a way of refuting this as well as the evidential issues. Those with no experience of the system often took the first solicitor that came along, sometimes the duty solicitor they had seen at the police station; only later at appeal stages were they able through their experience to seek more experienced or committed solicitors. When faced with complex and subtle case constructions what is needed is a solicitor who will thoroughly and expertly examine the evidence, including unused or undisclosed material - a solicitor not only with experience and knowledge but a commitment and belief in the client: -

"What's important in these cases, I think, is interest. Most lawyers hit a reasonable degree of competency, the inadequacy is lack of interest, lack of taking on board what the client is saying, lack of scraping beneath the surface to find out what's true - that passion and interest." (S4)

One solicitor felt that the system could potentially provide disincentives for lawyers to nip fallacious case constructions in the bud: -

"Standards in criminal defence is an issue that needs to be addressed because too often, especially larger firms, approach a case, murder for instance, on how much money can be made from it rather than obtaining a result for the client. So for instance of the last six clients we've had arrested for murder, only two have been charged and only one went to trial, because the solicitor who attended the police station was extremely competent and thought about his advice very carefully and discussed every single issue that arose with the client and four out of six were not even charged. With the one that was charged the first thing the solicitor did was to write to the prosecution to ask for details of the evidence that justified the charge and within a week of receiving that letter the charge had been dropped.

That demonstrates the competence there should be cross the board. The goal should be to achieve the best for the client regardless of how it affects you, because realistically the fact that these clients did not go on trial for murder will have cost the firm upwards of quarter of a million pounds....other solicitors can go on holiday to Bermuda and buy a new car....We have a very, very grateful client, to all intents and purposes that solicitor saved his life, but it cost us a six figure sum.” (S3)

What lies behind this statement, beyond the slightly cynical view of financial motivation, is that case construction has a momentum that gains potency as the case progresses through the system. The social assumption that weaknesses in the case will be picked up in the early stages and that lawyers will always act in the interests of the client or with adequate thoroughness at crucial times may be a misleading one.

The introduction of the barrister, normally a QC with a “Junior” assistant in serious cases, may be seen as a bastion of hope for the accused facing trial. This may well be the case, however it may also widen the gap between the naivety of the accused and the lawyer’s professional status still further. A number of people in this study felt that their QCs had made strange decisions which they found hard to challenge, a danger described by one solicitor: -

“Who’s going to argue with the QC, not the person charged, he thinks its being done for his benefit. How can he argue with his QC and solicitor – but their actions can be devastatingly disastrous.” (S1)

Both Mike Attwooll and AN maintain that their barristers at trial ignored their instructions and requests. AN claimed his notes from the dock were simply screwed up and ignored while Mike Attwooll maintains that his barrister, Gerard Elias who had prosecuted in the Newsagent Three case (see Chapter 6), was frequently responding by saying he was saving certain matters for the closing speech. At that time Mr Attwooll was unaware that rules prevent matters being raised in closing speeches that have not been raised in the trial. The failure of Mike Attwooll’s defence to call a crucial witness is discussed in Chapter 10 above. John Roden described how barely perceptible nods and shakes of the head from his QC ‘helped him decide’ to continue with the trial, rather than ask for the jury to be discharged, despite the presence of a relative of a senior officer in the investigation being on the jury. In some cases, though not in the cases featured here, lawyers advise that the defendant does not take the stand; what might be seen as a protective move by lawyers might then be seen as a negative inference by juries.

Judge 1 in this study described as “quite extraordinary” the defence QC ‘s approach at the first trial of Sion Jenkins. The QC simply asked one question of Sion when he took the stand: “Did you murder Billie-Jo?” Sion answered “No” and the QC sat down. This incident is now described in a book on the case as the “seven second defence” and an intended but unsuccessful “coup de theatre” (Jenkins and Woffinden 2008: 193).

As Mr Jenkins had hoped prior to his QC’s ‘surprise tactic’, taking the stand might be seen as the defendant’s chance to put the record straight and undo the prosecution’s case construction. There are however limitations over the level of control that this gives defendants.

“A horrendous experience in many ways, you have to be extremely careful because it’s not just about being honest and answering the questions honestly, it’s about how the jury are observing you and how the prosecution try to con you...you are naturally extremely nervous, you know, dry mouth, sweats, shakes....you try to concentrate on remembering a very long and complicated scenario... and it’s common practice, they lead slowly up to a sucker punch ‘Yes but you said this and now you’re saying something different’”

(Ian Thomas)

Ian, and numerous other participants, went on to point out that the questions are framed in terms of the prosecution case rather than the whole picture and how he experienced frustration with demands for yes or no answers to complex questions and a difficulty with expressing the story in the terms he would wish to. One lawyer explained the rationale for this situation: -

“It’s an artificial system but you don’t just say to people tell us what you know – They’ll come out with all sorts of stuff, like my mate down the pub told me he did it” (B2)

The best intentions of the trial system aim to test the prosecution case but in so doing the scope of discussions are in the main limited to that case. The case presented may be a selective one and the parts that are emphasised by either side will be selective. The defence however has to address the case construction and there are limits on how far alternative perspectives can be advanced – no-one else is on trial, there is only one case to answer and that is the one put forward by the prosecution. The defendant may feel entrapped by the trial system, losing control and identity, as the prosecution builds on the selectivity and coincidences that prompted the initial case construction.

Case Construction and Coincidence

Events surrounding anyone's life might be seen as a series of coincidental events, why do certain events coincide to form a career, a relationship or whatever. Perhaps coincidence is more common than we realise in day to day events, yet coincidence can be very convincing when framed in a case construction or combined with other 'coincidences'. In many respects it is coincidence which makes 'evidence', often referred to as circumstantial evidence.

The fact that Nettie Hewins gave her niece a lift to the petrol station to buy electricity tokens on the same night that the family of a man whom her niece had had an affair with died in an arson attack, was the essence of the case against Nettie. This with the slight added coincidence that they took the car out of the field of view of the garage CCTV in order to use the car vacuum cleaning machine, thus allowing the prosecution to make speculative suggestions about siphoning out petrol, while off camera, for her niece to start the fire. The Jonathan Jones case (see Chapter 5) was founded almost entirely on coincidence, his being in Wales at certain times, his possession of a trench coat etc. Similarly Sion Jenkins' unfortunate timing of the moneyless trip to 'Do It All' was viewed with great suspicion, when in fact looked at another way; the absence of the rest of the family was a necessary requirement for someone else to commit the murder (see Chapter 14).

There are therefore almost always some apparently suspicious coincidental features around almost anyone, especially those close to the victim. Case constructions and "Agatha Christie syndromes" are not formed without any foundation, but sometimes those foundations may appear much more solid than they are. This can be especially compelling if a number of coincidences can be presented together, even if some of these coincidences are interpretations rather than facts. This can be illustrated by comparing aspects of the Sally Clark case with that of Ian Thomas.

The now infamous fallacious statistic provided by Professor Meadow giving a likelihood of 73 million to one of two cot deaths happening naturally in one family, enabled Sally Clark's conviction to be supported primarily on a co-incidence argument, albeit a misleading one. The question should have been not 'how likely is this to happen' but 'did

it happen in this case'? However the prosecution relied on a raft of apparent additional coincidences, these were summed up in the judgement of the first unsuccessful appeal: -

“Taken separately there was a very strong case on each count. Taken together we conclude that the evidence was overwhelming having regard to identified similarities: -

- (a) The babies died at the same age
- (b) They were both found by the appellant and both according to one version of the appellant, in a bouncy chair.
- (c) They were found dead at almost exactly the same time of the evening, having been well, having taken a feed successfully and at a time when the appellant admitted tiredness in coping.
- (d) On each occasion the appellant was alone when the baby was found lifeless.
- (e) On each occasion the appellant's husband was away from home or about to go away from home.
- (f) In each case there was evidence of previous abuse: for Christopher an attempted smothering, for Harry, an old rib fracture.
- (g) In each case there was evidence of deliberate injury recently afflicted: For Christopher bruising and a torn fraenulum. For Harry hypoxia damage, petechial haemorrhages in the eyelid and fresh bleeding of the spine and swelling of the spinal cord.
- (h) The rarity of two natural deaths in one family with the first five features above present, and the extraordinary coincidence, if both deaths were natural, of finding evidence of old and recent abuse.”

(Court of Appeal R v Clark EWCA Crim 54 2nd October 2000; Para 255)

On the surface this does seem a compelling case. However close consideration of points (a) – (e) perhaps puts their evidential value in a different light. It is hardly surprising that cot deaths occur around the same age, or that the mother is the most likely person to find the baby, or that a mother might complain of tiredness. The appellant, Sally, was only alone, in the house on one of the two occasions on the other occasion her husband was downstairs. Point (e) might just have easily been written “On one occasion her husband was home, on the other occasion he was away”. The medical coincidences perhaps seem more compelling but all these matters were the subject of dispute from the trial onwards. Paediatric pathologist Professor Berry gave evidence at trial that some cot deaths happen after a feed, there may be familial factors that predispose a mother to a second cot death, that in his view there was no hypoxia and no sure evidence of a fracture, petechial haemorrhages are rare in cot deaths but not unknown and not significant, fresh and old bleeding of the spine often arises naturally and the torn frenulum could have happened during the autopsy or CPR. Dr Ian Rushton also a paediatric pathologist, gave evidence

that a nosebleed one baby had suffered could have given rise to old blood in the lungs, the fresh blood was a common feature of cot deaths as were hypoxic changes and in this case it was not significant enough to indicate smothering. He could not confirm a swollen spinal cord and the lack of other injuries suggested this was unlikely. Professor David, a paediatrician, backed up these views including stating that babies after death often looked bruised when they were not (Batt 2005: 270-279). On the medical evidence the Court of Appeal thus relied on the jury's apparent interpretation of the medical evidence, or their assumptions about this. The case illustrates how medical and social uncertainty can be combined to make a strong but false case, while the evidence that one of the babies had a potentially fatal infection remained undisclosed.

The third appeal of Ian Thomas concludes in a similar vein suggesting the strength of the circumstantial case as a strong indication of guilt: -

“We mention in particular: the serious argument between the appellant (Ian) and Julie (his wife) on the Saturday night; the nature and timing of the appellants injuries and his differing and unconvincing explanations for them; the appellants appearance and behaviour on Sunday at 1pm when Mr Kamara, the debt collector called, and his subsequent lie as to what he was wearing at the time; the appellants washing of the bath mats, tidying the house and washing the back yard; the appellants conduct thereafter in seemingly establishing an alibi; his immediate ability on the Sunday night to identify which of Julie's clothes were missing; his delay in reporting Julie's disappearance to the police; the evidence of the fire and the nauseous smell emanating from it over the next three days; his opportunities to replenish the fire, and his curious conversation with Mr Jackson on the Tuesday morning.”

(Court of Appeal R v Thomas EWCA Crim 941 26th April 2002: Para 100)

Again on the face of it this sounds compelling. In interview for this study Ian responded to questions about this paragraph: The argument was a minor argument, its seriousness was grossly exaggerated. The injuries were a few tiny scratches which experts for the prosecution at trial could not conclusively say were human hand scratches incurred in a struggle, but could have easily been, as Ian believed, scratches incurred while decorating, scratches from the cat, or “any one of a thousand causes”. Mr Kamara's evidence that Ian was nervous and wearing shorts (presumably the implication being that he had blood on his other clothes) was simply untrue and he had not lied about this, Mr Kamara may have been influenced by the needs of the investigation. In response to the issue of cleaning the house to destroy evidence, Ian responded as follows: -

“Witnesses said the house was always clean and tidy and forensic scientists said they found nothing to connect with death or injury in the house, nothing to connect with any sort of disturbance....nothing to connect anything in the house with an attempt to dispose of a body... For police and forensic scientists to say I cleaned up to get rid of forensic evidence - it’s quite a remarkable set of circumstances”

(Ian Thomas)

As for constructing an alibi this seemed to refer to his being with his family and others but after the time that the prosecution claimed Julie had been killed. Identifying what clothes she was wearing was to Ian a complete red herring: -

“If you’re with somebody a long time you know the kinds of things they wear, the kind of routines they haveso it doesn’t take a genius to break it down and say that’s not here, I’m gonna have to assume it’s with her. I mean I couldn’t do that perfectly but I could do it say 60-75%. But the inference was that all of a sudden I have this ability to identify exactly what Julie was wearing....therefore I was responsible for disposing of the body.”

(Ian Thomas)

There was a delay in reporting Julie missing but this was largely on the basis that Julie’s sister’s boyfriend, a policeman, had said the police would not be interested if she had been missing less than 24 hours. In fact Ian did report it in less than 24 hours. Reports about the smell from the fire were inconclusive in terms of time and his opportunities to replenish the fire were two or three at most which would not have been sufficient. The conversation with Mr Jackson, the refuse collector, was discussed in terms of its potential for distortion and retroactive interference in Chapter 7 (p 133).

No evidence can be 100% certain and coincidence or circumstantial evidence can be compelling as will be argued in relation to ‘Mr B’ in the Sion Jenkins case (Chapter 14). The difference is that in the Sally Clark and Ian Thomas cases the balance was tipped by a series of ‘coincidences’ that were in fact a collection of interpretations from one side of the argument, which could simply be ‘typical’ situations that happen to fit, or situations that could be matched by a series of alternative explanations. The coincidence with Mr B by contrast is, it will be argued, so abnormal that it defies contradiction or explanation.

Ian, unlike Sally, has not been cleared, even though there has been some significant new evidence (see Appendix 3 and ‘Selectivity’ below) but nothing deemed as conclusive as the microbiology report in the Sally Clark case.

Case construction may then be enhanced by collectively interpreting a number of coincidences as having a connection and providing an explanation. This chain of circumstances is then provided to the jury and to appeal courts as what appears to be an overwhelming set of coincidences when in fact it may be a carefully selected set of interpretations. Once a jury has decided to accept a certain construction that is what stands and the Court of Appeal will not question such matters unless they form direct and admissible grounds of appeal. As seen above however the Court of Appeal will use such matters, stated effectively as facts, in order to re-enforce their decisions to dismiss appeals.

Selectivity

It should be apparent that selectivity is at the heart of case construction, it is the quality and reasonableness of the selectivity which makes a fair or unfair case construction. The three detailed case studies in this document (Chapters 5, 10 & 14) all show numerous examples of questionable selectivity, and of the interpretation of that selectivity – the red herring of Jonathan Jones’ trench coat for example (see page 107).

With the exception of the three cases where the defence argument was that an accident or illness, not a crime, occurred (Nick Tucker, Sheila Bowler and Sally Clark) all the other people who had been convicted felt that there were other stronger suspects who were not followed up adequately in the investigation (See Table 3 page 83). Perhaps the most dramatic was the playing down of the evidence concerning Mr B. in the Sion Jenkins case (see Chapter 14). Almost as remarkable was the apparent failure of the investigation in Sue May’s case to follow further information given by a neighbour concerning a red car parked outside her aunt’s house with the engine running on the night of the murder. Only very recently have enquires revealed that the police traced the car and found it to be linked to a known burglar, who sold the car a few days after the murder (Sue May). It seems the car was located before the trial but the information was left in the unused material and not found by the defence. Such curious selectivity is hard to explain, one

explanation is that the “Agatha Christie scenario” had taken hold and the investigation was “progressing” too far in another direction to be reversed. One ex-police officer in this study had worked in a private capacity to review the investigation in this case, including examining the police policy book. He had noted a number of curious entries such as the decision not to do house to house enquiries because of the cost and indications that other leads were being played down: -

“Policy book entries allocated to the inquiry should go up as it proceeds and all of a sudden they drop. So somebody’s actually taken a whole wodge of stuff out of the inquiry so it hasn’t been disclosed...One of the entries links the crime to a murder in West Yorkshire, but there’s a set procedure for linking crimes and it should be documented....but there’s also a set procedure for unlinking crimes, but there’s no documents for that either. The crimes linked one minute and there’s no reference and de-linked the next so you think to yourself, who’s made these decisions and where are the documents” (P1)

Investigative journalists working on the case of AN discovered some very incriminating information in relation to other suspects, eventually broadcast in a national TV programme (Reference retained for anonymity). It seems conclusions which may have been incorrect about the time of the murder had led the police to eliminate these suspects and focus on AN.

Again most police officers in this study were adamant that these kinds of unethical or one-dimensional thinking would not be likely to happen today. All leads would be followed and all suspects traced, implicated or if appropriate eliminated (TIE). However as one officer put it “It’s important not to put these things to bed forever”. What cases like Sue May and AN illustrate is the inability of the criminal justice system to adequately review where things have, sometimes quite obviously, gone wrong.

It can however be the subtleness of potentially misleading selectivity which may be much more difficult to eliminate and uncover. Ian Thomas responded to accusations that he had opportunities to replenish the fire in which his wife’s body was eventually found by pointing out that of 64 occasions when an unpleasant smell was reported he was with other people for all but 4 of these occasions. These four occasions were picked out while other factors such as the lack of any reports of a smell of smoke or fire debris on Ian were disregarded (Ian Thomas). Nick Tucker spoke of being accused of inconsistencies in his

evidence when these were all of a highly trivial nature such as a difference in his statements about whether he or his wife first saw the deer that he swerved to avoid, hence causing the accident. Some participants felt that inconsistencies in prosecution witnesses were accepted as normal memory issues while the defendant's inconsistencies were portrayed as evidence of lying.

Conclusion

While some of these examples may beg the question of how such obvious alternatives could be evaded, it should also be apparent that many aspects of adversarial case construction are full of subtleties. They are perhaps the subtleties of everyday life; the way people use information to construct and justify their world. Skilfully used in a prosecution process however they can, like the adverts on a TV screen or the wording of newspapers, be a highly effective investment in creating impression or belief.

Professional views about such aspects of the adversarial approach will be considered further in Part 5 below. Typically there was an acceptance that adversarialism had some positive aspects but also an acceptance that the kinds of manipulations that emerge did not in any strict sense amount to a search for truth: -

“I think that the adversarial system is exactly that and your job is to persuade a jury and it's not about getting to the truth normally....if you get two sides equipped and resourced, fine... you know, the truth should emerge. But of course so often it isn't like that, so often it's a lottery with one side more powerful than the other, then it becomes a bit of a game, a performance” (S6)

This kind of belief seems to live alongside the contrasting concepts of uncertainty, 'proof' and finality; an apparent contradiction that certainly troubles some within the criminal justice system but is more often somehow accommodated and accepted as rational; a process that requires the application of magical legalism.

SUMMARY CONCLUSIONS OF PART 3

This section has described a variety of ways that cases can be constructed and built upon and how such elements may, not inevitably but potentially, lead to wrongful convictions. All the common features (listed on page 95) have been shown to have occurred in the cases featured in this study.

The process of case construction starts with an initial prompt; this may often appear to be of substance, yet not in itself probative, such as the physical evidence in cases like that of Sue May, Sally Clark or Sion Jenkins, in addition it may be events that are interpreted as suspicious circumstances or co-incidences as in cases like Jonathan Jones or Ian Thomas. The influence of assumptions about close perpetrators and motives can also be significant in influencing the thinking of investigators. Often it is the inter-relating of these factors which begins a momentum of case building that can seem unstoppable and which influences the way witnesses are utilised or disclosure rules are enacted or science is interpreted. This process is perpetuated onwards through the criminal justice process, becoming increasingly difficult to unravel or dispute as that process proceeds even if other suspects or explanations are emerging.

Case construction can be the overt practice of corruption but more often it may be a mode of thinking or belief based on what appears, on the surface at least, to be evidence. It may be that that mode of thinking leads to practices which encourage case building rather than evidence scrutiny. Thus techniques of character debasing and reversal of positive images can be utilised to build a picture not only of guilt but of inherent criminality or immorality, even where no history of this exists. Within this the accused person rapidly surrenders control to professionals and enters a world of alternative rules and rituals supposedly designed to ensure fair play but often experienced as mystifying, frustrating, terrifying and disempowering. The evidence is constructed while their character and image are re-constructed to fit in with the 'evidence'. It is the creation of a picture of guilt that potentially gives case construction the power to achieve convictions on the weakest of evidence or even, as will be argued in Chapter 14, despite strong contrary evidence.

Sometimes this process can seem to obstruct rational thinking at all levels through the creation of suspicion based even on the most mundane thing – such as the possession of a certain type of coat in the Jonathan Jones case or Nettie's Hewins' trip to the petrol station. The more subtle and hidden the processes used, the more sustainable the case construction becomes because the flaws cannot be unearthed or articulated in sufficiently strong legal terms. Thus subtle manipulation can be much more powerful than overt corruption.

It is apparent that most professionals are fully aware of the dangers of false case construction and the police in particular are keen to echo the need to investigate all avenues. No doubt many potential wrongful convictions are avoided where this caution is enacted but the pitfalls are both numerous and often well disguised and the business of investigation often involves murky moral boundaries and human or scientific complexities.

The process of building sometimes false case constructions is not the exclusive preserve of the police but involves the whole of the prosecution process and any ethical doubts can be conveniently suppressed by the adversarial ideal and the application of magical legalism (see page 4). Once a conviction is established the case construction becomes the 'truth' and the system has the foundation for upholding the conviction. The nature of post conviction procedures will now be considered.

PART 4

POST CONVICTION PROCEDURES

“Better yet, I must know the truth very exactly in order to conceal it more carefully”

Jean-Paul Sartre “Being and Nothingness” (1956: 49)

CHAPTER 9

THE COURT OF APPEAL AND THE CRIMINAL CASES REVIEW COMMISSION (CCRC)

The discussion now moves from questions about the production of wrongful convictions to questions about whether and how they are rectified. It will be argued that the mechanisms for correcting injustice are overly restrained by attitudes, remits, and adherence to notions of finality which effectively mean that the original case constructions are extremely difficult to challenge or dismantle. Consequently the effectiveness of the appeal process, in terms of correcting injustice, is tightly constrained by the rules, traditions and interpretations of the very bodies that should exist for that purpose. In many ways the chapter illustrates the enactment of the notion of ‘magical legalism’ (see page 4), the CCRC and in particular the Court of Appeal justify their actions by reference to procedure, but it will be illustrated that at times procedure can be utilised to deny uncertainty or even the probability of innocence. Moreover ‘magical legalism’ enables the manipulation of rules and espoused principles in order to maintain convictions – a process observed and articulated by McBarnet (1981) in the lower courts. The rules and principles are adjusted and manipulated; it is suggested, to suit the priorities of the courts. These priorities may sometimes be more about preserving the finality and control within the system than about the justice and fairness that in theory they represent.

This chapter considers the historical background and literature on two key bodies responsible for the rectification of miscarriages of justice, the Court of Appeal and the CCRC. Chapter 10 then gives a detailed case study of the CCRC in action, in the Mike Attwooll and John Roden case – a case that, it is argued, illustrates how superficially justifiable rules can be applied in a way that ultimately may deny justice and fairness. Chapter 11 discusses the views of participants in this study on these topics.

The Court of Appeal

The dangers inherent in the investigative and legal process, described in Parts 1 and 3 above, might be thought to be alleviated by the existence of appeal procedures. To some extent this is undoubtedly true, but the question remains, to what extent can the system be relied upon to correct its own injustices? To what extent can the Court of Appeal, the only body empowered to quash crown court convictions, be seen as an independent, impartial and truth seeking body?

According to Malleson (1994: 156-7) the resistance of the judiciary to the reviewing of criminal convictions goes back a long way. The fear that such reviews would open the floodgates with challenges to court decisions was considerable in the nineteenth century, such that the judiciary opposed numerous Bills proposing the establishment of a Court of Criminal Appeal, the first of which was proposed in 1844. It was the publicity surrounding a number of miscarriages of justice that provoked sufficient public and parliamentary pressure to bring about legislation. The case of Adolf Beck, who was twice convicted of defrauding women in 1896 and 1904 through mistaken identity with the real offender, was particularly influential. The judiciary feared not only the 'floodgates opening' but also losing control to the influence of the press and above all the threat to the concept of finality within the system, expressed by the deference to jury decisions. The issue of review and re-trial by judges was debated as the Bill that led to the 1907 Criminal Appeal Act proceeded through parliament. The Act set up the Court of Appeal and allowed the overturning of jury verdicts in exceptional circumstances which might include an unreasonable jury verdict or a miscarriage of justice on any ground (Nobles and Schiff 2000: 54). Prior to 1907 there was very limited scope for appeal on points of law only, to the 'Court of Crown Reserved' or the Home Secretary who could grant the 'Prerogative of Mercy' usually only considered in death penalty cases. The 1907 Act in theory created a body empowered to correct miscarriages of justice including acting as a safeguard against the potential for the logical possibility of jury error. Thus it can be said that: -

"The Court of Appeal has always had the formal statutory power to define whatever it saw fit as a miscarriage of justice, to be as liberal as it wished towards new evidence, and to be as disrespectful as it chose towards the verdicts of juries"

(Nobles and Schiff 2000: 253)

Judicial practice however continued to see ‘re-trial by judges’ as a threat to trial by jury and in practice Appeal Courts were reluctant to review jury decisions, hear fresh evidence or evidence that was available but unused at the time of the trial.

The Criminal Appeal Act of 1968 attempted to address the Court’s restrictive interpretation of its powers by directing that convictions should be quashed “if under all the circumstances of the case the conviction was unsafe and unsatisfactory”, if the trial judge wrongfully directed on the law or if there was a material irregularity in the course of the trial (Belloni and Hodgson 2000: 178). Initially the message intended by this legislation appeared to be having some effect with the notion of ‘lurking doubt’ being coined by Lord Widgery to describe the notion of unsafe and unsatisfactory in relation to the trial conclusion given the case as a whole [R v Cooper 53 Cr App R 82 (1968)]. However 20 years later the organisation ‘Justice’ could report only six cases of successful appeals on the sole ground of lurking doubt over evidence heard by the jury (Justice 1989). Furthermore the 1968 Act required that, in order to be considered by the Appeal Court, fresh evidence needed not only to be admissible and credible but also that there should be a reasonable explanation for the failure to adduce it at trial (Nobles and Schiff 2000: 77). This latter point remains a contentious issue as ‘tactical’ decisions by defence lawyers which result in evidence not being used at trial are rarely seen as good grounds for the Appeal Court to hear that evidence. This policy was endorsed more recently by the Court of Appeal in R v Day 2003 EWCA Crim 1060. Effectively this approach means that the appellant pays the price for following the advice of lawyers, or even for actions they fail to take despite the appellant’s wishes.

In practice any intention within the 1968 Act to encourage a less restrictive approach by the Court of Appeal seems to have had a very limited impact. Research commissioned for the Royal Commission of Criminal Justice (RCCJ) concluded that the Court remained more likely to quash convictions on the basis of legal or procedural errors than on factual errors. Moreover that they rarely heard fresh evidence, that they construed grounds of appeal very narrowly and despite acknowledging their wide powers, very rarely overturned jury decisions on the basis of lurking doubt (Malleon 1993: 8-12).

The Royal Commission took note of this research, and no doubt the failure of the first appeals in the Birmingham Six and Guildford Four; cases that had led to the

Commission's formation, and thus they unanimously agreed that the Court should be more willing to overturn convictions than in the past: -

“As part of the redrafting of Section 2 of the Criminal Appeal Act 1968 it should be made clear that the Court of Appeal should quash a conviction, not withstanding that the jury reached their verdict having heard all the relevant evidence and without error of law or material irregularity having occurred, if, after reviewing the case, the Court concludes that the verdict is or may be unsafe”

(RCCJ Para 319 pp 216)

The RCCJ was therefore acknowledging the reality of possible jury error. Unfortunately the redrafting of the 1968 Act in 1995 did not make this principle explicit but simply enacted RCCJ recommendations that amounted to little more than a re-wording of the legislation on two counts. The 1968 test of “unsafe and unsatisfactory” was to be replaced by the single test of whether the conviction is “safe” and the test of hearing fresh evidence was to be changed from “likely to be credible” to “capable of belief”. These changes were incorporated into the 1995 Criminal Appeal Act but, as discussion during the reading of the Bill and other observations noted, they amounted to the subtlest of changes that could just as easily be seen as re-stating the previous situation (Belloni and Hodgson 2000: 177). It may even be that dropping the word unsatisfactory has encouraged the Courts to be less inclined to attach significance to procedural issues which might effect safety, hence making it more rather than less restrictive in approach (see for example the recent case of *R v Button* 2005 page 60 above). Consequently the 1995 Act seems to have had little affect on the approach of the Court of Appeal which prefers to be guided by its own case law even where this pre-dates the legislation.

The 1907 Act gave the Court of Appeal unrestricted authority to quash convictions ‘in the interests of justice’ and the intention behind the 1968 Act, the Royal Commission and to some extent the 1995 Act, seemed to be to encourage a more liberal approach. The problem however has been: -

“How to encourage the Court to apply its statutory powers in the way which Parliament intended”

(Malleon 1994: 153)

and furthermore: -

“finding a formula to require the Court to do what it already has the power to do”

(Nobles and Schiff 2000: 86)

The traditional approach of the Court of Appeal in avoiding the questioning of jury decisions and thus restricting appeal rights in serious criminal cases has also been described as illogical given that those who appeal from magistrates courts are entitled to a full re-hearing of the case while those convicted of the most serious offences are not: -

“The situation is perverse: to those who are convicted of minor offences we give the most generous rights of appeal imaginable, and to those who are convicted of serious offences, and liable to be punished accordingly, we give a narrow and restrictive one”

(Spenser 2006: 694)

A hundred years after the establishment of the Court of Appeal the position of the judiciary in relation to appeals remains much as it was before the Court was established. Legislation has failed to cross the constitutional divide between the executive and the judiciary such that the Court’s allegiance to its own traditions remains largely untouched. This divide, necessary as it may be in many respects, ensures that the judiciary can choose their own interpretations and traditions in preference to those of Parliament, Royal Commissions or the public. In successfully resisting a more liberal approach to appeals some argue that they have used their constitutional position in the interests of legal tradition rather than the interests of justice: -

“With the new arrangements (the 1995 Criminal Appeal Act), as before, the important factor is the Court of Appeal’s un-stated (and un-stateable) sense of appropriate practice, its deference to the jury, its upholding of its and the legal system’s authority and its concerns with finality and workability.”

(Nobles and Schiff 2000: 83)

Some examples of the Court of Appeal’s Resistance to Overturning Convictions: -

The case of the Birmingham Six; convicted of the IRA bombing of two pubs in the city centre in 1974 in which 21 people died, has become a legendary example of a miscarriage of justice sustained with the aid of blatant judicial partiality. Like many high profile

wrongful convictions the issue of justice and fairness became submerged in the interplay of media attention, traditional institutional resistance, political posturing and political expedience and prejudice. The judicial prejudice began at the trial of the six men in June 1975 with the extraordinary departure of Mr Justice Bridge from any notion of judicial independence: -

“I do not think any of us can be detached. We all see things differently, but I have naturally formed an impression of the conclusions to which the evidence leads, as I daresay some of you already have.....So I am of the opinion, not shared by all my brothers on the Bench, that if a judge has formed a clear view it is much better to let the jury see that and say so, and not pretend to be a kind of Olympian detached observer”

(Bridge J. summing up to the jury. Quoted in Hill 1995: 141)

The judge continued to sum up the evidence giving full weight to the prosecution case and little or none to the defence (Wood 1999: 226-8; Hill 1995: 140-9), ironically he stated that if the men’s version of events were true then the police had been involved in a massive conspiracy “unprecedented in the annals of British criminal history” (Hill 1995: 145). Mr Justice Bridge’s “brothers on the Bench” were to maintain solidarity with this position over the next 16 years, producing an array of now famous conclusions: -

In refusing to grant leave to appeal against conviction in March 1976 Lord Chief Justice Widgery concluded that the injuries inflicted on the men by the police were nothing “beyond the ordinary” (Wood 1999: 228).

In 1980 Lord Denning, then Master of the Rolls, stopped a civil action by the six men against the police officers who had assaulted them, on the basis that: -

“If the six men win, it will mean the police were guilty of perjury, that they were guilty of violence and threats, that the confessions were improperly admitted in evidence, and that the convictions were erroneous. That would mean the Home Secretary would either have to recommend they were pardoned or he would have to remit the case to the Court of Appeal. That is such an appalling vista that every sensible person in the land would say ‘It cannot be right that these actions should go any further’ “

(Denning quoted in Rose 1996: 3)

Lord Denning’s position, that the system should be protected over and above the individual victims of injustice, remained consistent. In 1988 ‘The Times’ (22 Feb 1988)

reported his views in relation to television programmes on miscarriages of justice, that “it was more important that public confidence in the system of justice be upheld than that such programmes should take place”.

In January 1988 at the appeal of the Birmingham Six, Lord Lane rejected a further dossier of new evidence, including claims from former police officers that the men had been brutally treated in order to extract confessions, with another now infamous statement aimed at discouraging Home Secretaries from referring cases back to appeal:-

“As has happened before in references by the Home Secretary to this court under section 17 of the Criminal Appeal Act 1968, the longer this hearing has gone on, the more convinced this court has become that the verdict of the jury was correct. We have no doubt the convictions were both safe and satisfactory”

(Lord Lane quoted in Rose 1996: 4)

By 1988 the campaign and media attention in favour of the Birmingham Six had become enormous but the court’s response seemed intended to show that such public support or weight of evidence meant nothing to the Court of Appeal. As one of the six men described it, the attitude of the judges from the start of the appeal was dismissive of the new evidence: -

“We had all expected the decision. I was just surprised the judges had been so blatant. I had not been able to see how they were going to be able to reconcile all the new evidence with a conviction, but in the event they didn’t even try. They simply went over it with a steamroller”

(Paddy Joe Hill 1995: 225)

In 1991 the Court of Appeal had little choice but to quash the conviction on the announcement from the Director of Public Prosecutions that yet more new, previously undisclosed, evidence showed the confessions to have been fabricated and re-written and the scientific evidence to be distorted, misleading and open to contamination (Hill 1995: 241-9). The Crown could no longer oppose the men’s appeal. Despite this, the appeal continued for nine days before the men were finally cleared.

The four young people convicted of the Guildford pub bombings in 1974, in which 5 people died experienced similar judicial resistance. The convictions were based on similarly unreliable and doctored confession evidence made in violent and oppressive

custody situations. In 1977 the Guildford four lost their first appeal, despite the fact that four other convicted terrorists had by this time admitted responsibility for the crimes. Much of the prosecution case collapsed but the appeal judges decided that the new evidence simply meant that they were part of a larger team (Rose 1996: 2). The implausible notion of a true IRA active service unit employing four unemployed, drug using residents of squat properties aged between 17 and 21 who claimed benefits under their own names was not apparently given any weight.

As public and media pressure grew and dramatic new evidence emerged of non-disclosed alibis and confession statements shown by ESDA testing (Electro-static Document Analysis) to have been fabricated, the Director of Public Prosecutions decided that the Crown could no longer contest their second appeal in 1989. Thus the Court of Appeal had no basis to continue resistance and had to quash the convictions. In so doing Lord Chief Justice Lane made no apology to the four appellants: -

”You will have heard no word of apology or even regret from the many judges who were accomplices to this scarcely imaginable injustice”

(Hugo Young ‘The Guardian’ 24/10/89)

Lord Lane concluded that “the officers must have lied” (Rose 1996:1) but not that the courts had colluded with an inherently unlikely prosecution case or, at the very least, been guilty of gross naivety with regard to police actions in such a highly charged and politically significant case. Neither could the appeal courts maintain that oppressive treatment in police custody leading to false confessions was something new. Indeed within the same few months of 1975 that saw the convictions of both the Birmingham six and the Guildford four, the Court of Appeal did overturn the convictions of three vulnerable young men for the murder of Maxwell Confait for exactly that reason. The profile of this event could not have been missed given that it prompted not only the Fisher Inquiry of 1977 but in turn the Royal Commission on Criminal Procedure in 1981 and eventually the Police and Criminal Evidence Act (PACE) in 1984. PACE became fundamental in establishing safeguards for suspects in police custody. The Birmingham and Guildford fiascos were continued in the Appeal Courts in parallel with the growing revelation that what the appellants always maintained had happened was a serious and inherent risk; an “appalling vista” that needed to be addressed rather than denied.

The early 1990s saw numerous other high profile cases collapsing: The Tottenham 3 and the Maguire 7 in 1991, Stephan Kisko, Judith Ward, the Cardiff 3 and the Darvell Brothers all in 1992, along with a series of fourteen appeals brought by people convicted of armed robberies on the basis of confessions to the, eventually disbanded, West Midlands Serious Crime Squad. Confessions, non-disclosure and dubious scientific evidence were common themes, and in this progressive period, fuelled by the “momentum of crisis” (Nobles and Schiff 2000) the Court of Appeal, under Lord Chief Justice Taylor (LCJ Lane’s successor) showed that it could play a part in setting due process standards by its rulings. Standards were established for example on disclosure (Judith Ward case in 1992), oppressive interrogation (Cardiff Three case in 1992) and prejudicial media coverage (The Taylor Sisters case in 1993).

As Nobles and Schiff (2000) describe however, the sense of crisis in the system soon declined with a growing emphasis, in both the media and the political arena, on controlling crime rather than protecting suspects. The 1996 Criminal Procedure and Investigation Act, for example, reversed the principle of open disclosure established at the appeal of Judith Ward and placed the responsibility for disclosure more firmly than ever in the hands of the police and prosecution (see pages 137-8).

One notorious miscarriage of justice that remained unresolved throughout this brief ‘period of crisis’ was the case of four men convicted in 1979 of the murder of the newspaper boy Carl Bridgewater in 1978. Once again judicial resistance in the face of a seemingly endless stream of new evidence and public/media support resulted in many years (over 18 in this case) of wrongful imprisonment. Two years after the conviction the men sought leave to appeal on the basis that another prime suspect in the case had recently committed another shotgun murder at a farm adjacent to the one where Carl had been murdered. Despite this remarkable circumstantial case against another suspect Lord Lane refused leave to appeal seeing the argument put forward, not as creating reasonable doubt but as nothing more than a “red herring”.(Regan 1997: 2)

Substantially more new evidence led Home Secretary Douglas Hurd to refer the case back to appeal in 1988. The appeal was the longest in British legal history, lasting from November 1988 till March 1989. The evidence included new alibi evidence, five prison

witnesses who admitted that they lied at the trial and psychological evidence that another was a pathological liar, nonetheless described famously as “a witness of truth” by Mr Justice Leonard.

“Anyone with a blind faith in British justice should study the proceedingsbefore Lord Justice Russell, a prosecutor of the Birmingham Six, Mr Justice Leonard, a defence lawyer in the original trial of the Guildford Four, and Mr Justice Potts. Every shred of the voluminous new evidence produced.....favoured the men’s case”

(Paul Foot ‘Guardian Weekly’ 2 March 1997)

The appeal however concluded that the Bridgewater convictions were “safe and satisfactory”.

Yet more new evidence continued to emerge including linguistic evidence from four experts that the confessions were fabricated. Judicial obstruction now became supported by political obstruction as Home Secretary Kenneth Clarke refused to refer the case back to appeal despite this. A successful judicial review decision on 28 November 1994 challenged Clarke’s secretive decision and forced the Home Office to reveal all information to convicted people and their lawyers before any decision is made (The Bridgewater Four News Jan 95). The fact that this information was strongly favourable to the men’s case put pressure on new Home Secretary Michael Howard to refer the case. He resisted until July 1996 when yet more previously hidden evidence about an alternative set of fingerprints on Carl Bridgewater’s bike was revealed. ESDA testing then assisted the defence to establish that the confession statement of Vincent Hickey had been forged. That forged statement had then been shown to co-defendant Patrick Malloy in order to encourage him to confess. Molloy’s confession had been extracted by violence, intimidation and trickery. The prosecution finally conceded the case on 21 Feb 1997 leaving the Court of Appeal no option but to quash the convictions. It was perhaps revealing however that the Court of Appeal chose this most notorious of injustices to re-state its position in relation to guilt or innocence. In doing this they were able to imply that the conviction had been quashed on a ‘technicality’ rather than on the extraordinary continuing revelations of innocence and official corruption that had taken place over some 19 years: -

“This court is not concerned with the guilt or innocence of the appellants, but only with the safety of the convictions. This may at first sight appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for the courts which have to hear appeals against convictions. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair, if it is distorted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened”

(R v Hickey and Others 30 July 1997 EWCA Crim 2028)

The irony of this sanctimonious statement lies in the court’s own distortion of the integrity of the criminal process on two previous occasions in 1981 and 1988 and was further exacerbated by their continued pretence that the system had kept its integrity: -

“We reject the submission made to us by the defence....that there was a general conspiracy, including police officers, to pervert the course of justice. We do not accept that the material placed before us substantiates that submission”

(R v Hickey 1997 as above)

This apparent blindness to overwhelming evidence of police corruption was to be echoed in 1999 at the appeal of the Cardiff Newsagent Three (see page 120).

The Bridgewater case like the Birmingham Six and Guildford Four reflected many years of judicial and political obstruction to justice. What gives these cases added significance in this context is the level of media and public awareness that they had achieved, even at quite early stages. This included numerous television documentaries, newspapers articles, high profile international campaigns and books, notably Foot (1986) on the Bridgewater case, Kee (1989) on the Guildford case and Mullin (1990) on the Birmingham Six. It seemed for many years that the only people who could make any serious study of these cases and conclude that the convictions were “safe and satisfactory” were the learned judges of the Court of Appeal, with the occasional deferential support of Home Secretaries. While perhaps unique in profile, these were by no means the only cases where justice was being denied for as long as such denial was sustainable.

Recent years have seen the eventual quashing of convictions after many years of wrongful imprisonment such as those of John Kamara (20years), Patrick Nicholls (23 Years) Andrew Evans (25 years), Paul Blackburn (25 years), Robert Brown (25 years) and Stephen Downing (27 years). Furthermore the Court of Appeal has continued to state its

certainty about the safety of convictions at first appeals, only to have to reluctantly concede at a later stage: -

In 1990 three black men were convicted of a series of robberies, committed in 1988, around the M25 motorway area (hence the name 'M25 Three' emerged). One person was murdered in the process of these robberies. Witnesses reported, initially at least, that, although masked, they thought that at least two of the assailants were white. At appeal in 1993 previously undisclosed police note books revealed these descriptions (M25 Three Campaign Group 1993) and their lawyers claimed that there was more evidence against three white men who had been seen off-loading stolen items from the robberies from a stolen car, than there was against the convicted men. These men however became key prosecution witnesses. Despite serious non-disclosure, evidence of "off the record" interviews with the white suspects and a range of other dubious features of the case, the Court of Appeal had no doubts: -

"In dismissing the 1993 appeal, Lord Justice Watkins, sitting with Mr Justice Leonard and Mr Justice Scott Baker ruled that there was no basis for 'even a lurking doubt' about the convictions. The case against them remained 'formidable'."

(Terence Shaw "The Telegraph" 17 Feb 2000).

In 2000 a unanimous decision of 17 judges in the European Court of Human Rights in Strasbourg ruled that their trial had violated Article Six of the ECHR regarding fair trials. The prosecution, it had been revealed, had withheld significant evidence under 'Public Interest Immunity' certificates (PII) without telling the trial judge. This information included the revelation that one of the key prosecution witnesses described above was a paid informer who had done a deal with the police to avoid prosecution himself for the crimes (Clare Dyer "The Guardian 17 Feb 2000). While PII in this case was wrongly withheld from the trial judge it would have been available to the appeal judges. The curious defence of the Court of Appeal by the European Court shows perhaps that mutual support between the judiciary can cross international boundaries: -

"The Court of Appeal, *which had itself considered the material on two occasions*, was not able to remedy the position as it had not seen the witnesses give their evidence, and had to rely on transcripts of the Crown Court hearings and on the prosecution for its *understanding of the relevance of the material*" (Emphasis added)

(Registrar of the European Court of Human Rights: Press Release 16. 2. 2000)

It seems inconceivable that the Court of Appeal, in considering this material on two occasions in the light of other doubts about the case, could not understand the relevance of it. If their problem was that they had not seen witnesses give evidence, they were empowered to call them at the appeal.

Faced with this ruling the Court of Appeal was forced to reluctantly quash the convictions in July 2000. Again the implication that this was largely a 'technicality' could not be resisted: -

"This is not a finding of innocence, far from it.....However we are bound to follow the approach set out earlier in this judgement, namely assuming the irregularities which we have identified had not occurred; would a reasonable jury have been bound to return verdicts of guilty. In all conscience we cannot say that it would"

(Mr Justice Mantell quoted by Chris Summers on BBC News on-line 22.7.2000)

In the light of the circumstances and widespread media doubt about this case it is hard to resist agreement with the conclusion of one of the defendants on these comments: -

"It's obvious that those comments were an exercise in damage limitation, preserving the status quo"

(Raphael Rowe quoted by Chris Summers BBC News on-line 22.7.2000)

As with other cases, perjury, deceit and injustice had been reduced to "irregularities", enhancing, where still possible, the fallacious notion that miscarriages of justice are merely about "technicalities".

In 1995, at the first appeal of Sheila Bowler for the murder of her aunt, Lord Justice Swinton-Thomas dismissed the appeal concluding that the possibility of her disabled aunt wandering off and falling into the river on her own was "quite incredible". The Judges had refused to hear expert evidence indicating that elderly people who rarely walked unaided did at times of panic or confusion sometimes walk surprising distances, on the grounds that this evidence was "theoretical". In 1997 further expert evidence was produced that showed such a possibility was not only credible but experienced relatively

commonly. A re-trial was ordered and Mrs Bowler was finally acquitted in 1998 (Devlin and Devlin 1998).

In 2000 the Court of Appeal concluded in the case of Sally Clark that a statistic of 73 million to one against two cot deaths occurring in the same family, given by an eminent professor, would not have influenced a jury. In 2003 new evidence again forced the Court of Appeal to review its certainty about the safety of the conviction. Similarly in 2002 the Court expressed its certainty about the guilt of Barry George for the murder of Jill Dando:-

“Looking at the evidence as a whole we have no doubt as to the correctness of the conviction”

(R v George EWCA Crim 1923 para. 125)

In 2007 (EWCA Crim 2722) the Court had to quash the conviction and Mr George was acquitted at a re-trial in 2008.

There are numerous cases, where appeals have been lost, that continue to attract considerable media, legal and public concern. Examples include Michael Stone, Jeremy Bamber, Eddie Gilfoyle and the five un-resolved ‘focused’ cases in this study all of whom have had considerable media and TV coverage.

Whether these and other cases become the classic miscarriages of justice of the future depends on many factors. One such factor is the interplay between the political and legal spheres of influence. It may be seen from the discussion above, that politicians may be influenced by the attitude of the Court of Appeal (Clarke and Howard in the Bridgewater case for example) or by the political flavour of the times. The brief change of approach of the Court of Appeal in the early 1990s perhaps shows that the court can also be influenced to some degree by political and social trends and events (Nobles and Schiff 2000). Despite its conservative approach to appeals, the court nonetheless does overturn many convictions every year. Given that new evidence is hard to find in most cases, especially with limited resources, the importance of issues that may affect the fairness of proceedings (sometimes referred to as technicalities) is often critical to finding grounds of appeal. Most crucially, as the examples above endeavour to show, the resistance of the Court of Appeal to dealing with actual innocence (this is always a matter for the jury in their eyes) means that once convicted, establishing innocence is not just difficult but

impossible unless perhaps the real perpetrator(s) are convicted. As the court has taken trouble to stress, only the *presumption* of innocence can be re-established. The Court of Appeal have frequently only overturned cases after many years when much new evidence has been rejected on previous occasions. Nobles and Schiff (2001: 287) quote the solicitor Gareth Peirce speaking to the Home Affairs Committee review of the CCRC, who explains how the strong evidence concerning the real bombers once dismissed at the first appeal of the Guildford four, could not be used at future appeals. It is always then a case of finding yet more new evidence.

Not only is the Court of Appeal inclined more towards appeals based on procedure, it is, as the cases above show, inclined to convert the decisions to allow appeals into technical procedural terms, even when the evidence has demolished the prosecution case. Corruption is converted to 'irregularity' and powerful evidence is converted to that which might have rendered a jury 'not bound to return a guilty verdict'. Convictions may be overturned on procedural points not because the evidence of innocence is absent but because the Court of Appeal chooses to bury it in the interests of preserving the illusion of integrity (these issues are expanded upon in Part 5). It is in this light that the current government's desire to prevent "factually guilty people from having convictions quashed on technicalities" must be carefully considered.

"Quashing Convictions" – The dangers of current thinking

In Sept 2006 the Government published a consultation document entitled "Quashing Convictions" (Home Office 2006). Home Secretary John Reid explained the purpose of the consultation as follows: -

"Under the current law, a convicted person can have his or her conviction quashed even where the Court of Appeal have formed the view that he or she was indeed guilty of the offence. The conviction is overturned in such cases because the Court are dissatisfied with some aspect of the trial or pre-trial process. The Government wants to ensure that, where the Court of Appeal are of the view that a conviction is, in the normal sense of the word, 'safe', it should not be possible to quash it."

(Home Office 2006: 3)

The consultation however is of limited scope and reflects a dangerous political climate where miscarriages of justice and due process principles are concerned: -

“However, whilst the Government is open to suggestions about how we achieve the aims, we are not consulting on the aims themselves or therefore on whether the law should be changed. It is our firm view that the present system risks outcomes which are unacceptable to the law abiding majority”

(Home Office 2006: 2) (Emphases in the original)

As noted above, the one area where the Court of Appeal has been more willing to quash convictions has been on procedural issues rather than evidence, or more precisely and crucially it has often framed evidence within procedural arguments.

The Courts position is guided by case law which has fluctuated in approach. In *R v Chalkley* 1998 (QB 848 & 2 All ER 155) the court favoured an approach where pre-trial irregularities, such as non-disclosure, could not render a conviction unsafe if, in the court’s view, they did not undermine the defendants guilt. Conversely in *R v Mullen* 2000 (QB 520 & All ER (D) 108) the court ruled that abuse of process, in its self, could render convictions unsafe. This ‘due process’ approach was re-stated by the court in *R v Togher* 2001 (3 All ER 463 & 1 Cr App Rep 457).

It seems that the government’s desire is to ensure that the court returns to the Chalkley approach and is only consulting on options on how to enact this approach (Ferguson 2006: 1582). Taking into account the history of miscarriages of justice, the nature of the rules of evidence and the restrictions on the scope of appeals stemming from deference to jury decisions, the dangers of such a change are indeed serious and worth re-stating: -

1. The Court of Appeal has often preferred to overturn convictions on procedural grounds rather than on evidence, even when the evidence of innocence is strong. As the examples above illustrate, procedural grounds can be the means by which the court concedes while maintaining an image of integrity. Without this option the reaction might be to uphold wrongful convictions to an even greater extent than is currently the case.
2. The Court of Appeal’s view that they are sure of guilt has in many cases eventually been proved wrong (see case examples above). The document

acknowledges that the Court of Appeal is not always in a position to decide on guilt (p. 3) but then continues to say that “where they have formed such a viewthey should not be empowered to allow the appeal”. By its own admission (e.g. R v Hickey 1997 above) the court cannot declare innocence, why then should it have the power, let alone the obligation, to declare guilt.

3. The relationship between ‘procedural irregularities’ and innocence is complex and inter-related. Due process exists for the very reason that lack of observation of rules of fairness creates the pathway by which false or misleading evidence can be constructed. Evidence of breaking the rules suggests that other aspects of the process may well have been equally compromised. It is rarely possible to see where this begins and ends or what cumulative effect it may have further down the line of a complex investigation and trial process. Furthermore what are sometimes described as procedural issues (non-disclosure, poor defence tactics, infringement of PACE etc) are often in fact the fundamental and well documented causes of false evidence and wrongful convictions.
4. Even fresh evidence is often evidence of abuse or failure of process (such as non disclosure etc). The Court of Appeal has always considered whether such evidence is relevant or might be relevant. When it has been relevant it has often backed up evidential issues that might have been ‘exhausted’ (not allowed to be re-visited) and rejected at previous appeals. (For example later evidence, some of which could be described as procedural, at the Birmingham six or Bridgewater trials showed that previously rejected evidence of innocence should have been accepted).
5. Due process safeguards become worthless if they are not given significance by the courts. The motivation for actors within the legal system to follow the rules and act with fairness is thus compromised. The system then becomes open to abuse and those who abuse it act with immunity.

Regardless of these arguments and the fact that: -

“Most legal respondents expressed the view that no reform is needed” (Para 1)

and

“Many respondents were concerned that the change would oblige the Court of Appeal to violate the right to a fair trial under Article 6 of the ECHR” (Para 3)

(Summary of Responses to the Consultation paper 2007)

The government nonetheless effectively incorporated the proposal into section 26 of the Criminal Justice and Immigration Act (2008).

In short the government’s policy ideas, rather than seeking to make the Court of Appeal a more effective safeguard against the inherent propensity of the system to create wrongful convictions, aim it seems, to weaken still further the already weak and inconsistent protection offered by the Court of Appeal. Perhaps for the first time since the establishment of the Court of Appeal, the government, rather than trying to make the Court of Appeal less restrictive, is trying to make it more restrictive. The lessons of history have not been learnt if the system is encouraged to use improperly obtained evidence and to perpetuate an ideology that permits inadequate legal safeguards and abuse of power (Belloni and Hodgson 2000: 209).

The Criminal Cases Review Commission (CCRC): Role and Context

People convicted in the Crown Courts can appeal initially to a single judge for leave to appeal. If the single judge considers there are grounds for appeal the case will be heard before the full appeal court of three judges. People refused by the single judge can petition the full court of three judges for leave to appeal but there is rarely legal aid for this action. On occasions the full court might disagree with the single judge and grant leave to appeal. Convicted people who are refused leave to appeal or who lose their first appeal can only be referred back to the Court of Appeal by means of a successful application to the Criminal Cases Review Commission (CCRC). The role and context of this body will now be considered.

“We are all of the opinion that the Court of Appeal should be readier to overturn jury verdicts than it has shown itself in the past”

(RCCJ 1993: Ch 10, Para 3, p 162)

The Royal Commission on Criminal Justice (RCCJ) was not only keen to make the Court of Appeal more open to quashing convictions in the light of the many gross injustices that had led to the RCCJ's establishment but also to ensure that there would be an effective mechanism for referring potential miscarriages of justice back to the appeal courts. The RCCJ held the view that the Home Office C3 Department, that considered miscarriage of justice petitions prior to the establishment of the CCRC in 1997, had inadequate investigation powers and moreover faced a constitutional problem in that the Home Secretary's power to refer cases back to appeal “if he thinks fit” (a wider power than the test eventually ascribed to the CCRC) meant that he or she, as the executive power, was in a difficult position to challenge the Courts. Hence the constitutional position left the Home Secretary inclined towards an overly deferential approach to the Court of Appeal and thus reluctant to refer cases (Nobles and Schiff 2001: 283).

The proposal to establish an independent review body was thus recommended by the RCCJ and established by the 1995 Criminal Appeal Act as an ‘independent executive non departmental public body’ financed by the Home Office (CCRC 2006: 11) . The Commission took over the role from the Home Office C3 Department on 31st March 1997. The Commission was given wide powers of investigation including powers to obtain documents and records from all public bodies, interview witnesses, commission expert reports and order and supervise police investigations of specific matters (Walker 1999: Ch 11).

In terms of resources and investigatory powers this was clearly a major step forward; however the 1995 Criminal Appeal Act limited the power of the CCRC to overcome the fundamental problem of deference to the Court of Appeal that had so hindered Home Secretaries in the past. Thus the most fundamental problem of the CCRC is not of its own making. It has been widely noted that the Criminal Appeal Act 1995 applies a legally based test rather than an ethical or justice based test (for example Nobles and Schiff 2001; Belloni and Hodgson 2000): -

The Criminal Appeal Act 1995 (Section 13.1.a) states that a case should be referred to the Court of Appeal if: -

"The Commission consider that there is a real possibility that the conviction, verdict or sentence would not be upheld were a reference to be made".

This test effectively means that referrals will be based not on the likelihood that a miscarriage of justice has occurred but on the CCRC's attempts to second guess the prevailing attitude of the Court of Appeal

Section 13. 1. (b) goes on to prevent the referral of a case on the basis of any argument or evidence raised at any previous trial, appeal or application for leave to appeal.

Section 13. 1. (c) might be used to over-rule this if there are "exceptional circumstances" (however this clause has never been used or interpreted in this way and remains ill defined)

The requirement of the Court of Appeal to decide whether a conviction is "safe" does not prevent the consideration of evidence previously heard (which may have been misunderstood, given false emphasis or wrongly ignored), arguably therefore neither should the CCRC be prevented from considering such matters. The fact that certain issues may have been considered before (or available but not raised before) should not prevent their reconsideration if there are serious and reasonable doubts about the conclusion previously reached.

The CCRC have effectively admitted that some miscarriages of justice may not be corrected under the current rules: -

"Although the Commission must review cases dispassionately, applicants and their representatives may have personal perspectives and emotional involvement that cloud their interpretations of seemingly arid concepts such as "real possibility" and "argument or evidence not previously raised" that must determine the Commission's case decisions. That is never more manifest than when alternative explanations and interpretations are advanced for events but evidential support and persuasive argument cannot be established for them, either by the applicant or the Commission. The alternatives may indeed be correct, but if such support or argument are not forthcoming the miscarriage cannot be exposed"

(CCRC Annual Report 2002-2003 section 5.1 Emphasis added)

In 1994 the organisation “Justice” proposed that the test for CCRC referrals should be **“whether there is an arguable case that there has been a wrongful conviction”** (Justice 1994: 36). The Scottish CCRC uses a test on this basis (using the term miscarriage of justice rather than wrongful conviction) and has a considerably higher rate of referral (Northcote 2005). Had the 1995 Act established such a test of referral rather than the “real possibility” test it would have echoed much more closely what the RCCJ intended the CCRC (referred to as the Authority) to do: -

“The role of the Authority should be to consider allegations put to it that a miscarriage of justice may have occurred.....and where there are reasons for supposing that a miscarriage of justice might have occurred, to refer the case to the Court of Appeal”

(RCCJ 1993, Para 332, p 217)

Some commentators have suggested that to change the test of referral in this way would create a gulf between the mode of operation of the Commission and that of the Court of Appeal. For example one Chairman of the CCRC, Professor Zellick, has pointed out that in the case of Ballard (2004) EWCA Crim 3305 the Court of Appeal was critical of the CCRC for exceeding its statutory authority by referring a case without new fact or legal argument (Zellick 2005: 940). Furthermore: -

“The test we apply is one which is so clearly linked to and indeed derives from the way the Court of Appeal goes about its job”

(Zellick 2005: 940)

A fellow CCRC Commissioner echoes this state of deference to the Court of Appeal: -

“Critics assert that the Commission should work to a lower standard, perhaps that of possible miscarriage of justice, or ‘lurking doubt’. This criticism is misplaced: the Commission can only work to the standard which applies to the Court of Appeal itself, namely, whether a conviction is safe.”

(Leigh 2004: 2)

For the CCRC therefore their role has, for some key players at least, become not only accepting of its limited remit, that it is not an “Innocence Commission” (Leigh 2004: 2), but internalised to the point where that very limited remit can be fully recognised while

still claiming that the vast majority of cases reviewed “can be shown not to have involved a miscarriage of justice at all” (Leigh 2004: 3). Somehow the concept of innocence has become divorced from the concept of correcting miscarriages of justice. Put slightly differently: -

“The rhetoric of justice is reconstructed into the language of management”

(Nobles and Schiff 2001: 292)

The logic or the ethics of this argument are often framed around the meaning of the Court of Appeal’s test of “safety”. This is the only question that the 1995 Criminal Appeal Act requires of the Court of Appeal - to decide whether a conviction is “safe”. It seems reasonable to suggest that, in the light of the RCCJ’s recommendations, the aim of the legislation was likely to be that the term “safe” should mean that there is no danger that the appellant has been wrongly convicted (i.e. convicted for something he or she has not done), rather than that the term “safe” should merely mean that a set of very restrictive appeal rules have not been met. The latter is however the situation that currently predominates.

Part of the reason for this may be that the precise question of what is meant by “safety” seems to have been developed not by the Act but by case law interpretation. The Court of Appeal has continued to include the notion of ‘lurking doubt’ in a few cases, albeit very rarely and generally as a last resort, hence incorporating into the ‘safety’ test the possibility of reviewing jury decisions (Roberts 2004: 4). . The question of “safety” in relation to ‘procedural irregularities’ has been discussed above with the government currently questioning whether the current weight given to such irregularities should be reduced (Home Office 2006). In terms of fresh evidence the case of Pendleton in the House of Lords (2001) UKHL 66 is considered to be one of the most definitive statements of how the Appeal Court should interpret ‘safety’. The question for the Court on fresh evidence should be whether in the opinion of the appeal judges the new evidence might have affected the decision of the jury to convict. The position has been summarised as follows: -

“If sure of guilt or innocence in the light of new evidence uphold or quash respectively, between these extremes take account of the likely effect on the jury”

(Nobles and Schiff 2005: 186)

The change in the CCRC test, to that proposed by Justice in 1994 (p. 191 above), might send a more correct ethical message to both the Commission and the Court of Appeal; that their duty lies not with conformity to restrictive and bureaucratic rules but to the principle that innocent people should not remain wrongly convicted.

It has been argued that the current structure retains the longstanding problem of the power and influence of the Court of Appeal. The rules and final resolution of appeal issues thus remain “in the hands of the very body which for years has failed to deal effectively and consistently with miscarriages of justice” (Belloni and Hodgson 2000: 193)

As long as Sections 13.1. (a) and (b) of the Criminal Appeal Act 1995 continue to restrict the remit of the CCRC then some innocent people will remain convicted with no chance of having the injustice rectified.

The current rhetoric of the CCRC shows no sign of any motivation to challenge the Court of Appeal, indeed the relationship is enhanced by close liaison, with the Chairman meeting regularly with the Appeal Court Judges and sitting on the newly established Court of Appeal Criminal Division Users Committee. Furthermore it is freely conceded that the CCRC may have to follow questionable decisions by the Court of Appeal (Zellick 2005: 938). The notion of challenging the Court to bring about the kind of change desired by the Royal Commission in 1993 is lost in a state of deference:

“My colleagues hold the Court’s Judges in high regard and admire greatly the overall quality of the Court’s output.....So quite clearly, our role is not to sit in opposition to the Court of Appeal or to assert ourselves as some rival judicial authority”

(Zellick 2005: 937- 938)

Quite the opposite is happening with the Court of Appeal urging the CCRC on occasions to be more restrictive in its approach for example: -

Not to refer without new evidence or legal argument

(R v Ballard 2004 EWCA Crim 3305)

To be cautious about referring cases on the basis of poor defence representation

(R v Day 2003 EWCA Crim 1060)

In addition the Court's comments influenced the Government's inclusion of Section 315 of the Criminal Justice Act 2003 which restricts appeal grounds to those included in the CCRC Statement of Reasons (for referring a particular case). Exceptional leave from the Court is now required for lawyers to include other grounds not acknowledged by the CCRC (see Chapter 10 for an example of the affect of this in practice).

The Figures

The CCRC receives around 900-1000 applications a year (previously C3 received 700-800 a year) with the consequence that it can take from one month to around 19 months for a review to begin depending on the level of review provided (see below). A full review (Stage 2) can then take from a few months to many years (see Chapter 10). Examination of the figures of CCRC applications generally indicates that an application has around a 4% chance of being referred and a 60-70% chance achieving success at appeal once referred (CCRC 2005-6).

Despite this low level of successful applications, Professor Zellick concluded in the 2003-4 Annual Report (p.6), that Parliament and the public can be reassured that: -

“96% of applications to us are found after thorough review not to disclose possible miscarriages of justice”

This statement is highly complacent and misleading for a number of reasons: -

Firstly the term miscarriage of justice is being used here, not to indicate wrongful conviction but to mean a case that meets the very restrictive rules of appeal.

Secondly, while there is little doubt that there are some dishonest applications to the CCRC, the possibility that 96% of applicants are guilty people trying to cheat the system seems highly unlikely given the level of legal, media and campaigning support that many of these cases have. As discussed in Chapter 2 even disregarding such factors as police and legal failing or malpractice, the criminal justice system is a complex and imperfect system which will inevitably create mistakes and distortions. The very existence of the CCRC is testimony to this.

Thirdly, it is simply not true that all cases have a thorough review. As the 2005-6 Annual Report indicates 38% of cases are cleared at Stage 1 on the basis that they are considered ineligible and another 51% are cleared within 5 days ('Screen Review' Stage) usually because they can provide no new argument (The inability to find new arguments or evidence when confined to prison is hardly surprising and not necessarily indicative of guilt). Only around 11% of applications therefore can really be said to have a thorough review (Stage 2 review) and the quality of some of these reviews has often been questioned (for example Keirle 2002; South Wales Liberty 2003). (The system of 'Stages' referred to here changed in October 2006 to a system of grading cases A, B or C according to anticipated complexity following a review of administrative systems by external management consultants)

A complacent acceptance of the idea that the current system is adequately safeguarding against continuing injustice cannot be acceptable. The vision of the RCCJ, of an effective and fair system of appeals, has not been realised and is increasingly under threat of further restrictions.

The CCRC does have resources to undertake or pay for investigations that they or applicants raise, but what they do is at their discretion. Given the screening system that quickly eliminates those with no fresh evidence or argument the need for help from lawyers, relatives, supporters, campaigning groups and the media can be crucial. This is true both in drawing up an adequate application to the CCRC and on an ongoing basis. The "Green Form Scheme" currently provides up to 10 hours of legal aid for CCRC applications but this is a tiny fraction of the time usually involved in taking on a miscarriage of justice case. The CCRC alone is rarely an adequate resource for overturning major injustices. Often supporters are vital, to engage skilled and experienced lawyers, willing to take on cases on a largely unpaid basis, in turn supporters or lawyers may recruit media or journalistic support. This necessary building of links and contacts has been described as a 'Chain of Fortune' (Eady 2003: Ch 14). The overturning of major injustices is a long, demanding and expensive process requiring many people's commitment and considerable long overdue good fortune, reliance on the established statutory bodies alone is rarely sufficient.

CHAPTER 10

TEN LONG YEARS AT THE CCRC: THE CASE OF MIKE ATTWOOLL AND JOHN RODEN

In the case of Mike Attwooll and John Roden ten years passed from the first application to the Criminal Cases Review Commission (CCRC) in 1997 until referral to the Court of Appeal in May 2007. This chapter outlines this complex and curious case and discusses the approach of the CCRC in the context of their stated aims and values. Material has been sourced from various documents and from direct discussions with Mike Attwooll and John Roden. In conclusion the outcome of the appeal is briefly discussed on the basis of direct observation and the written judgement.

Outline of the case

At around 1.30 am on Friday 6th May 1994 the bodies of Gerald Stevens and Christine Rees were found in the office of a taxi firm called Western Valley Taxis on the Birds Industrial Estate in Risca, South Wales. They had been shot and cut with a sharp weapon and were discovered by a taxi driver returning to the office in the early hours of the morning. Gerald Stevens was the joint owner of the firm with Mike Attwooll, and Christine Rees was a driver with the firm. The two victims had been having an extra-marital relationship.

Mike Attwooll, Gerald Stevens' business partner, was arrested on Monday 9th May 1994. His daughter's boyfriend, John Roden, was arrested on 8th August 1994 (one week after Mr Attwooll's committal proceedings). Both were convicted in June 1995 of the murder of Gerald Stevens and Christine Rees.

Essentially the prosecution case was that Mike Attwooll was motivated to commit the murders by anger about the relationship between the victims and/or by a feeling that his

business partner was cheating him financially (no motive could be attributed to John Roden). Apart from some disputed statements which amounted to little more than local and contextual gossip, such claims, as often the case with motive, could be implied but not substantiated.

Like most potential miscarriages of justice in serious cases, this case became immensely complicated and littered with confusions and contradictions. Following his conviction, Mike Attwooll wrote a document running to 90 pages describing his version of the evidence in the case. This formed the basis of his request for leave to appeal and his initial application to the CCRC and despite its rigorous and arguably compelling content was largely dismissed as a series of 'jury points' rather than a set of legal arguments. Due to limitations of space many of the details of, and disputes about, certain pieces of evidence cannot be included here but some of these may be referred to in the analysis of the CCRC involvement below. The key strands of evidence will be briefly summed up under four headings: -

- Timings and Sightings
- Blood Traces in Mike Attwooll's car
- The Gun and the Evidence of Vincent Price (against Mr Attwooll) and Carl Perkins (against Mr Roden).
- Evidence of David Eaves

Timings and Sightings

It was undisputed that Mike Attwooll left the taxi office around 12.30am on the night of the murders. This was verified by another driver (MC) who left at the same time. Mr Stevens was still at the office and was joined by Mrs Rees who had completed her driving jobs. Mike Attwooll then drove the short distance (less than half a mile) to call at his daughters flat to confirm taxi arrangements for the next day. At this point the two versions of events diverge. According to Mr Attwooll he then drove the short distance home, arriving around 12.40am and retiring to bed around 12.50am – a version of events confirmed by his wife in statement and at trial. According to the prosecution Mr Attwooll picked up John Roden at his daughters flat, Mr Roden then lay down in the back of the car so as not to be seen and they drove back to the office and committed the murders.

This version of events was backed by statements from the owner of a garage next to the taxi office who claimed that he heard an argument between the business partners followed by a loud bang around 12.30. It was also backed by the evidence of two teenage girls who claimed, after seeing newspaper reports and photographs following Mr Attwooll's arrest, to have seen him driving towards the office in his white Sierra car at the material time. The evidence of the two girls was highly inconsistent in both statement and at trial but may have been seen as an important piece in the prosecution jigsaw. However, since conviction, Mike Attwooll has provided the CCRC with an analysis of timings based on the girls' own statements, their till receipts from the garage outside the Estate and the time they themselves said it took them to walk up the road. The analysis seems to provide a compelling argument that they would have been well past the place that they claimed to see his car by the time they claimed to see him.

The other claims were countered by Mr Attwooll denying that there had been an argument and suggesting that the loud bang was probably his closing of the roller shutter doors around that time. In addition a group of young men outside the estate during the period of the alleged events gave statements which included hearing shots at about 1.15 am. These young men were not called for the defence and only part of their statements were read out in court. On 1st Nov 2001 one of this group appeared in an HTV "Wales this Week" documentary confirming his version of events and expressing surprise that he had not been called to give evidence.

It has also emerged since conviction that evidence of another white Sierra in the vicinity at the time was not utilised by the defence. The time scale available for the prosecution scenario to take place is by any measure very tight - "an enduring feature of miscarriages" it has been argued (Woffinden 1998: 28).

Blood Traces in Mike Attwooll's Car.

Following information given to the police by Vincent Price on the Sunday after the murders (see below) Mike Attwooll was arrested the next day and questioned as a suspect and his car was searched and tested. Four tiny areas of faint blood staining were found on the inside of his white Sierra and tests indicated that some of these could be combinations of the blood of both victims. Four pages of the Judge's 216 page Summing Up document

discuss the testing that took place and the conclusion is far from clear. The Summing Up only very briefly alluded to the fact that the victims often used the white sierra and were known to fight and make love in that car. This somewhat crucial point was dealt with by the statement “remember the evidence we heard from more than one witness that Stevens and Christine Rees used to quarrel with one another” (Summing Up p105 Para A). The likelihood that they could have left small traces of their blood in the car is not insignificant (the blood traces could not be aged).

The other issue relating to this piece of evidence concerns Mr Attwooll’s visit to the crime scene at the request of the police on the morning after the murder, to locate files and describe the normal layout of the furniture in the office. In a statement made before the discovery of the blood traces and consistently ever since, Mr Attwooll has claimed that he travelled from his home to the office in his own car following a police phone call to agree this arrangement. Although this call and his departure in the Sierra, was witnessed by Mrs Attwooll and another witness, no log of the call has ever been made available to the defence (Mike Attwooll) and the police maintain that he was taken from his home to the crime scene in the police car. Despite the other possible ways that the blood traces could have got into the car, this began to establish a case against Mike Attwooll, especially in the light of the evidence of Vincent Price.

The Gun and the Evidence of Vincent Price and Carl Perkins.

One of the most curious features of this case is that the key prosecution witness against Mike Attwooll, his brother in law, Vincent Price, claimed to have provided the alleged murder weapon and the key prosecution witness against John Roden, Carl Perkins, claimed to have disposed of it. There is no other connection whatsoever between the two defendants and the weapon, other than the word of the two prosecution witnesses who both admit committing the illegal acts of providing an illegal converted weapon (Mr Price) and disposing of a weapon believed to be a murder weapon (Mr Perkins).

Vincent Price had an interest in guns and had a firearms license. He claimed that he had provided bullets to a man called O’Neill to use in a converted air rifle. Mr O’Neill then claimed that he had engaged a friend, Mr Duffy, to convert this gun to fire .22 bullets and

to fix a silencer. Having had this done he gave this now illegal weapon to Vincent Price. These events might be seen as suspicious in terms of motive and were certainly illegal. Mr Price claimed that he had sold this gun to Mike Attwooll some months before the murders and furthermore that Mike Attwooll had visited him on the morning after the murders and effectively confessed to the crime by saying he had got rid of the gun and asking Mr Price for advice on how to remove nitro stains from his hands (CCRC Statement of Reasons 2001 para 1.24 & 1.25). Mr Attwooll has always denied buying or being in possession of the gun and making such incriminating remarks. Vincent Price however gave evidence to this effect, despite suffering mental health problems at the time of the trial including a suicide attempt (CCRC Statement of Reasons 2001 para 10.9).

Carl Perkins was a friend of John Roden and Mike Attwooll's daughter, Vicky. He had a history of criminal convictions relating to drugs and theft and had suffered mental health problems which had been treated at one point before the trial with ECT (Electroconvulsive therapy). Mr Perkins was imprisoned shortly after the murders for non-payment of fines and while there he requested to be placed on the wing for vulnerable prisoners (at that time known as Rule 43) apparently because he was fearful due to his reputation as a 'grass' (Trial Summing Up p 36G and 37A). When placed in this section he shared a cell with a man convicted of sex offences named Woodland. "Mr Woodland was, or shortly thereafter became a registered police informant" (CCRC Provisional Statement of Reasons for John Roden 2004 para 1.33) and he gave information to the police that Mr Perkins had told him that he (Perkins) had knowledge about the Risca Murders. Following this information the police visited Mr Perkins at his home on Monday 8th Aug 1994 and spent almost three hours with him, recording only a few minutes worth of notes (CCRC 2004 para 9.4). During this time however Mr Perkins was able to direct the police to find the two parts of the gun which had been thrown into the river Ebbw at the back of his house. In fact the gun was located in the river roughly half way between the home of Carl Perkins and the home of Vincent Price who lived in the same street, although the two men claimed they did not know each other (Mike Attwooll). Following this Carl Perkins gave further evidence claiming that John Roden had confessed to the murders and had asked him to dispose of the murder weapon, which he did by partially burning it in a bonfire and then throwing it into the river. Mr Perkins was never charged with the offence of assisting an offender but gave crucial evidence at trial along with Mr Woodland.

The Evidence of David Eaves

After being charged Mike Attwooll was remanded to Cardiff Prison where he came across a man called David Eaves. Mr Eaves had convictions for violence and sexual offences against young people including incest with his daughter and at the time was on remand on charges of assaults and threats to kill his wife. On 27th May 1994 he gave evidence to the police that Mike Attwooll had confessed to the murders and given him certain details. On 2nd June Mr Eaves was granted bail, the prosecution opposed bail but the judge was told that he had given evidence in the Risca murder case. Following this his wife dropped the case against her husband and the police did not pursue the matter ('Summing Up' p114 B). The Judges Summing Up spends 28 pages (111-139) discussing the evidence of Mr Eaves and Mr Attwooll's response to his claims. Inconsistencies and inaccuracies around detail and possible motives are considered along with the possibility that information was gained from newspaper, TV and radio reports. The possibility that detail was obtained from meetings with the police is not considered. Mr Eaves provided considerable detail, much of it contradicted earlier statements and some provided explanations for unexplained factors in the case such as why no blood could be found on any of Mike Attwooll's clothing. He had according to Mr Eaves worn "wet gear...oils" - there was nothing to support this accusation. Mr Eaves also made claims that re-enforced the motives about resentment and being cheated which the prosecution were purporting.

Jury secrecy means that it can never be known whether the jury believed Mr Eaves but the attention given to his evidence by the judge indicates that it was taken as serious evidence to be considered, even though the use of prison informers has often been used to bolster cases which have later been established as miscarriages of justice (Bridgewater Four, Cardiff Three, Cardiff Newsagent Three for example). In fairness the judge warned the jury at one point "to consider his (Eaves) evidence with the greatest care and caution" (Para 113D). However the complexity of the intellectual task faced by the jury and the inevitable role of speculation is well illustrated in the whole of these 28 pages (and throughout the lengthy Summing Up) with all the various possibilities they might consider. To give an example with just one paragraph: -

"You will also want to ask, suppose Attwooll were guilty, why should he ever want to confess his guilt to a man who, before they met in prison was a total stranger? Would a guilty man ever trust a stranger with his guilty secrets? Would

he regard a convicted criminal as on the same side, against the law, and someone therefore to be trusted? Would he just want to talk about it?

(Mr Justice Jowitt 'Summing Up' p 113 para.B)

It might be argued that a jury could never do more than speculate on such questions.

The importance of thorough research and questioning by counsel including examining previous statements in cross examination is also illustrated by Mr Justice Jowitt's directions about the primacy of oral evidence: -

"It's only what he (Eaves) said in the witness box which is evidence, and it's important therefore, if you should find something referred to in the statement which he did not speak about in evidence, that you do not treat that as though it were part of the evidence. It isn't"

(Mr Justice Jowitt 'Summing Up' to Jury p117 paras G & H)

One of the problems with any trial and particularly with one as complex as this, is how much evidence is included, how much is understood or remembered, how it is treated and most difficult and obscure of all, what has really gone on behind the scenes of the investigation? In fairness both the jury and later the CCRC faced a considerable challenge with this case.

Chronological Outline of CCRC Involvement

Following conviction in 1995 both men were refused leave to appeal. Mike Attwooll's own submission was forwarded from the Home Office C3 Department to the CCRC when it came into operation in 1997 and John Roden's solicitors submitted representations on his behalf in June 1998. Further submissions followed from John's solicitors and the South Wales Liberty Group at various intervals from 1998-2000 and following the CCRC's Provisional Statement of Reasons in May 2001. Despite this the CCRC confirmed its decision not to refer the case with a Final Statement of Reasons on 14th Nov 2001.

Faced with potential judicial review proceedings from John Roden's lawyers the CCRC decided in April 2002 to place the case before a newly constituted Committee of Commissioners (effectively re-opening the case). The reason for this decision was the presence of David Jessell on the original panel of Commissioners, whose former firm, Just Television, had undertaken some investigation work on the case in 1997. The CCRC therefore, wishing to uphold "the very highest standards of decision making", accepted that there might be a genuine perception of potential bias although not accepting that there is "any evidence of actual bias" resulting from Mr Jessell's "undisclosed previous involvement" in the case (Letter from CCRC Case Manager to Mike Attwooll 11 April 2002)

In the second review of the case it appears that the cases were treated separately although prior to this the CCRC had maintained they would be treated together. More submissions were made by John's lawyers at this stage. South Wales Liberty, after a great deal of searching and persuading, were able to find a solicitor for Mike Attwooll in 2002.

In June 2004 the CCRC issued a Provisional Statement of Reasons (PSOR) declining to refer John Roden's case. Responses followed from South Wales Liberty and John's lawyers in October 2004. Both these submissions expressed concern at the Commission's approach to new evidence about the handling of the witnesses who gave evidence against John Roden by the police, and the fact that the Commission's own Case Manager had recommended that Mr Roden's case be referred to appeal but had been overruled by the committee of three Commissioners.

Since 2004 it appears that the cases were again reviewed together and in May 2007 the Commission reversed its previous decisions and referred the case of both men to the Court of Appeal.

The Chairman of the CCRC conceded unequivocally in a letter of August 2005 to John Roden's lawyers that there had been unacceptable delays in this case. It was however another 18 months before the referral decision.

Analysis of the CCRC Involvement

The CCRC have adopted value statements which are sometimes published in their presentations and in their Annual Reports. These values are presented in the 2004/5 Annual Report (page 2) by the words 'Independent', 'Thorough', 'Investigative', 'Impartial', 'Open' and 'Accountable'. In later reports (2004/5, 2005/6) the list of values remains essentially consistent except that the word 'Open' is replaced by 'Transparency' and the words 'Thorough' and 'Investigative' are replaced by 'Integrity' and 'Professionalism'. It seems this wording is more of an elaboration rather than a replacement as the later reports present their first aim as: -

“To *investigate* cases as quickly as possible and with *thoroughness* and care”
(page 2 emphasis added).

One might argue that stating noble values could leave any organisation or individual open to contradiction when particular instances are examined, and it is not the intention of this discussion to use these statements in a cynical or ironic way. The use of these terms to structure the following discussion is intended to illustrate how a case of this kind can bring into focus some of the fundamental difficulties and systemic limitations that the CCRC faces in enacting its values. This is not to deny that such values may be genuinely desired or pursued but to acknowledge the internal and external barriers to their achievement.

Transparency (Openness) and Accountability

In the early days of the CCRC the applicants tended to feel that there was a willingness to listen to their voice and both lawyers and campaigning groups were given attention. In this case the level of communication has fluctuated over the years with long periods of complete silence and apparent complete inactivity (as acknowledged in the CCRC letter of August 2005). Equally at times, especially when lawyers or campaign groups have pushed issues, these issues have been taken up to some degree at least and responses given. Communication directly with the applicants has largely been limited to responses to their submissions rather than any active policy of keeping the applicant informed. The CCRC's policy is only to visit the applicant when there is a perceived reason that might

advance the case. John Roden has never been visited by the CCRC, while Mike Attwooll had one visit in the early stages from the first Case Review Manager (Over the ten years four Case Review Managers have been involved). While it may be impractical to visit all applicants it might equally be argued that the complexity of this case and the extraordinary length of time it has been with the CCRC would have warranted more visits in the interests of thorough investigation as well as openness and accountability.

In June 2004 the CCRC issued a provisional Statement of Reasons declining to refer the case of John Roden to appeal. It came to light as a result of enquiries by the campaign group that the Case Review Manager had recommended referral but had been over-ruled by the Commissioners. The Case Manager concerned left the Commission shortly after this. Efforts by campaigners to acquire a copy of the original Statement recommending referral were met with claims that the document no longer existed. Only a letter from the previous Case Manager could confirm that this different view of the case existed within the Commission: -

“The complete absence of any indication in the Provisional Statement of Reasons that the Commissioners took a different view to the Caseworker is not in the spirit of openness and fairness that the Commission pronounces publicly”

(South Wales Liberty: Response to Statement of Reasons 2004: 6)

Furthermore the new Statement of Reasons gave scant explanation as to why the submissions of John Roden’s lawyers had been rejected and it was argued that a spirit of transparency required some explanation of this: -

“Openness and fairness surely require full disclosure of the Committee’s legal arguments and discussions given that these overcame the case put forward by Mr Birnbaum QC – a case found to be “compelling” and “very strong” by the Caseworker. Surely the Commissioners cannot concede on the points made yet simply declare themselves “unpersuaded” without any rationale”

(South Wales Liberty Response to Statement of Reasons 2004: 6)

Expediency and an image of credibility were, it seems, in this instance, being given preference over accountability and transparency. The importance of this is arguably that those representing John Roden should have access to the knowledge that the Caseworker agreed with Mr Birnbaum QC and while the Commissioners apparently did not, where is

the rationale for concluding that there is “no reasonable possibility” that the Court of Appeal might also have agreed with the Caseworker and the QC? Not to be open with this information therefore might deprive John Roden of crucial information in support of his case and/or the opportunity for a judicial review application on the reasonableness of the Commissioners’ decision.

In terms of accountability, while the CCRC report to the Home Secretary, it is hard to identify any real accountability, for example for the delays in this case or for investigations that may not be thoroughly conducted. In practice it seems that the CCRC feels most accountable to the Court of Appeal and responds to the messages they receive from them. The Court of Appeal may on occasions be critical of referrals made by the CCRC but, notwithstanding the often expressed views of lawyers and campaigners, there is no ‘official body’ in any position to be critical of non-referral.

Thorough and Investigative (Integrity and Professionalism)

When the CCRC came into being many wrongly convicted people and their supporters expected, or at least hoped, that the Commission would be a proactive investigative body. In fact the 2005-6 CCRC Annual Report recorded that 38% of applications are considered ineligible, 51% are cleared within 5 days (often because they can provide no new argument) and thus only 11% could really be said to have a thorough review, unless the case is simple enough to be adequately reviewed in 5 days. In practice the CCRC responds to issues raised by applicants when they see this as appropriate. They do not generally review the case as a whole or delve proactively into areas not raised by the applicant, unless their enquiries specifically lead onto other areas.

In this case the applicants themselves left no stone unturned in their presentations to the CCRC and, faced with the complexity of the case, the CCRC have effectively paid little investigative attention to many areas that they saw either as ‘jury points’ or as issues of little relevance. This is unfortunate given the view expressed by CCRC Commissioner David Jessell at the Conference held in May 2007 to mark the ten year anniversary of the CCRC. Mr Jessell reflected on how previously, as a journalist he would have longed for the resources, powers and rights of access to information now available to the CCRC.

Unfortunately there have been many areas raised by the applicants where the CCRC has not deemed enquiry relevant. These matters include the lack of any thorough examination of the ballistics issue. This is crucial given that whether the alleged murder weapon is in fact the murder weapon is, in many ways, the key to the case and the credibility of the two main prosecution witnesses. When enquiries were made following a partial report obtained by the defence it was discovered that the bullets and initially the gun could not be located by the police despite, it is assumed, a CCRC preservation order on the exhibits. In their Notification of Referral (2007) document the CCRC make no comment on this other than to say "Further examination of the bullets is therefore precluded". Apart from Vincent Price, who was interviewed by the CCRC, no other key witnesses have been interviewed; Perkins, Woodland, Eaves or the witnesses who claimed to have seen the white sierra driving back towards the office for example, all remain unquestioned by the CCRC review. Numerous issues have not been taken up, such as the informant status or otherwise of Perkins, or his current whereabouts and the "bullet-like objects" which were referred to at the trial as being found in Mike Attwooll's home, which to this day, and to his great frustration, he has never been given the opportunity to identify (Mike Attwooll).

Despite this, the case was finally referred, in May 2007, to the Court of Appeal but on only two grounds, both of which had been raised primarily in Mike Attwooll's submissions. To what extent then does the decision to refer reflect a thorough and investigative approach?

The CCRC referred the case on two grounds: -

Firstly they undertook a much more thorough and critical view (than the view they had previously taken) of whether Mr Attwooll may have used his own car to travel back to the office with the police in order to enter the crime scene and locate files and describe how furniture had been moved in the incident (this action in itself is not questioned by the CCRC – see below). If Mr Attwooll had used his own car then clearly the traces of blood found in his car could have been transferred when he entered the crime scene to assist the police rather than from committing the crime. The Commission now accepts that the jury

considered this issue important by asking a question about it and that they were not given full information on this. It was not made clear to the jury for example: -

- That the main prosecution witness, Mr Price, had stated in his interview and statement that he had met Mr Attwooll coming out of the estate from the office in his own car.
- That two witnesses who might have supported Mr Attwooll's story were not used by the defence to do this.
- That Mr Attwooll's movements in undertaking his next taxi run would have meant he would have been travelling in the wrong direction had he met Mr Price at any other time than when he left the office in his own car. As the CCRC put it the prosecution's version of events on this matter "was inherently implausible".
- That one of the two police officers involved in arranging for Mr Attwooll to travel from his home to the office did not give evidence because he maintained that he could not recall the events of the day at the time of the trial but could recall them later when questioned by the Police Complaints Authority.

(CCRC Notification of Referral 22 May 2007 Paras. 170-180)

Thus a thorough analysis of this issue now recognises the significance of these matters in supporting Mr Attwooll's credibility in conflict with that of the police officers. There is however nothing here which was not available to the CCRC, and argued by and on behalf of Mr Attwooll from the very start of the investigation in 1997. The CCRC revisited the issue with more rigour and changed their view from the decision not to refer the case in 2001, but it took another 6 years for the points made by support organisations at the time of that decision to be recognised: -

- 1.5 The failure of the defence to call DC Morgan because he claimed not to remember "details of the matter" is again inexplicable. What conclusion might a jury draw if told that an experienced detective could not remember which car Mr Attwooll travelled in to the office? This is hardly a detail and hardly reflective of an observant detective. Moreover the apparent lack of

memory coupled with the apparent lack of any notebook or diary entries relating to Mr Attwooll's mode of transport may have led to a conclusion by the jury which would have been favourable to the defence case.

- 1.6 The Commission records that Mary Attwooll wrote to them in Nov 1997 saying that Mr Attwooll used his own car. The Statement of Reasons states that "No explanation has been given why this evidence was not called at trial" (Along with we would add similar evidence from David Goodwin). The Commission then concludes in the next paragraph (10.34) that "The relevant facts were before the jury". We would dispute that this is the case and that **clearly once again important evidence was not provided to the jury.**

(South Wales Liberty Response to CCRC Statement of Reasons 2001 –emphasis in the original)

The second issue on which the referral is made is that the Commission now recognise the importance of a statement from a Mr Rowlands which the defence had inexplicably failed to use at trial. Mr Rowlands spoke to the victim Gerald Stevens earlier on the evening of the murders and gave a statement asserting that Mr Stevens had been very nervous and frightened when a blue ford sierra drove past. The statement contained revealing information which might point to other suspects: -

"Gerry had told me previously that he thought that someone was after him.....Gerry appeared very agitated and nervousI can remember that Gerry continually looked up the road, in my opinion watching to see if the Ford Sierra was returning toward him.....In my opinion Gerry was waiting for someone to come and confront him."

(Extracts from Mr Rowland's statement 17 May 1994)

Mr Rowlands also stated that Gerry had said that he thought the attack and stabbing of another employee of the taxi firm shortly before the murders had really been meant for him. There is no suggestion that the defendants could have been the occupants of this blue car, Mike Attwooll's white sierra was elsewhere and Gerry was reportedly completely at ease in the company of Mike Attwooll later that same evening.

As with the issue of transport to the office, the argument about the importance of Mr Rowlands' evidence had been argued by the defendants and their supporters since 1997 and again in response to the 2001 decision not to refer the case:-

- 1.4.1 We cannot agree with the conclusion of the single judge and the Commission that the evidence of Mr Rowlands was not of significance. Clearly if the jury had been presented with the knowledge that Mr Stevens was seriously worried by the presence of other parties on the night of the crime it is likely that this evidence

would have raised serious doubt about the involvement of Mr Attwooll and Mr Roden.

(South Wales Liberty Response to CCRC Statement of Reasons 2001)

Again the CCRC has now looked at the issue more thoroughly and has linked Mr Rowlands' statement to the statement of another witness who was refuelling his white sierra at the garage near the murder scene around 12.40 that night. (It has been argued that this white sierra might have been mistaken for Mike Attwooll's). This witness also reported a blue sierra in that garage at that time. Furthermore the CCRC's examination of police papers found a record of another person, a woman who saw the blue saloon car with two or three occupants in the garage and being made to feel nervous by the cars occupants for some reason, decided not to stop in the petrol station but pulled off and drove home. Thus there is evidence that the blue car that had so alarmed Gerry Stevens earlier may have returned to the area around the time of the murders (CCRC 2007).

In fairness to the CCRC both of these issues had been rejected by the single judge in refusing to grant leave to appeal after the original trial and the CCRC rationale was to follow that ruling. They have had to use legal and cautiously worded arguments to justify the referral to the Court of Appeal, especially in the always difficult area of defence inadequacies or tactical decisions. Herein lays the systemic problem that denies justice because of rulings made in the past which may have been inadequately examined or simply wrong. The CCRC has been reluctant to challenge the way the system interprets fair process and most of all reluctant to challenge the Court of Appeal. In this sense even now there is a caution about the CCRC referral which manifests itself in the very limited grounds on which this case has been referred. This is particularly serious given the clause (s315) in the Criminal Justice Act 2003 which prevents grounds other than those on which the CCRC referral is based from being raised at the appeal, unless the Court of Appeal agrees to accept them following a specific application from the defendants. In a case as complicated as this one, where a miscarriage of justice may only really come into focus by taking a holistic view, this could be very serious. The danger is that the Court of Appeal may see some merit in the grounds of referral but maintain the conviction on the basis of the other evidence which the CCRC does not appear to question. The "catch 22" imbalance here should be obvious; the appeal cannot be argued holistically but it can be rejected on the basis of a holistic argument. In fact there are numerous other areas that

lawyers, supporters and the defendants feel are of equal importance and relevance to those that form the grounds for referral but have not been considered so by the CCRC. In this sense while years have been wasted awaiting the more analytical approach that has now been taken on these two issues, the over cautious approach to other matters, which seems to stem from fear of criticism from the Court of Appeal, risks repeating the mistakes of the past. One might argue that if a case is worth referring it is worth referring well, armed with the full range of major areas of doubt.

A few examples of important issues that the CCRC have not seen fit to include as grounds of appeal are as follows: -

- The Gun Issue
- Contextual Developments in the Evidence of the two young women.
- The Relationship of a Juror to the Officer Second in Command of the Investigation
- Prison Witnesses in Support of Mr Attwooll re: David Eaves
- Support for Evidence of Police Impropriety in John Roden's Submissions to CCRC
- Entering the Crime Scene

This list is not exhaustive but some discussion of each of these issues is warranted

The Gun issue

There are at least three elements to this matter: -

- (a) The bullets in Duffy's Garden and the Summing Up.

Bullets for the alleged murder weapon were provided to Mr. O'Neill by Vincent Price. Mr O'Neill then gave the gun to a friend Mr. Duffy who testified that he converted the air gun to fire .22 bullets and then test fired the gun into the ground in his garden. He then returned the gun to Mr. O'Neill who test-fired it into a tree and then gave it to Vincent Price who then alleged he sold it to Mike Attwooll. (This has been referred to as the 'audit trail' of the gun). The prosecution ballistics

expert, Mr. Fletcher, suggested that the bullets in the tree could be consistent with the bullets found in the bodies but the bullets in Mr. Duffy's garden were certainly not. The CCRC seem to make a crucial acknowledgement of the potential importance of this: -

"The judge did not mention Mr. Fletcher's conclusion (the only one on which he was definite) that the three bullets from Duffy's garden had not been fired from the gun which killed the victims. That seems a potentially important point for a jury following an 'audit trial' in respect of the converted air rifle"

(CCRC Notification of Referral 2007 Para 209)

There is a question mark about whether Duffy was telling the truth about the number of guns he fired in his garden (Para 212 CCRC) but if the position on this was not made absolutely clear to the jury, and the ballistics issue is complicated to say the least, then they could well have wrongly believed in the 'audit trail' as described.

There seem to be only two logical conclusions to this: -

Either Duffy was telling the truth in which case the gun he converted could not have been the murder weapon, in which case the evidence of the key witnesses, O'Neill, Price and Perkins is totally undermined.

or Duffy was lying under oath about the number of guns he had converted (he claimed he had only converted the one), in which case his evidence is perjury and the 'audit trail' story (crucial to the conviction) must be thrown into question and considered unsafe.

(b) Colonel Mead's View

One of the reasons for the delay in this case was that Michael Attwooll's lawyers had to seek legal aid for an expert report into the crucial ballistics issue. Sadly when this had been established the ballistics expert Colonel Mead died before he could complete his report. His partial report however referred to the comparison of the bullets found in the tree (not those in the garden) with those in the bodies of the victims, Colonel Mead's report suggests that as a result of the way the prosecution expert, Mr. Fletcher, worded his ballistics report "the jury might have been left with too strong an impression that the bullets might have been fired from the same gun" (CCRC NOR 2007 Para 214). The

report suggests that "inconclusive" would have been a more appropriate expression than the words "strongly suggest" which the jury heard. Col Mead also states an important principle in this respect: -

"Clearly, there is no place for a firearm to be 'nearly' identified and, if events thwart an identification, so be it and explain why".

(Para 27 Col Mead's Report)

(c) Lost Exhibits

Defence initiatives in seeking further ballistics examination have led to the revelation that crucial exhibits (initially the gun and still the bullets) have been lost by the police, despite being presumably the subject of a CCRC preservation order. This: -

(1) Prevents detailed re-investigation of the crucial ballistics issue.

(2) Raises the possibility of deliberate concealment to prevent re-investigation.

If there is suggestion of deliberate concealment then this should surely warrant investigation and a ground of referral to appeal.

The CCRC dismiss this point without comment or analysis in one short paragraph (Para 202) of their 2007 Notification of Referral (NOR), stating that "Further examination of the bullets is therefore, precluded." This rather bland acceptance of the situation is further undermined by the acknowledgement in the previous paragraph which suggests that further examination could be of value — "...today's microscopes are more sophisticated than those in use in 1994" (Para 201).

The importance of this element of the evidence cannot be over emphasized, because if the gun concerned was not the murder weapon, then both Price and Perkins were lying and the whole case must surely collapse. There would seem to be enough matters that were not fully canvassed before the jury to justify the ballistics issue as a ground of referral given its importance, but the CCRC declined to do this.

It also seems unlikely that anyone would undertake such a pre-meditated murder with such a woefully inadequate weapon. According to Vincent Price's statement made 10/5/94 the bullet casing had to be prized out of the barrel after each shot which could take "as long as three minutes". Firing three shots as in this murder, might therefore take around six minutes, making the already tight time scale even tighter.

Contextual Developments in the Evidence of the Two Teenage Girls.

Mike Attwooll has presented to the CCRC an analysis of timings in relation to the evidence of the two girls who claimed they saw him returning to the office. Using the girls' witness statements and till receipt timings from the garage, where they bought some food items, Mr. Attwooll illustrates that the window of opportunity for the two to pass as they suggested is extremely tight, or in his view impossible. The CCRC's argument is that the many inconsistencies in relation to the girls, including a witness statement from a fellow taxi driver that he saw the white sierra heading on towards the Attwooll's home rather than back towards the office, were before the jury. However there is no indication that the timing argument, as described by Mike Attwooll, was ever adequately propositioned. As such this is at least a new argument, if not new evidence.

The argument is strengthened by the fact that the jury did not hear the evidence of the 8 youths, who were outside the estate yet did not see Mr. Attwooll's car entering the estate. Neither did they hear evidence that a Mr. Francis was driving another white sierra car in the area at the time or that another similar car (Blue sierra/saloon) was seen at the garage by other witnesses. The CCRC admit that it "has found no indication that the route taken by Mr. Francis, in his white sierra, was established and that this definitely ruled out the possibility that the girls saw Mr Francis' Sierra, rather than Mr Attwooll's" (CCRC SOR para 199). The same could be said of the blue car, the movements of which are unknown.

The CCRC have accepted that the statements of witnesses at the garage give support to Mr Rowlands' evidence in the second ground of their referral. It seems reasonable therefore that these issues, that were not before the jury, should also be given the opportunity to support an alternative perspective of the girls evidence especially in the

light of the timing issue described by Mr. Attwooll. Indeed the whole issue of timings in relation to a number of witnesses is so complex that the jury must have been confused by the mix of information they did receive.

Relationship of a Juror to the Officer Second in Command of the Investigation

It was discovered during the trial that a member of the jury was related to the second in command of the police investigation and lived close to him. The CCRC have followed the indication of the single judge when refusing leave to appeal, considering the fact that this was discussed with the defendants to be adequate. The alternative position on this issue was summed up in South Wales Liberty's response to the CCRC's Provisional Statement of Reasons which declined to refer Mike Attwooll's case in 2001: -

"The failure to discharge the jury was such a grave failure as to render the trial unfair. It is not sufficient to state that the matter was explored in the presence of the defendants — It is incumbent upon the defence and indeed the Court to ensure that justice is seen to be done. The notion of a "fair trial" includes concepts such as impartiality and independence (something which is clear from European Court of Human Rights jurisprudence), and the relationship of the juror to such a police officer cannot be seen to be in accordance with these concepts. We therefore submit that in the light of human rights standards in force today, the Commission should conclude that there has not been a fair trial, requiring immediate referral to the Court of Appeal"

(South Wales Liberty 2001 Para 1.12)

In a case as complex as this one where the inter-relationship of so many different factors, many of which are conflicting and uncertain – where the term 'lurking doubt' might well be reasonably applied - then any bias within a jury might well be critical. Under the current law we cannot know whether this was the case or not. In constituting a new investigation of this case in 2002, on the basis that there could have been perceived if not actual bias on the previous decision panel, the CCRC itself recognised this important principle. It seems logical therefore that such explicit potential bias as reflected in this jury should constitute grounds for referral.

Prison Witnesses in Support of Mr Attwooll re: David Eaves

The CCRC argues that evidence from a number of prison witnesses, who might have made statements supporting Mr. Attwooll's view of the prison informant David Eaves, would in any event have been inadmissible (Notification of Referral 2007 para 249) with the exception of a Mr. Robinson who claimed that Eaves had suggested "grassing up" someone to him. The CCRC view Mr. Robinson's point as "not a strong point" (para 250).

However the point may be considerably stronger if the jury were aware that there was something of a culture of claiming cell confessions among certain inmates of Cardiff Prison at that time. The statement of Perry Clarke includes the comment: -

"One thing I also wish to add is that Eaves occasionally spoke about Jonathan Jones".

Jonathan Jones' trial (see Chapter 5) took place about one month before that of Attwooll and Roden. During this trial the prosecution produced two witness statements from prisoners claiming that Jonathan had confessed to them. In the end the witnesses were not used in court when it was discovered that both their statements quoted details word for word including factual and spelling errors from the Western Mail newspaper. The claim that Eaves obtained details from newspapers might be supported by this, along with the possibility that Eaves was following the actions of others in order to seek favour with the authorities, a practice which the jury may not have been aware was, it seems, not uncommon. Jonathan Jones' solicitors advised him on a daily basis not to discuss his case with any other prisoner because of this well known danger. A truly investigative CCRC, it might be argued, would be particularly cognizant of such dangers, notorious as they are in the history of miscarriages of justice.

Support for Evidence of Police Impropriety in John Roden's Submissions

In October 2004 Michael Birnbaum QC for John Roden made a response to the CCRC Provisional Statement of Reasons that had declined a referral for John Roden. This included a schedule of the CCRC's responses to the points made in his submissions. Mr Birnbaum lists 13 points, four of which were accepted as discrepancies in the police handling of Woodland and Perkins but the other nine are listed as 'not mentioned'. The

CCRC had concluded, it seems, that the four points conceded were not significant enough to warrant referral (a view not shared originally by the Case Manager) while the other nine points were not significant enough to warrant discussion, even though they concerned similar potentially serious questions around police practice. Suggestions such as the possibility that Perkins was offered inducements to give evidence are dismissed as “speculative”. An investigative approach however cannot surely rule out some speculation as a starting point for a detailed analysis; Mr Birnbaum’s submissions identified a number of aspects that gave considerable contextual support for such speculation, not least what seems to be a three hour ‘off the record’ interview with Carl Perkins at the time the gun was discovered, the record of which is covered by only a few minutes worth of notes. The transcript of the following interview then makes a reference to avoiding “hassle”, which is suggestive of some “warnings” that might have been given to Mr Perkins during his “off the record” period with the police. A common complaint from campaigners about the CCRC is the tendency to make value judgements of this kind even when presented with new evidence. In this case it is conceded by the CCRC in the Provisional Statement of Reasons for John Roden (2004) that: -

“There were significant departures, by the police, from the practices set out, then as now, in the PACE (Police and Criminal Evidence Act 1984) codes” (Para 9.6)

“It is at least possible that the jury could have been left with the mistaken impression that the CPS (Crown Prosecution Service) was closely involved in deciding how the police should approach Mr Perkins” (Para 9.5)

“As with the handling of Mr Perkins, there are several inconsistencies in the information regarding how Mr Woodland was handled” (Para 9.12).
(These inconsistencies include two police officers recording entirely different accounts of the same meeting with Mr Woodland)

The treatment of suspects and witnesses is crucial to the validity of their evidence, the PACE codes exist for this very reason. The significant departures and inconsistent accounts conceded here go to the heart of the only evidence against John Roden – the testimony of Perkins which was prompted by the registered police informer Woodland. The rejection of this new evidence as not being sufficiently significant to warrant referral to the Court of Appeal is the kind of value judgement that many might feel shows a lack of impartiality from the CCRC where the police are concerned or a naivety about the pressure that can be put on witnesses when the rules and records are abused. As one ex-

police senior investigating officer and forensic expert interviewed for this project put it, referring to the three hour mostly 'off the record' police discussion with Perkins: -

“It’s a classic isn’t it? If he had the firearm or he knew where it wasthey should have taken him to the police station. The firearm should have gone through a relatively impartial senior officer.....he (Perkins) should have made a statement first of all, saying what he was going to say and then dealt with either by proceedings or a caution. The fact that he was dealt with the way he was, was a complete breach of the way it should have been done – obviously they’ve leant on him - ‘tell us where the gun is mate and you become a witness’ – but obviously they leaned on him quite hard for 3 hours” (P1)

Entering the Crime Scene

In the Final Statement of Reasons of 14 Nov 2001 for Mike Attwooll the Commission responded to concerns raised by South Wales Liberty about the practice of allowing Mr Attwooll onto the crime scene the morning after the murders, when blood was still present and forensic scientists and scene of crime officers were still working at the scene (although the bodies had been removed). The response was as follows: -

10.111 It is submitted that notes or messages regarding whether or not it was agreed for Mr Attwooll to travel to the taxi office in his own car are conspicuously absent. The practice of allowing Mr Attwooll access to the crime scene was not normal practice. It is incumbent on the Commission to provide some explanation for this practice

10.112 This submission is entirely speculative and is not evidence upon which a reference to the Court of Appeal could be based. Furthermore the Commission does not accept the assertion that by allowing Mr Attwooll access to the scene of the murders the police breached “normal practice”. The Commission is not obliged to provide an explanation for this practice beyond noting that it was a matter for the jury as to the significance that they attached to this matter which was fully aired at trial.

(CCRC 2001 Final Statement of Reasons for Michael Attwooll)

This response does not seem to echo thoroughness, openness or an investigative and impartial approach by the Commission. In fact it sidelines an important issue without adequate investigation, analysis or explanation.

The Notification of Reference to the Court of Appeal of 22nd May 2007 does not make any comment to reverse the above view. The referral ground is based on the issue of whether Mr Attwooll might have taken his own car to the scene rather than being transported in a police car. On this issue the Commission provides a much more rigorous and critical review, than that provided in their previous decisions. This analysis acknowledged that if he used his own car “the possibility of innocent transfer of the victims’ blood to his car was increased” (Para 115) and that “the issue might have impacted on the jury’s assessment of Mr Attwooll’s credibility more generally” (Para 116)

However it is not just the credibility of Mr Attwooll that is at issue here and indeed throughout this case, but the integrity of the police investigation. In this respect it is surprising that the practice of taking onto a crime scene, a witness who might be considered a potential suspect, given Mr Attwooll’s links with the victims, has not been questioned it seems by the police, by forensic scientists present, by lawyers or judges or the CCRC. The CCRC note that “Mr Attwooll entered the heavily blood stained room” (Para 114 Notification of Reference) and that “Mrs Galbraith, a forensic scientist who was in the room where the murder had occurred, confirmed that the blood in the room was still wet when Mr Attwooll entered” (Para 123)

Other experts take a very different view of this practice. In their book “Active Defence” Roger Ede and Eric Shepherd (2000) describe preservation of the crime scene as vital and list ‘Do’s and ‘Don’ts that seem highly pertinent to events in this case: -

Do

- Preserve the scene for forensic examination, disturbing as little fingerprint or forensic evidence as possible.
- Protect blood or other bodily fluids.
- Protect potential footmark impressions – particularly at the point of entry or on hard surfaces.

Don't

- Cross-contaminate victims or suspects – for example by touching one and then the other.
- Touch windows, doors, items and other surfaces likely to have been touched by the offender
- Walk on evidence such as broken glass, footprints etc.

(Ede and Shepherd 2000)

When this scenario was put to the police officers interviewed for this study they were universal in their view that not only did such a practice break the basic rules of treating such a serious crime scene but also that to do so would nullify the value of any trace evidence found afterwards. The following was a typical response: -

“Absolutely incredible, I mean it completely undermines the integrity of any evidence found on him or found at the scene.....Most forensic experts would agree that you would never, ever take a suspect to a crime scene until it had been completely sterilised, and if you did you couldn't rely on any evidence you got thereafter. It would undermine the credibility of any subsequent prosecution because it must be so evident to everybody that you would have cross contamination.....that's why you guard it that's why everybody wears suits.”

(P1)

It was not, in this case it seems, evident to anyone that cross contamination would occur, neither did Mr Attwooll wear a protective suit, only paper boots and to the further surprise of P1 “no gloves”! It was pointed out that at that stage Mr Attwooll was not officially a suspect, P1 replied “Even then you've got a problem – you wouldn't take anyone onto the scene”.

A thorough investigation by the CCRC should surely have been initiated into this practice, P1 (a very experienced investigation and forensic expert) provides some direction as to how this might have been initiated: -

“It would be interesting to know how much experience whoever made that decision had, why they made it – that should be in the Policy Book – but I guarantee it won't be” (P1)

The Policy Book or File (the Senior Investigating Officers record of decisions made and the rationale for them) was seen as a crucial document in examining the integrity of any police investigation (P1). The CCRC list police files and documents as items they have viewed in their investigation but the Policy Book is not specifically mentioned.

According to the defence team for Mike Attwooll's appeal, the Policy File was eventually disclosed to the defence after much prevarication one week before the appeal in March 2008. The prediction of P1 above was absolutely correct – the file contained no explanation of how or why the decision to take Mr Attwooll into the crime scene was taken.

It seems that the CCRC have been reluctant to confront this issue because it seems to have been accepted from the outset of the case. To question it now might embarrass many parties who should have done so in the past, in this sense the CCRC may have missed an opportunity to demand professionalism where this is lacking rather than turn a blind eye to it.

In conclusion therefore, there are, belatedly, aspects of this case where the CCRC have been investigative and thorough. In other respects it has been argued that they have not achieved this stated aim. It is perhaps in relation to their other two principles independence and impartiality that their investigative approach and thoroughness have been compromised.

Independence and Impartiality

The CCRC has a limited remit, the “real possibility test” which generally prevents the referral of any case to appeal without new evidence or argument. The “Exceptional Circumstances” clause is very rarely used and certainly not in support of a general “lurking doubt” about the safety of a conviction. Section 315 of the Criminal Justice Act 2003 (which limits grounds of appeal to those in the CCRC's Statement of Reasons unless the Court grants permission to include other grounds) causes so many problems for a case of this kind, as described above. The section was prompted by pressure from the Court of Appeal who felt unhappy about dealing with cases involving too many grounds

of appeal. This case seems to illustrate how the CCRC have taken this on board in being extremely cautious even in the context of a referral. It might be argued that if a case is going to be referred it is in the interest of all to give it the best chance of a full hearing rather than a restricted one.

Factors such as these support the impression that the CCRC is not and cannot be independent because of its subservience to the Court of Appeal. It is the approach and attitude of the Court of Appeal that dominates the approach and attitude of the CCRC and consequently has limited the ability of the CCRC to truly change the landscape of miscarriage of justice rectification. Three factors are illustrated by this case and are echoed by many others. These three problems mirror the traditional conservative approach of the Court of Appeal: -

- The CCRC is resistant to making a referral based on cumulative factors comprising “lurking doubt”. The fact that a great many aspects of this case in combination amount to serious doubt about the case is not accepted; there have to be legal points which stand in isolation. Ironically even such points can be undermined by a superficial view that they are outweighed by other evidence or a value judgement about their significance.
- The CCRC is resistant to making a referral based on serious question marks about police investigation practices even, as in this case, despite admissions of failings in relation to PACE and other inappropriate practices. In this case there has at last been an admission of some question marks about police integrity but a refusal to view other questionable practices in the light of these. This reflects both the reluctance to challenge police practices and the reluctance to look at a case holistically. It would seem reasonable that to conclude that police and defence failings may well be present in some areas might well indicate that other areas of complaint might also have grounds. If some parts of a process are not functioning as they should then other parts of the same process undertaken by the same team should be looked at critically.

- The CCRC is resistant to making referrals on the basis of poor defence representation that has resulted in significant evidence not being heard by the jury. Again, in fairness, the referral has acknowledged some question marks about defence performance but it has taken many years in this case to reach this position and the acknowledgement is still only partial.

A truly independent and impartial CCRC would not be restricted by a fear of criticism from the Court of Appeal and would be using its investigative powers to ensure that police investigations were properly conducted and that legal representation did not leave out crucial evidence through negligence or tactical decisions that clearly damaged their clients' case. Independence requires the thorough use of investigative powers even when this seems to question police and legal establishments. There have been some cases where the CCRC has done exactly that, but in other cases, as to a large extent in this one, there has been acceptance of bland explanations and the tolerance of inadequate practices, often it seems because no other body along the way has questioned those practices. This approach does not promote impartiality. In this case, to a large measure, the benefit of the doubt has been awarded to the established authorities and the dice loaded against the defendants. Without the support of lawyers and campaigners it seems doubtful that the case would have been re-opened in 2002 and a more thorough investigation leading to referral might never have happened. Independence and impartiality should not depend on the amount of pressure that can be applied.

The Appeal 17th March 2008

After nearly 14 years of struggle the Court of Appeal finally heard the case on 17th March 2008. Lawyers for John Roden had to argue for inclusion of the evidence on his behalf on the day, even though extensive representations had been forwarded to the Court the previous autumn – no preliminary hearing had been arranged. The Judges declined to include this evidence in their considerations. Thus only the two grounds relating to Mike Attwooll were allowed, although lawyers were permitted to discuss some of the other issues as background. The appeal, listed for two days, lasted under four hours. The men and their families and friends then faced a tormenting reserved judgement which took

over 5 weeks to be finally delivered on 23rd April 2008 [EWCA (Crim) 879]. Some reflections on the judgement are as follows: -

The Court of Appeals Judgement: R v Attwooll and Roden EWCA (Crim) 879 (23/4/2008)

Paragraph 2

Describes the difficulties of evaluating the significance of criticisms of the investigation and trial process long after the events and suggests that questions about the conduct of these will “inevitably” be thrown up. The Court’s job, they say, is to assess the significance of these questions; their conclusions give the benefit of the doubt substantially to the prosecution, demonstrating the reverse burden of proof at appeal.

Paragraph 3

If correct, this paragraph, combined with paragraph 30 which states that the prosecution did not challenge Michael Attwooll’s wife’s evidence that he was at home at 12.50 am, effectively exonerates Michael Attwooll by stating that the murders occurred between 12.50 am and 1.30 am. No comment is made on this.

Paragraph 19

The court attempts to excuse the police action of taking Mr Attwooll onto the crime scene: -

“In order to give the information that the police wanted, he clearly had to have access to the office to some extent”

The information required was “to point out where various documents would be found and to describe the original position of the furniture”. There is no consideration of why this could not be done through simple explanation, drawings, or if really necessary, later on when the crime scene had been fully forensically examined and cleared

Paragraph 24

The judgement states that the prosecution witness, Carl Perkins, via his wife, tried to make false taxi bookings so that the victims would be alone in the office thus enabling the murders to take place. If this part of Perkin’s evidence was taken as true then he and

presumably his wife were involved at least as accessories to attempts to set up the murders. There is no acknowledgement of this or explanation as to why they were not charged.

Paragraph 26

The account of Perkins evidence about what John Roden said to him reflects, with remarkable accuracy in the main, the details in other statements and forensic reports. Perkins apparently claimed that John Roden had said “they wanted the murders to look like a lovers tiff rather than a robbery”. The Court does not comment on what kind of lovers tiff would result in two people shooting and hacking each other to death.

Paragraph 45

Blood transfer from office to the car is ruled out largely on the basis of the recollections of those present about whether Mr Attwooll would have got blood on him. The regular use of the car by the victims, which Mr Attwooll has always maintained was the more likely explanation for the blood traces in the car, is not mentioned.

Paragraph 46

Basically concedes the first ground of appeal (that the police may have lied in saying that Mr Attwooll was taken to the crime scene in a police car) although only discussing part of it i.e. Price meeting Attwooll leaving the office in his own car: -

“We therefore have doubts as to whether or not this point was indeed made clearly to the jury”

The significance of other evidence supporting this ground of appeal (Witnesses to Mr Attwooll’s use of the car, the “inherently implausible” route the CCRC said he would have to have taken to if he had picked up Price at any other time and the inconsistency and memory of DC Morgan) is not commented upon.

Paragraph 48

Appears to concede the second ground of appeal concerning Mr Rowland’s evidence of other suspects, although the wording is extremely vague and gives reference to the material having been available (in the case papers – not necessarily discovered by the defence), but not used at the trial.

Paragraph 49

This paragraph is worth stating in its entirety because it suggests acceptance of the grounds of appeal but then clearly establishes the process of using a holistic argument as the basis for rejecting a case - a case which has been refused the right to be presented holistically.

“It seems to us, therefore, that both of the matters raised by the Commission are matters which require us to look with care at the other evidence to determine the extent to which the safety of the conviction has been undermined. In doing so, we shall refer to the other grounds advanced by the appellants for which no leave to appeal has yet been given”.

Paragraphs 50 and 51

Discuss respectively the evidence of the two girls, described as evidence of “considerable significance” and evidence relating to the gun which was “critical to the prosecution case”. In both instances the judgement appears to concede defence arguments by re-stating them and makes no comment to dispute them. Similarly; -

Paragraph 53

This paragraph discusses problems about the evidence of the prison informant David Eaves. However the compelling argument put forward at the appeal (Personal Observation) that Eaves must have seen other witness statements (i.e. been ‘fed’ information) is not mentioned. In particular Eaves’ claim that Attwooll told him that he waved to the girls as he passed suggested that Eaves had seen the girls’ statements, as this claim was in one of the girls’ statements but denied in her court evidence. The judgement appears to accept that there are problems with Eaves’ evidence and also with the question of the time frame for the accused to commit the crime.

Paragraph 54

The step is then taken to say that none of these issues provide a substantial basis for allowing the appeal even when combined with the two referral grounds, this despite having described the gun issue as being “critical to the case”, the girls’ evidence as of “considerable significance” and the evidence of Eaves as requiring “great caution”. There is no explanation at all as to why this conclusion is drawn. Arguments in relation to John Roden it is claimed amounted to a re-run of matters around Perkin’s credibility which

were explored at trial. However the substantial new arguments that had been raised on behalf of John Roden go much further than this (see pages 216-218 above) and were not presented at trial. The court had listened in part to these arguments, but decided not to admit them as grounds of appeal. Consequently in the judgement there is no reference at all to these matters even though in 2004 a CCRC caseworker (albeit over-ruled by the CCRC Commissioners) had considered them worthy of referral in themselves. The only comment which perhaps relates to this evidence, suggests that the material had not been used at trial due to tactical decisions by the defence: -

“In so far as there are other criticisms, they were available to be made at the time if counsel had considered that they were of any significance” (Para 54)

There is however no evidence that the original counsel was aware of the information uncovered later by John Roden’s lawyers, and if they were their failure to use it would have been very hard to justify.

Paragraph 55

Returns to the first ground of appeal and states that it is not a matter of any great significance. The issue of credibility is sidelined in favour of discussing the likelihood of contamination occurring from entering the crime scene. The issue however is credibility and this is not discussed at all. The possibility of the police manipulating an investigation and lying in court is not considered to be a matter of significance. The second ground of appeal which in fact throws up the possibility of other suspects unknown to the jury is also dismissed, this evidence, it is maintained, would not “have made any difference to the jury’s verdict”. No explanation is given to justify this assumption except to say that there was substantial other evidence against the defendants. This comment is made despite the apparent, albeit vaguely worded, acknowledgements of serious problems with the other evidence and the previous implied acknowledgement that both grounds of appeal had some validity.

Paragraph 56

The Judgement falls back on the evidence of Price and Perkins saying “No credible explanation has been given as to why they should have lied”. Ironically, the judgement then gives a very credible reason why Price may have lied ”The evidence of Price placed the gun in the hands of Attwooll” – conveniently one might suggest for someone keeping

and converting illegal guns. Price's psychological problems are then assumed to be caused by the stress of giving evidence against Attwooll without consideration of other possible reasons. No reasons why Perkins may have lied are discussed for the simple reason that the Court refused to admit the evidence that Mr Birnbaum QC had deduced on the police treatment of Perkins and the other prison informer Woodland. The evidence may have been read or heard but if it is not "admitted" as grounds for appeal then, conveniently some might suggest, no explanation for rejection is required to be given. Finally Paragraph 56 expresses acceptance of D C Sutton's explanation that the police did not regard Perkin's as a witness they could use and therefore would not have tried to influence him. This dismissal of the comprehensive argument prepared by Mr Birnbaum is demonstrably untenable given that, of course, the police did use Perkins to great effect.

Conclusion

The Attwooll and Roden case took ten years at the CCRC to achieve a referral. This is not entirely down to the CCRC; there have been long delays, especially for Mr. Attwooll, in finding lawyers, obtaining legal aid for experts, commissioning experts and perhaps most of all, the problem for lawyers in finding the time to do work on such a complex case without the required funding. Furthermore this case is exceptionally complex, even by the generally highly complex nature of major murder inquiries, with many issues being raised by and on behalf of the applicants.

However there was nothing in the referral rationale that could not have been available from the outset of the review in 1997. It has to be said that a rigorous investigation, willing to be critical where justified of police and legal practice, should have led to a referral by at least 2001. Had this been done the defence could then have argued any grounds of appeal they felt relevant and would not have been limited to the grounds on which the CCRC referred as they now are under section 315 of the Criminal Justice Act 2003. The limited grounds of appeal in the CCRC reference, it could be argued, reflect a continuing tendency to be over cautious, potentially to the detriment of innocent applicants. However the approach of the Court of Appeal one might equally argue is

epitomised by Section 315 and any attempt by the CCRC to show less deference to this by including all reasonable grounds of referral, might have been treated with equal disregard.

The Court dismissed the appeal on the basis of a holistic argument while refusing to hear a holistic argument from the defence. They maintained that the evidence of Price and Perkins had not been undermined. The judgement appears to accept some validity in the grounds of appeal and some of the other concerns about the gun audit trial and the evidence of David Eaves but is remarkable in its vagueness, largely failing to comment on the significance of these issues. The over-riding claim, that the evidence of Price was not undermined, conveniently ignores the gun audit trial and other matters that were not specifically grounds of appeal. Moreover the crucial point behind the grounds of appeal, that evidence of a flawed investigation and poor defence, should inevitably throw doubt on the potential reliability of all witnesses is conveniently ignored or side stepped. Furthermore denying the jury evidence of alternative suspects as evidenced in the second ground of appeal, is not seen as significant. As for the claim that nothing undermined the evidence of Perkins; the evidence of police impropriety which the defence believed fundamentally undermined the evidence of Perkins, is not discussed in the judgement for the simple reason that the judges refused to admit that evidence into the appeal grounds.

The Court of Appeal judgement sends back to the CCRC the message that the Court is not interested in properly reviewing such cases and is as reluctant as ever to take a serious stand against flawed investigations and poor legal defence. The CCRC remain between a rock and a very hard place – should they challenge the Court of Appeal or play by the Court's 'rules' – which course of action is more likely to bring justice for their applicants? The legal system functions on such tactical conjecture. The problem ultimately lies at the top with the Court of Appeal; it is their message that makes overturning many miscarriages of justice almost impossible and may condemn innocent people to a life of incarceration.

CHAPTER 11

VIEWS AND REFLECTIONS ON THE APPEAL SYSTEM

This chapter reflects on some aspects of the appeal judgements in the cases focused upon in this study and on the views of various participants, firstly on the Court of Appeal and secondly on the Criminal Cases Review Commission (CCRC).

Views on the Court of Appeal

Intellectual Dishonesty?

Chapter 9 gave a somewhat critical account of the Court of Appeal and the CCRC. In terms of the cases focused on in this study a number of issues relating to appeals have been discussed above: The concluding section of the Jonathan Jones case study (pages 113-115) illustrated how the Appeal Court was reluctant to make strong statements about the running of evidentially weak cases and preferred to be very cautious about new evidence, framing the decision to allow the appeal in legal terminology rather than ethical argument. As with Jonathan Jones, the Court of Appeal in the Newsagent Three case (Mike O'Brien and others) allowed the appeal but declined to make any clear criticism of police or lawyers involved, preferring to place the blame primarily on the personality disorder of one of the victims of the injustice (see p. 120).

In Nettie Hewins' case the Court unusually quashed the conviction on the basis "that in reality there was no sufficient evidence to prove the case against her" (R v Clarke and Hewins EWCA Crim 386 15 Feb 1999 Para 16) although the wording of the judgement stresses that Nettie had incurred suspicion by lying to the police (Para 12). In Nettie's account it was not a case of lying but a case of recalling details of events two weeks later, which led her to confuse different events and recall visiting a different petrol station to the actual one visited on the night of the fire. Such anomalies enabled the Court of Appeal to retain some cloud of suspicion, rather than issue what Nettie stated in interview she

desired more than anything - an apology for an unfounded prosecution. Nettie however was fortunate by comparison to Nick Tucker who recalled how the judges at his unsuccessful appeal (Unreported – 9 Dec 1998) concluded that the jury were entitled to infer that he had killed his wife, despite the lack of direct evidence (Nick Tucker). This type of assertion illustrates the application of ‘magical legalism’ – the fact that the jury has made the decision justifies the conviction regardless of the lack of evidence.

In Sally Clark’s case the misleading statistics that the first Court of Appeal disregarded as not likely to influence the jury and their certainty of guilt based on co-incidence (see pages 63-4 and 162-163), showed how the Court of Appeal could be misled by accepting what seemed to be ‘common sense’ in terms of co-incidences while simultaneously denying what seemed to be ‘common sense’ in terms of the influence of false statistics; only in the long run to be shown to be wrong on both counts.

“I was always struck by the easy ride the Court of Appeal had when Sally Clark’s conviction was overturned because it seemed to me there was more than enough information before the first Court of Appeal to allow it and that was a classic example of the Court of Appeal I think being dishonest. Taking the view that it was more important that confidence in the system be maintained by sustaining the unsustainable” (S6)

This feeling that the Court of Appeal could sometimes be “intellectually dishonest” was a common complaint from those maintaining wrongful conviction and was on a number of occasions stated or implied by lawyers and other professionals. Most comments from professionals were guarded and deferential; Senior Appeal Court Judges are after all mostly Knights of the Realm and members of the House of Lords, but some professionals were prepared to be more forthright in supporting the notion of intellectual dishonesty: -

“There are members of the senior judiciary who don’t think that there have been any miscarriages of justice, a lot of them have actually got their hands dirty in the past... The senior judge in a case I did a few years ago brilliantly turned logic upside-down in the most articulate way possible and came out with the wrong decision. I mean it was common sense that he’d got it wrong, everyone in court, including prosecution counsel, we were all open mouthed at the decision.....complete rubbish, when you know the case ...this person was not guilty and yet the law seems to be incapable of taking a common sense decision on this” (S1)

“You know the number of times I’ve seen that done, where you’ve won all the arguments that you thought you were going to have to establish and still lost. I mean I do bear the scars” (S4)

“There is anecdotal evidence of people coming back from the Court of Appeal and saying, ‘those bastards they’ve been intellectually dishonest again. There was a good legal point’ and you get some judges who will justify not allowing the appeal” (B1)

The judgement in the Attwooll and Roden case, discussed at the end of the previous chapter, some might argue, reflects these thoughts but provides little in the way of ‘brilliant’ inversions of logic; preferring in the main to simply evade difficult issues either by making assumptions about the jury’s view or by utilising legalistic devices such as section 315 of the Criminal Justice Act (see page 210) or the notion that the ‘new evidence’ was theoretically available at the time of the trial.

The potential of the Court to refuse to hear evidence is long standing, as indicated for example at the first appeal of Sheila Bowler in 1995 (see page 183) and in the Attwooll Roden case in 2008.

Additional Views of ‘Focused Case’ Participants on the Court of Appeal

The notion of intellectual dishonesty was one that most of these participants recognised and moreover the appeal process could render the defendant more powerless than ever – defendants are not enabled to take the stand and give their own testimony at appeals. The only sense where they felt more empowered was that, in most cases, by the time an appeal was achieved they knew the system better and had sought out new lawyers and communicated somewhat more effectively than at the time of the trial.

The view that the Court of Appeal compartmentalises grounds of appeal while generalising its decisions to refuse appeals was common among participants. The 2003 legislation, exacerbates the matter, but the situation already existed, as described by Ian Thomas, a veteran of three appeals which included grounds based on failure to hear important witnesses, non-disclosure of alternative scenario evidence and new expert evidence (see Appendix 3) : -

“The Appeal Court rather than trying to tie all the strands together were trying to compartmentalise things and say OK let’s have a look at that, then deal with that one on its own, then deal with another point, rather than take the view that all these individual points, their sum total, what does it mean, what does it indicate?

So I think they were trying to put this in a little box and see how it stands on its own, which again in my opinion was the wrong way to deal with it”

(Ian Thomas)

The over-riding feeling among those who maintained wrongful conviction, including to a large extent those that had been cleared, and among their supporters, was that the Court of Appeal was able to manipulate its decisions by choosing which evidence or witnesses to give credence to and which to ignore or downplay – the continuation of case construction. The power to do this, it was suggested, is invested in the power of words and more generally in the status and unchallengeable power of the Court of Appeal. (Technically challenges can be made to the House of Lords or the European Court but the rules are very restrictive): -

“But they can just do that can’t they?...when they’ve decided they’re going to make you lose your appeal.....they had to be so careful with the wording, they had to say ‘It was unfortunate that the forensic document was re-written.....it was unfortunate that various things had happened, Kerr was a credible witness when he had lied...it was so obvious.....they’ve got that power - you could have the best evidence going and they could still say ‘dismissed’”

(Sue May – emphasis as spoken)

“Prosecution, police and judges get together and ask how can we keep this conviction safe, we can’t let him go, and that goes on behind closed doors.....They do it by changing the goal posts on this or that point, or he’s telling the truth and he isn’t – they’re so bloody clever..... You can watch a film and some of them tell you what goes on behind closed doors but still people don’t believe that this stuff goes on – it’s easy to stick a glove in there and get a conviction – but ordinary Joe public thinks ‘No get out with your rubbish’”. (AN)

Additional Professional Views on the Court of Appeal

Police officers interviewed for this study did not generally have expansive views about the appeal system, tending in the main to see it as a reasonable safeguard but also at times as a threat to finality with the appeal system seemingly going on over and over again in certain cases creating stress to victims and their relatives.

One former officer (P1) felt the Court of Appeal should be “less restrained” in reviewing cases and there were some criticisms of the Courts failure to deal with genuine injustices:

"I suppose the Court of Appeal is quite a good system....but it does take a very long time to overturn some of these miscarriages of justice.....Where there are clear miscarriages they don't seem to be that effective.....They're all judges aren't they and their mates convicted them." (P5)

Apart from providing an additional reason to make sure the case presented at trial could resist any appeal attempts, appeals were not particularly considered the realm of the police: -

"I've not got a lot of experience of it really so I blindly trust the system works"
(P2)

Legal views ranged widely on the Court of Appeal although statements of complete faith were absent and positive comments tended to be qualified even from fellow judges: -

"It's getting better, if you'd asked me that question 10 years ago I'd have said terribly inadequate...I think they're more open to receiving fresh evidence than they were...they are much more open to investigating different scientific evidence and different psychiatric evidence"

(Judge 1)

"On the whole the appeals system is very good at correcting the kind of miscarriage of justice where a judge plainly gets something wrong or goes over the top....but in terms of where somebody has been convicted on lying evidence I don't feel the Appeal Court is terribly adequate at that. There are so many cases where it's taken years to come up with new evidence."

(Judge 2)

Comments such as the three quotations above are perhaps indicative of an unwillingness to embrace the importance of uncertainty and of complacency about the adequacy of the Court of Appeal.

Notions that the Appeal Courts are changing in nature were of course anecdotal and not all agreed that the changes were positive; -

"I'm afraid I feel that the Court of Appeal are far less likely to overturn cases these days than they ever were....probably since the advent of PACE which did stop a lot of obvious miscarriages of justice.....Lurking doubt is not considered to be enough and that's a problem when one has a gut feeling that there is something fundamentally wrong with a particular conviction by a jury because juries can be influenced by a variety of factors." (S2)

Available figures (see charts below) seem to suggest that this latter view may be the more accurate one with fewer appeals being allowed from Crown Court cases, less chance of a

successful appeal and a greater chance of a re-trial being ordered when an appeal is allowed than in the mid 1990s. There have been no dramatic changes over the last decade but a general trend towards a more restrictive approach, albeit with the lowest level of success being around the turn of the century. The nature of cases is not broken down in the figures and it may be that comments reflect changes in approach to certain types of case, perhaps high profile or serious cases. The Pendleton case in 2001 which re-asserted that the Appeal Court should not substitute its own opinion over that of the jury (see page 192), has been cited as one of the main reasons for the increase in re-trials (Jenkins and Woffinden 2008: 299). While this certainly seems to be true in high profile cases at least (Michael Stone, David Morris, Sion Jenkins and Barry George for example), it seems from Chart 3 below that the trend had begun before the Pendleton judgement and declined somewhat from its peak in the years following the Pendleton judgement. The decline in the number of appeals heard, despite rises in numbers of convictions, also suggests that the granting of leave to appeal has become more restrictive. The following table and charts are adapted from table 1.7 of The Judicial and Court Statistics 2006 (Ministry of Justice 2007)

Table 5: Outcome of Appeals at Court of Appeal (Criminal Division) 1995-2006

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Dismissed	521	469	367	403	380	333	313	319	364	384	386	391
Allowed	253	250	236	290	171	150	135	166	178	240	228	181
Re-trial ordered	52	53	33	73	70	72	58	50	45	66	77	58
Total	826	772	636	766	621	555	506	535	587	690	691	630

Chart 2: Percentage Proportion of Successful Appeals in Court of Appeal Criminal Division 1995-2006

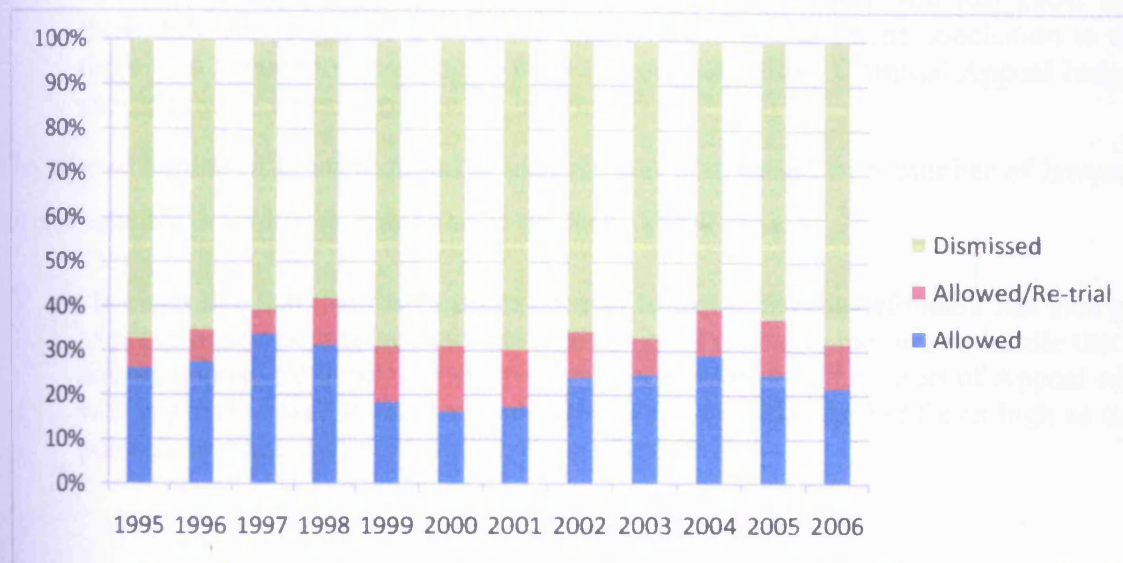
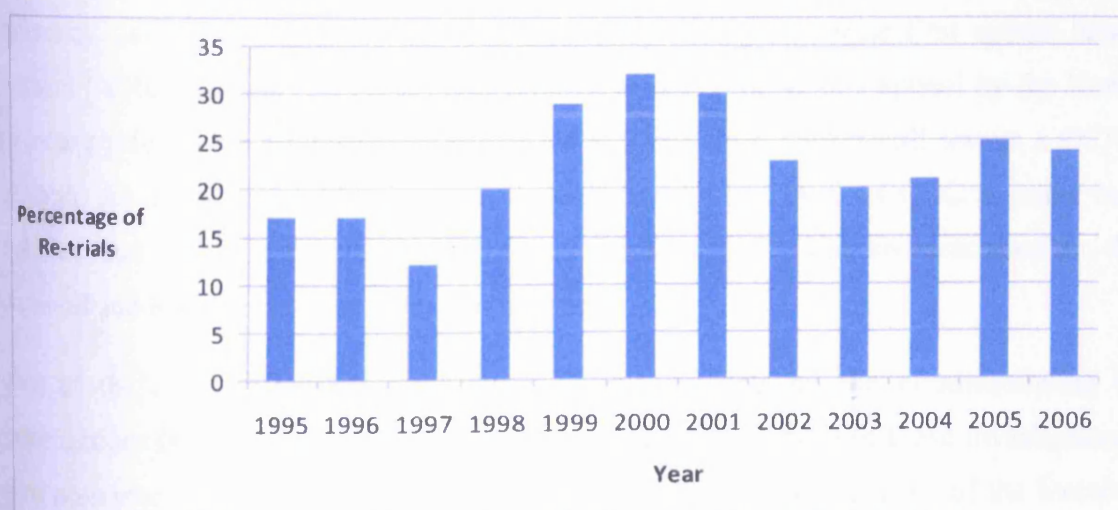


Chart 3: Percentage of quashed Convictions where a re-trial was ordered

(i.e. Re-trials separated from above chart)



Although it seems the Court of Appeal has remained typically conservative in the number of appeals allowed, the inconsistency of the Court of Appeal on individual cases was a common theme and this often seemed to come down to the attitude of different judges: -

“The thing that springs to mind is the inconsistency, where you just know that three different judges on a different day will reach a different conclusion to the three who happen to be sitting in front of you....any three Criminal Appeal Judges should reach the same conclusion but they don't” (S3)

The reverse burden of proof required at appeals was also raised by a number of lawyers.

As one solicitor described it in relation to the Sally Clark case: -

“In cases like that, for the Court of Appeal to insist that the defendant has then got to prove her innocence beyond reasonable doubt seems to me to be a hurdle that is almost impossible to jump, and there are many judges in the Court of Appeal who will say that is exactly what we are there for – to make the hurdle as high as it is possible to make it. I think that goes too far.” (S5)

Views on the CCRC

“Focused Case” Participants’ Views on the CCRC

Seven of the eleven featured cases in this study have had appeals resulting from CCRC referrals. Jonathan Jones and Nettie Hewins were cleared on their first appeal hence without CCRC involvement, Sheila Bowler was referred for second appeal by the Home Secretary prior to the establishment of the CCRC and Nick Tucker still awaits a CCRC referral. An almost universal complaint was the time taken by the CCRC to come to a decision and many other comments reflect the kinds of problems described in the Attwooll and Roden case in the previous chapter.

Two of the cases referred by the CCRC were assisted by the commissioning of investigations into the case by outside police forces although both of these investigations were prompted at least in part by TV programmes. In fact given that all of the featured cases have, at various stages, been featured on TV programmes, it is likely that this and other media enquiries are important features in prompting further lines of enquiry by the

CCRC. The prevailing view, among both those convicted and professionals, was that much of the work had to be done prior to CCRC involvement to build a case that would convince the CCRC that there were reasons for them to look into it. This view was backed by practice, with lawyers having to find ways (and funding) to commission expert reports and other new evidence before or in parallel with CCRC work. The numerous new evidence and expert reports prepared for Sue May and Nick Tucker, and key new evidence supporting Sally Clark and Sion Jenkins for example, derive primarily from individual and legal initiatives which the CCRC has then been urged to consider. This point is similarly demonstrated by the growth, and user demand, for Innocence Projects in UK Universities whose prime function is to seek out new evidence to get cases back to the CCRC. Many of those maintaining wrongful conviction saw the advent of the CCRC as a body who would investigate their cases to find what had gone wrong. In fact much of the ground work has to be done before the CCRC will accept the case and even then there may be resistance.

Both AN and Sue May spoke positively of some of the work done by the CCRC as to some extent did Ian Thomas and Mike O'Brien. Sion Jenkins in his book pays tribute to the work of a CCRC case worker, the late Dawn Butler (Jenkins and Woffinden 2008: 251). Sue May was similarly grateful for the commitment of Dawn Butler, who among other things prepared a full dossier on police malpractice in relation to the Senior Investigating Officer in the case. However since the Court of Appeal rejected Sue's appeal in 2001 a number of new reports such as that of Professor Jamieson (see pages 144-146) have not led to a second referral. Sue May expressed the view that the CCRC were fearful of making a second referral following the Court of Appeal's rejection of the first. They were, in her view, frightened of the judges "who keep putting the bar up" and therefore the CCRC resist a referral unless they have "a perfect peg to hang it on".

Perhaps the most remarkable example of CCRC resistance to referral is the case of Nick Tucker. Like Sally Clark and Sheila Bowler, Nick Tucker's position is that he has been convicted of a crime that never happened – that his wife died in a car accident (see Case Summary Appendix 3). The Court of Appeal in 1998 (Unreported) conceded that "there was and is no direct evidence that the appellant murdered his wife" (quoted in Nick Tucker campaign documents) but that the jury were entitled to infer guilt from the circumstances; once again clouding fundamental evidential weakness with generalised

statements. In the face of this decision the CCRC issued a Statement of Reasons in 2003 (SOR) refusing to refer the case back to appeal despite an extraordinary catalogue of new evidence. This evidence included two accident investigation reports (including a full reconstruction funded by 'Just Television's' Trial and Error Programme in November 2000), two neurology reports explaining how concussion might have affected Nick's original recollections and reactions, four reports by forensic experts critical of the way evidence was handled or interpreted and a further pathology report to add to the four already commissioned at the time of the trial. A further independent opinion given to Just Television by Dr Richard Shepherd gave a total of six pathology reports all of which agreed that there was no evidence of murder. Since the CCRC's SOR in 2003 further reports have supported Nick's position including a report on the effects of Post Traumatic Stress disorder from psychiatrist Professor Trimble and further work by the pathologist Professor Pounder who stated in a report of Dec 2003: -

"The case is clearly quite extraordinary from the point of view of pathology since there is essentially an absence of pathological evidence to support the allegation of homicide....It is difficult to understand how such a prejudicial and unsupportable allegation came to be presented to the jury."

(Pounder 2003)

It seems equally extraordinary how the CCRC still appear to remain reluctant to refer the case in the face of all the new evidence, although they have been re-considering the case since the threat of judicial review following the 2003 SOR. Nick Tucker has himself provided a number of extensive and cogently argued documents on the unfairness and irrationality of this intransigent position. His criticisms include the failure to understand or analyse material correctly, the failure to distinguish between raising a subject at trial and providing later detailed analysis, tunnel vision in looking at new evidence and "a contemptuous disregard for the fresh evidence and argument that meets the criteria for reference" (Nick Tucker). One example of the irrationality of the CCRC's reasoning is in Nick's view illustrated by their dismissal of the crash reconstruction reports by the Cranfield Impact Centre (CIC) and the Transport Research Laboratory (TRL), the UK's two foremost organisations on impact reconstruction. The CCRC concluded that: -

"The range of factors applicable to the incident in the Commission's view makes any reconstruction uncertain."

(SOR 2003 Para 10.105)

Nick's response echoes similar bewildered sentiments expressed by participants in relation to legal and bureaucratic reasoning: -

"If in the minds of the Commission, TRL and CIC cannot predict the results using all the technology and facilities at their disposal, how can the less than comprehensive evidence provided by a policeman with a tape measure, who omitted to obtain certain crucial measurements, and opinions based only on post crash visual inspection with no one witnessing the actual crash impact, be considered more credible or reliable?

Nick Tucker (Response and Analysis of CCRC Statement of Reasons Para 31)

The compartmentalising of arguments, as discussed above in relation to the Court of Appeal, is a technique also utilised by the CCRC: -

"So they push that aside because they argue that, that on its own wouldn't alter the case, but you've got to look at everything as a whole and just look at the complete and utter horlicks in every subject area." (Nick Tucker Interview)

Professional Perspectives on the CCRC

Police comments on the CCRC were limited and much like those expressed on the Court of Appeal tended to see the system as satisfactory even, some felt, perhaps over indulgent. It was, most felt, an issue outside of police work except in the sense that it increased the need for convictions to be "sustainable" (P7) in the first place. Two former officers did however express reservations about the ability of the CCRC to overturn cases of genuine injustice and about their level of investigative penetration: P7 described the difficulty of finding new evidence when faced with imprisonment, lack of access to legal and expert witness help and often evidence based on the false testimony of others which has been accepted by a jury. Furthermore he affirmed the problem of the CCRC not being willing to look at a case where, even without new evidence, there seemed to be reasonable doubt:

"You've got to give them (the CCRC) the evidence, to me that is unreasonable and basically unachievable" (P7)

P1 referred to the Sue May case to illustrate the CCRC's lack of critical investigation in some cases: -

"The CCRC find forensic science documents not printed until years after the event – you would have expected an investigation for forgery. The same with the two sets of contemporaneous notes of DS Rimmer – one has to be a forgery. So you

would have expected the CCRC to have referred that for investigation, but no.....its lack of dynamism, it's almost as if 'we'll find an explanation for all these things' – the incurious investigation" (P1)

Most lawyers interviewed in this study felt that the CCRC provided an important avenue of re-course and acknowledged pockets of outstanding work. The main criticisms lay in relation to inconsistency and the very high level of evidence required to refer a case. This view was summarised by one very experienced appeal solicitor: -

"As far as the CCRC are concerned, ironically at a time when they're under more and more pressure of resources, I think there's been quite a significant improvement in the way they work. But I think the basic problems remain; I think they're conservative in cases they don't refer, particularly so, ironically...fresh evidence cases....where there's undue concern about cases where.... it could conceivably be argued that it doesn't comply with the requirement that it should be fresh, a reasonable argument for it not being given at trial." (S4)

Reflected in this statement is the CCRC's subservience to the Court of Appeal and this seemed to be a problem that lawyers found impossible to overcome. Changing the CCRC test for referral to relax the need for new evidence or legal argument, as discussed above (pages 190-192), was not generally strongly supported, primarily for two reasons: Firstly because it would create a different test to that of the Court of Appeal which might make the Court of Appeal react even more negatively: -

"I think if their test was unaffected that's what they would apply and they wouldn't worry that somebody else was booting cases up to them. I think that would seriously undermine the reputation of the CCRC if they were applying a test which was not applied by the Court of Appeal, it's almost random" (S4)

Secondly because of practicality and preservation of the jury system: -

"It the old question isn't it, how do you know the jury got it wrong? The Court of Appeal can overturn a conviction on the basis that no sensible jury, properly directed could have convicted – never seen it done but that power exists. I don't think the problem's in the legislation I think it's in the culture" (S4)

It is probably true that the problem lies in the culture and perhaps part of this culture reflects something of a legalistic tunnel vision. The question 'how do we know the jury got it wrong' is a very fair question but one which was rarely balanced with the perhaps equally valid question of 'how do we know the jury got it right?' One solicitor preferred

to express a view based on an urgent need to address injustice over and above legal traditions and cultures: -

“The CCRC test is far too narrow and it actually impedes the CCRC, they’ve got too high a hill to climb which is why there is only a 3-4 % referral rate. I actually think their test is higher than that of the Court of Appeal.....It requires a fundamental shift in the mentality, at the moment the jury is sacrosanct. Appeal judges work out this artificial sort of logic – The jury had the opportunity to consider this and hear all the evidence and therefore we’re not going to interfere with that, however bizarre and stupid it was. And they don’t take into account that the jury automatically start off on the basis of 60-40 (in favour of guilt) in my opinion, it might be higher than that.....the defence counsel had the chance to bring this and that to the attention of the jury and why didn’t they do so?.....It’s all incredibly artificial, the whole process is artificial and can therefore be desperately, desperately unfair.....Let’s open the floodgates, fine, absolutely, who cares....let’s see people out of prison who shouldn’t be there. ” (S1)

Clearly there is a strong argument that without changing the Court of Appeal, changing the CCRC will have little effect, and few accepted the idea that opening the flood gates by changing the CCRC test would force the Court of Appeal to change, in fact some felt it would react even more conservatively. In the next chapters some of the cultural barriers and social trends that might affect the likelihood of miscarriages of justice occurring and their chances of being rectified will be considered.

SUMMARY CONCLUSIONS OF PART 4

Part 4 has outlined the traditional approach of the Court of Appeal, its conservatism and fundamental priority of preserving the traditions of the legal system. As such it can be argued that the Court exists not purely to correct injustice but to uphold the belief in the trial and jury systems and, as Nobles and Schiff (2000) have demonstrated, uphold workability and finality. Numerous examples have been given of high profile cases where the Court has upheld convictions at appeal only to have to concede at second or third appeals. This, it is suggested, is indicative of the Court's reluctance to concede that injustices have occurred. Although opinions of participants in the study differed about the nature of the current approach of the Court, there is no evidence that the Court's overall attitude is changing in any fundamental way. If anything the figures suggest that it is becoming even less open to quashing convictions and more inclined to order re-trials when it does (see pages 235-236).

While a few participants in the study felt that the appeal system was adequate, there was no strong endorsement of its performance and criticisms ranged from intellectual dishonesty to inconsistency and conservatism. At the same time there were few expressions, from professionals at least, of a desire for fundamental change, more often a wish for the Courts to be more open towards new arguments and new evidence within the existing structure. In line with the historical account, the impression emerged that the Court of Appeal was a power that had to be lived with and worked with rather than a functional body that could be designed and adjusted towards the aims of justice that others might desire. There was an underlying impression, usually indirectly expressed, that to try and change the Court of Appeal might simply cause an adverse reaction that would have the opposite of the intended effect – the Court is a power that has to be carefully handled.

These issues relating to the Court of Appeal have dominated the functioning of the CCRC and have had a profound effect on the evolution of an organisation that many saw as the solution to past problems. The remit of the CCRC is much more closely tied to the rules and traditions of the Court of Appeal than to ensuring the correction of injustice in the way that the RCCJ seemed to be seeking to achieve when they recommended establishing such a body in 1993. There was acknowledgement from participants that the CCRC had

done some excellent work in some cases and some participants had good reason to be grateful for this. However those who had close contact with the CCRC often felt that the work was inconsistent and over subservient to the Appeal Court.

There was evidence from some participants and from case analysis that the CCRC had adopted some of the 'less desirable' features of the Court of Appeal – unfair compartmentalisation of issues, inconsistency, value judgements and a bureaucratic approach that prioritised the system's image and workability over questions of justice and innocence. There were criticisms that the CCRC failed to use its considerable investigative powers to full effect and that in some cases its reasoning was unfounded, unsupported or illogical; seemingly trying to find a way to avoid confronting the Court of Appeal with a second appeal, as for example, in the cases of Sue May and Nick Tucker. The Mike Attwooll and John Roden case study illustrates the struggle of the CCRC to deal with a case where there are clearly major areas of doubt but (arguably) no overriding point of dramatic 'legal' significance. There was it seems, over ten years of CCRC involvement, a moral struggle taking place within a bureaucratic structure that epitomised the position of the CCRC – the struggle between justice and remit. The end result of this struggle was sadly a half hearted referral to which the Court of Appeal responded with a careless, casual and barely reasoned judgement (see pages 223-228).

It was also apparent to a number of participants that to achieve a CCRC investigation required that the main body of the case be prepared and formulated before the application was even made – the CCRC would thus rarely serve the purpose of helping those who were lost in the system with no legal, media or campaign support (hence the emergence of such projects as the Innocence Network in UK Universities to assist with establishing and preparing cases for the CCRC).

The Court of Appeal and the CCRC are the only routes to overturning injustice in Crown Court cases; applicants to these bodies frequently find themselves trapped and disillusioned when faced with the restrictive remits of these bodies and, more significantly still, the attitude that the protection of the system, rather than the unjustly treated individual, is the first priority. To restate and paraphrase the position stated at the beginning of Part 4 (page 171); post-conviction procedures deny uncertainty, or even powerful evidence of innocence, through the application of 'magical legalism'.

PART 5

Could it Happen Now: Political and Cultural Contexts and Current Risks

"In the War on Terror it had been decided to relax our taboo on torture.....The British government was even to argue in court for the right to use torture material as evidence. The government won this right in the Court of Appeal in November 2004 but lost to a unanimous judgement of seven Law Lords on 8 December 2005"

*Craig Murray (former Ambassador to Uzbekistan) "Murder in Samarkand" 2006:
138*

CHAPTER 12

THE POLITICAL CONTEXT: FROM PRINCIPLES TO “EFFICIENCY”

Part 5 attempts to put the propensity for wrongful convictions and their rectification into the context of the current political, social and cultural climate in the UK and thus consider whether the problem of wrongful conviction may be largely a thing of the past or whether it remains a serious risk in the same or in different ways.

This chapter gives a brief recent historical outline of relevant developments and trends in the criminal justice field and leads into some reflections on the current political atmosphere in relation to crime and justice. Chapter 13 then uses data from interviews and current events to develop this further in terms of its impact on attitudes towards miscarriages of justice. Chapter 14 provides a case study of the case of Sion Jenkins leading into questions of about ‘rationality’. Chapter 15 then looks further at this ‘rationalisation’ process, touching on some ideas about the social psychology that might be at work in dealing with the issue of wrongful conviction.

Sells (1994: 28) suggests that the prime concern for lawyers is not justice but the “more acceptable and achievable substitute” of social order. This may be unfair to some lawyers but is perhaps more accurately applied to governments. In terms of numbers, miscarriages of justice affect relatively few people and certainly do not figure as crucial election issues. This is not to underestimate the overall harm and extent of suffering created by a phenomenon that is probably much more common than most people think (Naughton 2003 and 2007).

Only when public opinion has been stirred by high profile events has the issue become politically active and driven, initially at least, by a desire to re-assert principles of justice (Nobles and Schiff 2000, Naughton 2007). Thus the Confait case in 1975 led eventually to the safeguards established by the Police and Criminal Evidence Act (PACE) 1984 (see

Chapter 2). Similarly the release of the Guildford 4 (1989) and the Birmingham 6 (1991) led directly to the establishment of the Royal Commission on Criminal Justice (RCCJ) under Lord Runciman. This “narrative of crisis” (Nobles and Schiff 2000) was further fuelled by more high profile quashed convictions, the ‘Tottenham 3’ and the ‘Maguire 7’ in 1991, Stephen Kisko, Judith Ward, the ‘Cardiff 3’ and the Darvell brothers in 1992. However by 1993 this “momentum of crisis” in the media (Nobles and Schiff 2000) was already in decline and soon to be lost. While the Court of Appeal might arguably be seen to take different approaches depending on the different political atmosphere or the prevailing approach of current Lord Chief Justices, the flow of miscarriages of justice continues much as it did during the “momentum of crisis” period in the early 1990s, including the quashing of, on average, around twenty murder convictions a year in the UK in recent times (see Table 2 page 16). The difference is that publicity is, in most cases, minimal and the degree of political will or public pressure to address the problem may have changed.

The Royal Commission on Criminal Justice

Following the high profile cases of the Guildford Four and Birmingham Six the establishment of a Royal Commission on Criminal Justice (RCCJ) under Lord Runciman was viewed by many as an opportunity for fundamental change and a re-emphasis of values that safeguarded suspects and enhanced the presumption of innocence (see for example Kennedy 1991; Mansfield and Wardle 1993). However the terms of reference reflected an already changing political landscape, one which was to become symbolised by the ‘tough on crime’ approach of a new Conservative Home Secretary, Michael Howard, and built upon since by each Home Secretary that has followed. The RCCJ was not to be specifically about what had prompted its creation (i.e. miscarriages of justice) but would be aimed at securing “the conviction of the guilty” as well as “the acquittal of the innocent” while having regard for the “efficient use of resources” (RCCJ 1993: iii ‘Terms of Reference’). Political and pragmatic considerations were threatening to override the principle that innocent people should be protected from wrongful conviction: -

“All the penal lessons that had been painfully learnt in the early 80s were lost in a scramble for a law and order rhetoric with popular appeal. Inconvenient evidence was simply ignored”
(Field and Thomas 1994: 7)

The RCCJ made 352 recommendations but many commentators noted that fundamental issues such as the need for corroboration of confession evidence, greater supervision of police investigations and independent forensic science services were not forthcoming, while recommendations endorsing plea bargaining and increased police powers of questioning, searching and taking intimate samples were. These concerns were reflected widely in academic circles and there was particular concern that the RCCJ had failed to take adequate notice of the numerous research studies available, many of them commissioned specifically for the RCCJ.: -

“A number of researchers who had worked for the Commission were critical of their treatment by the Commission and the lack of weight accorded to their findings”

(Field and Thomas 1994: 5)

“It is a document that is slipshod in its use of empirical evidence, slippery in its argumentation and shameful in its underlying political purpose”

(Bridges 1994: 20 - referring to the RCCJ Report)

Furthermore there was criticism of a failing by the Commission to adequately analyse and address the mechanisms of investigation (including case construction), the aims, attitudes and pressures on investigators, the issues of police and legal cultures, and generally the social and organisational contexts that had led to wrongful convictions (Maguire and Norris 1994: 73-75). Field and Thomas (1994: 8-12) make similar criticisms and suggest that the Report failed to exhibit any clear objective and principles or understanding of social forces.

Essentially it might be argued that the RCCJ was not only deflected by political pressures but also reflected a very traditional caution and deference to the established order. As such most of the media received it with, an equally traditional, cautious and qualified welcome (Field and Thomas 1994: 5): -

“‘The Times’ was impressed by its coherence and pragmatism, supporting its general endorsement of the adversarial system and avoidance of ‘reckless reform’”

(Field and Thomas 1994: 5)

One recommendation that was widely welcomed was the establishment of an independent body to review possible miscarriages of justice, the CCRC. This however, once

established, has been burdened with a much more cautious and restrictive remit than the RCCJ proposed (see pages 188-195).

The Growth of “Managerial Justice”.

The RCCJ had therefore, in the view of some commentators, been a lost opportunity to rebuild the criminal justice system towards a more principled, human rights based, model. Conversely, despite the passing of the Human Rights Act 1998, government policy has since veered dramatically away from the presumption of innocence towards an approach that has been described as “popular punitiveness” (Bottoms 1995); an approach which in this context increasingly approaches a presumption of guilt.

In the face of media attention towards high levels of crime, the idea that the legal system should be taking more care not to wrongly convict, rather than be ‘tough on crime’, has increasingly become unfashionable if not unutterable in terms of political rhetoric. In fact governments have gone beyond ignoring the issue to actively undermining safeguards such as the right to silence (Criminal Justice and Public Order Act 1994), the principle of full disclosure (Criminal Investigation and Procedure Act 1996), and a whole range of safeguards in the Criminal Justice Act 2003 (greater admissibility of previous convictions and hearsay evidence, further disclosure of defence case, abolition of double jeopardy rule). Similarly concerns have been expressed about the low level of conviction in rape cases (see for example Kelly, Lovett and Regan 2005; Travis 2005; Holden 2008). This concern is phrased in terms of a desire to increase the conviction rate with little acknowledgement that the problem may lie with the evidential uncertainty of most rape cases (one word against another). The government and its advisors are seemingly willing to compromise the presumption of innocence to achieve more convictions: -

“The most important recommendation of this study is that a shift occurs in the criminal justice system from a focus on the discredibility of complainants to enhanced evidence gathering and case building”

(Kelly, Lovett and Regan: Home Office Research Study No 293, 2005)

“Every (police) force has the responsibility to ensure that every single officer who comes into contact with a rape victim is supportive and believes the victim”

(Home Office Minister Vernon Coaker quoted in Holden 2008)

While the motivation to protect rape victims may be laudable the consequence for the principle of innocence until proven guilty is demonstrably abandoned in favour of encouraging case construction and the assumption of guilt.

Choo (2006: 421) notes a somewhat ‘prosecutorial’ selectivity by government towards recommendations by bodies such as the Royal Commission, the Law Society and the Auld Report. The Royal Commission’s decision not to recommend a corroboration requirement for confession evidence was heeded while their wish to retain the unqualified right to silence was not. Law Commission recommendations about greater use of hearsay evidence and abolition of double jeopardy were heeded while the retention of the similar fact rule was not. The Auld Report’s desire for freer admissibility of defendants’ bad character has been accepted while their idea of more coherent information to juries does not seem to have been widely adopted. In summary: -

“A cynic might note, however that recommendations made by such bodies have been accepted and implemented by the legislature only where they had the potential to assist the prosecution by shoring up its armoury”

(Choo 2006: 421)

As government legislation on ‘law and order’ has proliferated it might be argued that the presumption of innocence has been eroded in favour of a managerial and targeted approach aimed at more convictions. A few examples from both government and the agencies of law and order illustrate this rhetoric and approach: -

“The process will be geared towards getting the truth, convicting the offender as early as we can and minimising opportunities for anyone to impede efforts to achieve that”

(Home Office 2002:13)

This statement from the White Paper preceding the Criminal Justice Act 2003 appears to be hinting that the defence of a suspect is an impediment and that the truth necessarily equates with guilt. Conviction rates rather than the quality of justice have become the overt priority. The National Centre for Policing Excellence thus aims to increase “Professionalism in Policing” through: -

“..enhancement of the capabilities of those involved in tackling crime, in order to reduce crime and *increase conviction rates*” (Emphasis added)
(www.centrex.police.uk/courses/ncpe 2005)

While the Crown Prosecution Service's first Public Service Target in 2004 was: -

“To improve the delivery of justice by increasing the number of crimes for which an offender is brought to justice to 1.2 million by 2005-6, with an improvement in all CJS areas, a greater increase in the worst performing areas and a reduction in the proportion of ineffective trials”

(CPS Annual Report 2003-4: 6-7)

The police and CPS might argue that efficiency is the key to doing their job well and that increased capabilities and less ‘ineffective’ trials might decrease the likelihood of the wrong people being prosecuted. However it might equally be argued that in the modern political and criminal justice rhetoric, justice it seems is equated not with fairness and correctness, but with conviction and with fulfilling targets in terms of numbers of convictions.

This targeting trend is also observable in the CCRC; their Annual Report for 2007/8, focusing on Key Performance Indicators, celebrates the reduction in waiting times and the achievement of closing 103 cases more than it received (CCRC 2008: 13). This does show an achievement in expediting cases; addressing an issue on which they have been much criticised. However while the Report gives emphasis to the fact that, since the structural changes implemented in 2006-7 (see page 195), the number of case reviews completed has increased considerably (1087 compared to 990 in the previous year) it does not highlight that the percentage of referrals in 2007/8 is by far the lowest ever at 2.5% (compared to the average of 3.83%) (CCRC 2008: 14-15). If this trend continues it might suggest that, contrary to the assurances in the Report, “efficiency” may be compromising the approach to investigation. The Report laments a 10% drop in the number of Case Review Managers over the year and budget cuts of £100,000 planned for the next three years – the political concern about wrongful convictions is clearly not high on the government's current agenda.

The Court of Appeal is similarly streamlining its processes: -

“The (Criminal Appeal) office has undergone a number of internal reviews and restructures over recent times and the benefit of this work can be seen in the continuing improvement in performance against a range of targets, especially in the reduction in time taken to process both conviction and sentence appeals.”

(CADC 2007 - Review of the Legal Year 2005/6 Para 5.2)

On the surface there is nothing wrong with greater efficiency as long as it does not permeate into production line “justice”. However the appeal of the Newsagent Three in December 1999 for example, lasted two weeks with numerous witnesses and intense, perhaps sometimes excessive, scrutiny of the issues, while by comparison the Attwooll and Roden appeal of March 2008, in many ways a much more complex case, lasted less than 4 hours (see Chapter 10). The Appeal Court wrote to Mike Attwooll and John Roden shortly before their appeal indicating that they would not attend the hearing but would watch and listen by video link. Only objections from their lawyers prevented this denial of their right to be present. This again is reflective of an approach which replaces consideration of rights with those of efficiency, and reflects the intended policy for the future: -

“Other proposals for the future will be the installation of video links with the prisons to reduce prisoner movements reducing costs and delays in court”

(CACD 2007; Para 5.4)

Not only does this deny prisoners their right to be present and thus communicate adequately with their lawyers, a right Mr Attwooll and Mr Roden had waited 14 years for, but it sends an implied message about the Court’s approach to the appeal. One interpretation might be that the appellants have no chance of release and so no reason to be brought to the court; another might be that the appeal is a formality rather than a serious examination in a fair hearing. Certainly such an approach along with the trend towards re-trials in high profile cases (Sion Jenkins, Barry George and Michael Stone for example) is likely to prevent the embarrassment to the image of the criminal justice system that might be perceived from any triumphant exits of the exonerated on the steps of the Court of Appeal.

The government’s curious approach to consultation on its “Quashing Convictions” document of 2006 and the underlying implications of the proposal, now incorporated into the Criminal Justice and Immigration Act (CJIA), illustrates how for the first time the government is trying to make the Court of Appeal more, rather than less, restrictive in its approach and has done so regardless of the majority of views expressed in the consultation (see pages 185-188).

The CJIA also “caps compensation payments at £1 million for those who have suffered more than a decade of wrongful incarceration and £500,000 in any other case” (Naughton:

The Guardian 20/6/2008). Meanwhile, after losing their case at appeal the government pursued to the House of Lords, the issue of a reduction of an element of compensation awards to miscarriage of justice victims to pay for 'board and lodgings' while in prison. The Lords over-ruled the Appeal Court in favour of the government (O'Brien and Others v Independent Assessor UKHL 10 2007). The financial saving of such measures is hardly significant yet the message they send appears to represent an increasingly cynical approach to the financial, social, and psychological damage that wrongful convictions create.

Legal Aid: A case in point.

One matter that united the views of all participants in this study was the need for competent and resourceful defence work if miscarriages of justice were to be rectified and moreover prevented in the first place. The government is currently implementing reforms to the legal aid system based on the proposals in the Carter Review (2006). Soar (2007: 34-35) explains that Carter's "Market based Approach" has two key aspects where criminal legal aid is concerned: Firstly a change from hourly pay rates to fees per case. Many solicitors feel that the fee levels proposed are not adequate and will lead to corner cutting. Where, it is argued, will be the incentive to do a thorough job if the fee is the same for doing a basic job. Secondly the Legal Services Commission (LSC) will divide the country into small areas based on police stations and invite firms to bid for legal aid contracts, selecting four to six firms within each area. The result, according to Carter, will be many fewer firms undertaking legal aid work but firms will be larger, better quality and more efficient. "High cost" serious cases will be restricted to certain firms approved to do such work – the "Very High Cost (Crime) Panel" (Rahman 2008). One solicitor (S4) explained the changes as follows: -

"Our system is staffed as it is by a lot of medium, small and larger firms who build up their own reputations through various styles etc, but there's a lot of competition out there.....What the government and the LSC are doing, they are creating this High Cost Panel for any case that lasts more than 25 days....you cannot be on that panel unless you've done X,Y and Z high cost cases in the last 18 months.....but you don't get big cases that often...What they're trying to do is restrict the number of practices doing the work and cut out all the smaller firms and then the larger firms will have to tender for the work, so we as a business will not do these cases." (S4)

S4 went on to explain how he felt the vocational aspect of the work will be lost, how young lawyers will rarely see a career path in criminal work in the future and how the training value of solicitors with long experience and flexibility will be lost – much of the crucial work on miscarriages of justice being reliant on an approach that allows freedom for solicitors to do extra work often without extra pay. The dedicated and experienced solicitors who have become specialists in miscarriage of justice cases may be a dying breed in this “efficiency” drive: -

“I’ve given 30 plus years to this – doing cases for nothing because I have a vocation and there are many others like me, and we will go, we won’t be around very soon and we are trainers and we’ve trained people who’ve gone on to establish their own firms to carry it on, and it will go and you’ll just have transaction criteria.....it’s no longer a vocation, it’s a business, churning out work. I just see that there are real inherent dangers there” (S4)

Other solicitors accorded with these sentiments, for example: -

“I’m always very conscious as a lawyer about complaining about the restrictions of legal aid but ultimately the people who are going to suffer are the defendants. The number of experienced legal aid lawyers going out of the system is I think frightening. Year after year of restrictions and the proposed changes will make things harder. There will be less choice and less incentive to do the job” (S6)

Rahman (2008) explains how Defence Solicitor Call Centres are being established, provided by the LSC Criminal Defence Service, to refer cases to contracted firms. He questions however the viability of the current fixed fee rates and notes that the problem is exacerbated by solicitors from smaller firms who know that they will have to pass over more serious cases to firms on the High Cost Panel. Even then these firms increasingly face restrictions on the work they are financed to undertake: -

“This already has to be regularly challenged; including seeking that a judge declare that specific tasks are necessary to prepare a proper defence. It is a constant battle between the understandable desire to reduce costs and providing the best defence possible....The fear is that some firms will feel forced to lower standards to survive and jeopardise effective defence of their clients”

(Rahman 2008 Inside Time Online www.insidetime.org 12/3/08)

One expert witness (EW1) expressed concern that expert reports were sometimes less comprehensive than they should be when limitations on legal aid restricted the number of hours of work that could be done to less than what was really required. One solicitor expressed concern at legal aid restrictions in Magistrate’s Courts: -

“In Magistrate’s Courts they have re-introduced the means test for legal aid. It’s a bad idea because the level is quite low and quite a lot of people are being refused legal aid because although their application meets the interests of justice, which is the other test, their means are too high, and you have to pass both tests to get a legal aid certificate. So I think that’s a real problem....if you earn more than, say £11,000 a year, you could well be struggling to get legal aid in the Magistrate’s Court.” (S7)

The lack of legal aid for people seeking to find a basis for an appeal is one of the great barriers faced by people trying to establish their innocence. Funding is only available for example after a case is referred for appeal by the CCRC or, on the first appeal application, by the Single Judge. Thus the few solicitors who will work on these kinds of cases have little or no funding apart from a very limited amount under the “Green Form Scheme”: -

“The Green Form Scheme, it’s not worth filling in the form - 10 hours at £50; it costs a law firm £100 to open a file” (S1)

S1 also described how he felt he could have saved one client around 5 years of his 25 years of wrongful imprisonment had he had the money to commission the expert reports required. Another solicitor (S3) described how he did use the Green Form Scheme but had to constantly re-apply for each task undertaken. S6 described how he used students or young lawyers seeking experience to work on potential wrongful conviction cases to make the work affordable. These participants felt that big firms, acting in an increasingly market based, business model, will be unlikely to support this kind of work in the future.

Some felt then, that the increasingly managerial approach to justice and legal aid was likely firstly to reduce the thoroughness of defence work at trial, exacerbating a common cause of injustice – poor defence work - and secondly reduce still further the support for the wrongly convicted after trial. Moreover they felt the crucial lawyer/client relationship and the vocational aspects of the job would be reduced in an atmosphere of cost cutting and production line justice. Not all participants commented on the changes but of those that did none expressed support for them. Like the presumption of innocence another crucial quality of justice may be being eroded: -

“Justice is like fresh air, it’s a right, like oxygen, we don’t have to pay for our oxygen. It’s a great comfort to me; it keeps us all in order. So I want to be able to use the law – ‘well I’m sorry you can’t; I want £500 on account please” (S4)

Conclusion

The lack of electoral significance of an issue like miscarriages of justice means that it is inherently at risk of neglect. The current political atmosphere around crime and justice is fuelled by a media obsession with the very real problem of crime but is not matched by government commitment to the principles of justice which are increasingly portrayed as obstructions. Given the history of malpractice that has on occasions blighted the criminal justice system and the innumerable inherent risks (see Chapter 2) this political atmosphere runs a substantial risk of increasing the likelihood of wrongful convictions occurring and decreasing the likelihood that the system will be inclined to rectify them adequately or promptly. The next chapter considers the study data on occupational cultures within the current political and social context, and their influence on the above issues.

CHAPTER 13

CULTURES OF PRAGMATISM: CURRENT SAFEGUARDS AND RISKS

The last chapter suggested that the current managerial approach to criminal justice, combined with an emphasis on reaching targets for “convicting the guilty”, increasingly prevailed over any emphasis on the presumption of innocence. Furthermore that such a situation might promote a culture where there is significant risk of miscarriages of justice occurring, despite attempts in the past to address the problem. This chapter explores this further by reviewing the study data relating to prevailing occupational cultures in the context of the social and political trends discussed in the last chapter. Underlying this reflection is an attempt to consider how far current cultures reflect safeguards or potential risks and how far they reflect magical legalism or any cognizance of uncertainty. Parts 3 and 4 above included many reflections about the role of professionals within the system expressed by those maintaining wrongful conviction. This chapter considers current cultural aspects that might impact on the potential for miscarriages of justice to occur. The focus is primarily on data from professional participants in the study, firstly considering police culture, secondly legal culture and thirdly journalistic culture.

Police Culture

A Culture of Safeguards?

For the majority of officers interviewed it was the professionalisation of the investigation process and its ‘checks and balances’ that loaded the system strongly in favour of preventing errors and false case constructions. There was much discussion of PACE protections, monthly reviews of investigations, including on occasions by outside forces, close supervision by the CPS, access to, and teamwork with, experts of all kinds (see Appendix 1), advances in technology and investigation procedures, sophisticated

interviewing techniques, the duty to investigate all avenues and the rigorous professional training for detectives.

This safeguarding seemed to be the main factor for most officers, backed by their own work as they experienced it, that led them to feel convinced that the public could feel safe from the risk of wrongful conviction. Most acknowledged that witnesses who give false testimony or false science could lead the system astray but there was for most an underlying belief that the investigation process was well safeguarded, even for some close to infallible: -

“I would say that if a person is at Crown Court, that person is guilty and yet the conviction rate does not reflect that. Because you’ve gone through so many processes, checks and balances, where the evidence has been studied by the police officers, CPS, barristers – and that person is guilty. The only reasons they’re ever acquitted is because there was a fault with the process, a fault with the police system and the case has been presented inappropriately. So that’s how I’m biased in relation to the whole system. I can’t even remember why I said that I don’t think it relates to one of these questions, I just feel that you need to know that.”
(P4)

Clearly such a position shows little acceptance of the uncertainty principle. However not all were quite so convinced of the security of the current situation: One former officer (P9) acknowledged something of a gulf between the realities of detective work and the higher echelons of ACPO and their directives, expressing the view that there was a dearth of actual investigation and detection experience in the higher ranks of ACPO. Another former officer (P1) had reservations about the nature and level of investigation training and felt strongly that a Royal College of Detectives should be established “empowered to accredit or otherwise the competence of detectives and establish investigative processes that were beyond the political reach of government and the ambition of chief officers” (P1). This he felt would establish a greater degree of accountability, as in the medical profession for example, and perhaps provide independence and resistance to the managerial targeting approach which could threaten the integrity of investigations. The same officer had doubts that professionalism was always so closely enacted in practice: -

“It’s going backwards in my view.....It’s the general incoherence I find so depressing, it seems to be so simple to do the job properly you’ve got to disclose stuff and you’ve got to follow all reasonable lines of enquiry – now what’s the problem – either you’ve got the evidence to charge somebody or you haven’t.....people get emotionally tied up in it and then there’s things like personal ambition” (P1)

The suggestion here is that the pressure to get convictions (see pages 32-33) can still influence investigators and lead to cutting corners. However most officers interviewed rejected the idea that the pressure would lead to compromised investigations: except perhaps where cost was a factor (P9). One officer (P5) suggested that the modern team approach made it less likely that individual officers would see the inability to solve a particular case as a loss of personal status and thus there was less incentive to abuse the process.

There are of course exceptions to what may be reassuring cultural changes, and miscarriages of justice may derive from exceptions. As one solicitor responded to the suggestion that better police systems had all but eliminated wrongful convictions: -

“Well that’s nonsense, I think the kinds of miscarriages that occurred in the past are unlikely....I don’t think it’s impossible, I’ve certainly had cases where people have made false admissions post PACE....I think it’s probably less likely you’d get forensic evidence buried, but you can’t preclude the possibility.....but I think what you are getting are cases where there are problems over disclosure.....and over reliance on experts. I think it’s very difficult for a jury to resist somebody who’s portrayed as an expert and I think there’s a lot of dubious convictions” (S6)

Furthermore serious high profile cases might be prone to exceptional reactions especially if the media target senior officers creating pressure further down the line (P7): -

“I’ve been present when ACPO officers have slammed SIOs, shouting at them to get things sorted and sorted quickly” (P7)

“I’ve felt that there has been pressure on investigators to put the case to rest and I have experienced senior investigators who are very, very keen to prove a case.” (P6)

There is certainly much that seems reassuring in the current professionalising of investigation, in particular the clear awareness of how case constructions have taken the wrong paths in the past and how this can and should be avoided. Furthermore the officers interviewed expressed a pride and commitment to integrity and honesty. There are however some concerns that nonetheless arise from the current culture, not least of course that those wrongly convicted (even in recent times) and their families, would find such assurances entirely unconvincing (see Eady 2003 and 2005). Moreover, as discussed at length in Chapter 2, there are innumerable factors that can mislead even well intentioned and professionally run investigations. More specifically however two key questions arise from this research: Firstly whether the professionalised process may be over influenced

by securing convictions and thus whether the certainty of correctness it seems to engender might be a risk in itself – the danger of certainty. Secondly is there evidence that in some instances the police lack self criticism and an ability to accept and take responsibility when things go wrong, suggesting perhaps that change has not really permeated the culture – covering up the cracks.

The Dangers of Certainty

Policing by its nature involves decision making and assertive action (Reiner 2000). The uncertainty of many investigative and evidential factors may be uncomfortable in a culture where decisiveness is considered an important attribute. Furthermore one of the experiential problems for investigating officers is that they deal constantly with crime and people who commit crimes; they are no doubt faced on a regular basis with people who lie and distort the truth. Also as this document has endeavoured to illustrate, evidence can often appear convincing and supportive of a case when in reality it has been formed through errors in perception, coincidence, misleading science and so on. It might be the combination of these two factors that sometimes establishes a belief that the right person has been charged when that is not in fact the case. Under these circumstances the safeguards within the system might simply end up supporting an erroneous belief through the suggestion that there have been checks and balances, when in fact those checks may have been checks on the procedure rather than ‘reality checks’. For example the fact that a suspect has had a solicitor present does not necessarily mean his or her interests have been properly safeguarded, the fact that the investigation has been reviewed internally or externally does not mean that that review has necessarily identified a false case construction, and the fact that scientific evidence has been found does not mean that that evidence is necessarily probative. One of the key assertions of research such as McConville et al (1991) and McBarnet (1981) was that the potential exists for rules and procedures to be used to support a ‘convictionist’ approach rather than a safeguarding approach. While there may be more “hoops to jump through” (P4) than ever, it may still be possible to get through these with the aid of misplaced certainty and group solidarity.

Some police officers expressed reservations about the effect of managerial targets on the safeguarding culture. Furthermore it was clear from participants that investigation

training and case review does not focus on miscarriages of justice but on obtaining the right convictions through successful and professional investigation processes. The following exchange with a recently retired officer gives a different slant on the new professionalised managerial culture: -

Interviewer: "Do you think that wrongful convictions are still happening today?"

P7: "Yes, it's occupational culture forced down by the new managerialism, it's performance isn't it – getting results. And as a crime manager, every month I had to ensure that my performance was acceptablehow the individuals obtained those results?.....as long as it's sustainable – that is the huge word, because if it can't be attacked then de facto there's no problem with it."

Interviewer: "Does sustainable necessarily equate with the right conviction?"

P7: "No, I never said it did, but that's what the police operate on, pragmatism."

Interviewer: "You're about the first police officer I've spoken to who's said that?"

P7: "You've been speaking to the wrong police officers. I don't think detective constables who actually talk to defendants would ever concede it, but the higher up the hierarchy you go with the police and if they're perfectly honest, they would tell you that. It's all about performance and senior officers pass that pressure for results down the chain so those at the bottom have equal pressure to get results – now they're the actual individuals who speak to defendants – and we have scandals....but it would be wrong to think that they're isolated cases."

The same officer developed the point about pragmatism, echoing McConville et al and

"The Case for the Prosecution": -

"Well because the police are pragmatists, they'll work with the legislation...we, know what we've got to do to get a case through the CPS so that's what we'll do. Now how we do it, underlying the veneer, is up to us, provided it's sustainable and that's the word." (P7)

Other officers stressed that certainty about guilt was justified today in many cases as most were backed by strong scientific evidence, although P1 also pointed out that many cases were not, noting in particular the historical child abuse accusations where some people had been shown to have made false accusations to gain compensation (see for example

Webster 2005). There was for some officers a tendency to trust scientific evidence rather than stress the potential pitfalls and uncertainty around this type of evidence.

Certainty and especially 'sustainability' in convictions may, it is suggested, be dangers in themselves. Sustainability as used by P7 appears to mean amongst other things that the conviction is well packaged for the CPS and appeal resistant. On one view this reflects thorough police work, on another view it might reflect a danger in some cases of wrongful convictions built on case constructions that are more sustainable than ever. In an uncertain world certainty can be a dangerous psychological need: -

"The thing that always bothers me is the need that some people seem to have for certainty.....To be a really good investigator you've got to have an agnostic personality....a high tolerance of ambiguity, because you don't know at the end of the day whether you're right or wrong, all you've got is evidence that suggests you might be. If you're a person who's got a great intolerance of uncertainty you're bound to latch on to a theory and build a case. They're obviously guilty because that satisfies my psychological need, so I'll build a case to prove it. That's a fundamental weakness of investigation.....someone who is strongly conservative and intolerant of ambiguity...it's got to be black or white when in reality it's all many shades of grey" (P1)

This embracing of the uncertainty principle was however the exception rather than the rule. Integrity requires a self critical approach and openness to reviewing events rather than a culture of certainty or pragmatism. This may well be present in many areas of police work and in many sections of the police service. There have however been some examples of police forces holding on to, or at least implying, certainty that they were correct, even when cases have been overturned: -

Covering up the Cracks

The case study in the next chapter on the Sion Jenkins case expands on the police and CPS reactions to his acquittal, and the implied suggestions that they had not changed their view and were right to have brought the prosecution. While the police have always been reluctant to concede any form of apology for injustices, the reaction of South Wales Police to legal action taken by two participants in this study is particularly illustrative and has not appeared to reflect a form of integrity that is prepared to concede the failings of the past but rather has sought to cover up these failings. In Nettie Hewins' civil action

against the police (Queens Bench 2006) the police conceded that Nettie was not guilty although according to Nettie this was phrased in legalistic rather than moral terms. However an adept form of legal trickery successfully made the case to the judge that it was the CPS, not the police who had insisted that Nettie should be charged. Civil action against the CPS is not allowed under Crown Immunity hence leaving Nettie deprived further of justice and any vestige of emotional closure. Michael O'Brien had also taken a civil action against the police (Queens Bench Claim 2006) over the conduct of detective Lewis and others (see Chapter 6). In one sense this was a success, with Michael and his co-claimant being awarded a total of £500,000 in the largest out of court settlement ever made in this type of case. Mike O'Brien however was in one sense disappointed wishing more for the justice of winning the case rather than having the police concede to protect the long retired Lewis and others from exposure. The response of South Wales Police in the media on this matter was however one of the most extraordinary examples of intransigence and above all inversions of logic: -

"We acted in good faith at the time and have continued to do so. It would actually be illogical, as much as Mr O'Brien may want an apology, he's, he's challenged our reputation which we erm, which we erm, is precious to us. It would be wholly wrong to apologise and I think the public would actually see that as inconsistent as well"

(Deputy Chief Constable David Francis speaking on BBC Wales TV News 12th Oct 2006)

The payment of £500,000 of public money (for technical reasons the defendants only actually received part of this) in an out of court settlement can only logically be viewed as an admission of responsibility and an admission of the fact that the police team in this case did not act in good faith – that was the issue in the civil action which the police did not feel able to defend. One journalist commented on this issue: -

"I've looked at the reports and nobody could ever believe that that was properly investigated to lead to Mike O'Brien – you just couldn't, but they've got a huge institutional interest in protecting their reputations" (J1)

However, crude attempts to fool the public do not sit comfortably with reassurances about integrity and professionalism – a point with which some officers concurred: -

"There's a culture of cover up when things go wrongeverything closes down, everybody denies everything, everything becomes difficult, unlike a lot of

businesses that actually use complaints to uncover problems they're having with their systems" (P1)

"The senior officers of all forces where high profile miscarriages have occurred have done the police service a disservice because when miscarriages of justice have been demonstrated it has such an impact on the police service generally that they need to be a bit more humble and say we've made a mistake and the reasons we've made a mistake are A, B and C. Here is the thinking of the SIO at the timegive the public an explanation, not a one line media bite and I think the public will accept that honesty and transparency much better." (P7)

Clearly the South Wales Police remain unhappy about revealing what occurred but a more open and honest approach to the past might promote more faith in the idea that things are different now. The problem for the police perhaps lies in a "guilt assuming" culture which may be based on the majority of their experience but seems to make it hard for some to accept that on occasions they may be wrong. Things cannot be put right without an acceptance that something is wrong; an insight which some police officers do acknowledge: -

"I'll be honest, one of the ways that the police seem to do it though is – 'how are we going to put it significantly better against them next time'. You see what I mean, instead of saying well we've made mistakes doing this, there's still the assumption that there's some kind of guilt there – there's that sort of approach." (P2)

Wrongful conviction is a sensitive issue in relation to which the police, while undoubtedly major players in the process, perhaps take a disproportionate share of the blame: -

"As a police officer, miscarriages of justice hurt me.....it tarnishes the police, it rarely tarnishes the CPS or the barristers, it's always the focus on the police" (P7)

People who have been wrongly convicted and their relatives often complain bitterly that no-one is held accountable for what happened to them, even when there has been gross malpractice. Even the rare exceptions to this rule where policemen have been prosecuted they have either been acquitted, as in the Darvell brothers case, or the charges have been dropped on the basis that the events were too long ago, as in the Stephan Kisko case (time lapse being an exonerating factor only it seems in this type of case). Nonetheless, if blame is attached at all, it tends to fall on the police or occasionally on scientists, never, it seems, on the CPS or lawyers – there has never been a case where a lawyer has faced prosecution or serious internal censure, over a miscarriage of justice.

There is little doubt that standards and systems in the police have improved greatly, partly as a result of past scandals, and certainly most officers in this study demonstrated a willingness to be open and honest about a difficult issue. However this must be viewed in the context of the political atmosphere described in Chapter 12. Managerial targets, and a wider cultural view that the justice system over-protects defendants, may enhance an inclination towards ‘certainty’ which does not reflect the problematic realities and uncertainties described in Chapter 2. Such a situation could lead to safeguards being used in practice as ways of building on the sustainability of convictions. This might on occasions work against ensuring the correctness of the convictions. There are also examples of a tendency to cover-up or refuse to accept that things have gone wrong, reflecting either, or perhaps both, a ‘convictionist’ approach based on misguided certainty or a throwback to justifying some of the unethical methods of the past. As with all human services there will always be a need to reflect back on underlying values which can so easily become distorted under the pressure of day to day work. Without such an approach, it is only when people find themselves on the other side of the wall that the realisation that things are not quite as they seem becomes apparent; a situation that seems inconceivable then becomes a reality. Sally Clark’s father, Frank Lockyer, was a police officer for over 30 years: -

“To think that a mother against whom there is no evidence of ill will or aggression, only love and total devotion. That there are no marks or injury to the body, that there is no cause of death, can be convicted of murder is a concept of English justice which after 35 years in the business I find very difficult to take and I did not come across it till recent times”

Frank Lockyer BBC 1 “Cot Death Mother: the Witch Hunt” 13th Feb 2003.

Legal Culture

Many aspects of legal culture in an adversarial system and the literature on this subject were discussed in Chapter 2 (pages 51-63). This section reflects on and makes an interpretation of the views expressed by participants on this topic in the context of how legal culture might impact on wrongful conviction.

Unaccountable Power in a Changing Political Climate

The law has a unique constitutional position; although subject to government legislation, the independence of the judiciary is considered an essential democratic requirement and potentially a check on governmental powers. Judges have always had the power to establish case law in the Courts. This power is particularly true today in the sense of interpreting how new laws should be applied. Changes to laws about revealing previous convictions or use of hearsay evidence (Criminal Justice Act 2003) for example depend to some extent on how in practice judges apply them. Appeal rules depend on how judges apply requirements such as the “safety” of a conviction, it is the judges not the legislators who decide what “safety” actually means and as previously discussed (see Chapters 9 & 11), the Court of Appeal epitomises unaccountable power: -

“So on the face of it you’ve got this fine system with checks and balances but who is it that makes the decisions – it’s the judges, they’re the ones and therefore they are in such a special position that we’ve got to be very careful that we choose the right people because we’ve got to trust them” (S4)

While the constitutional separation of government and judiciary does provide important safeguards against misuse of government powers, it also may explain why lawyers and judges remain so unaccountable for their actions – there is no person or organisation to make them so, and it may also explain why legislation does not always end up being applied as Parliament intended: -

“A law when it’s made can be perverted and stretched beyond the meaning of parliament’s intention....you get precedent, precedent, precedent and eventually the meaning of the law has been totally changed.....so it depends upon those that manage justice to have a refreshed outlook.” (S4).

Some participants felt that modern judges were less traditional and there have been attempts to widen the social background of judges, notably the formation of the Independent Judicial Appointments Commission in 2006 to replace the Lord Chancellor’s role in appointing judges. However initial appointments under this system seem to continue traditions, the first 10 appointments being all white male barristers mostly educated at independent schools (Clare Dyer Guardian 28/1/08).

The independence of the law may also explain why unlike the police, who have changed their systems considerably as a result of past miscarriages of justice, the nature of the adversarial legal system has made no such adjustments. The adjustments that have been

absorbed by the legal system, it could be argued, reduce safeguards, firstly by placing more emphasis on targeting cases expeditiously through the courts and secondly by incorporating new legislative provisions such as those in the 2003 Criminal Justice Act which, to use the governments terminology, “re-balance” the system “in favour of the victim” (in other words against the defendant) (see Appendix 7 ‘Mr Q’ for a contemporary example of how these two factors may influence the running of a trial). Both these trends are more likely to aid conviction rather than prevent miscarriages of justice.

On the one hand the unaccountable power of the law makes fundamental change extremely unlikely, on the other hand the belief in the system that many senior lawyers maintain, supports the idea that outcomes are almost always correct and therefore societal and government trends towards “easier” convictions and guilt assumptions are more easily assimilated. Once again the application of magical legalism conveniently undermines the uncertainty principle. Thus while many lawyers feel unhappy about the erosion of safeguards for defendants, the system overall seems to have embraced these changes without major resistance. By contrast the responsibility for miscarriages of justice has been deflected onto the police and other agencies without internal examination of the legal system, the traditional practices of which continue largely unaffected and unquestioned.

“The Majesty of the Law”

“Courts echo the majesty of the State.....the high chairs that judges sit on, you’ve got ornate furnishing that sort of blow down on an offender. It’s the majesty of the State, it’s not the community. The majesty of the State was so powerful in earlier days that nobody in the system could recognise or cope with, and neither did anybody bother to find out, whether the conviction was correct or not.” (S4)

There are of course some more modern courts but the rituals of status and ‘respect’ remain; the judiciary remain the only profession, royalty apart, who demand that people stand when they enter their realm of influence. One solicitor recalled an occasion where a defendant addressed a magistrate as ‘Your Majesty’. Barristers and judges in this study were split on the retention of wigs and gowns (although a recent pole of barristers came out in favour of retention), some saw these as a uniform, even a disguise that somehow

protected them outside of court. A number of lawyers felt that such rituals did engender respect; others felt they were an irrelevance. S4 went on from his statement above to suggest that the law was moving more towards being part of the community, in part ironically because the law was no longer just concerned with the suppression of the traditional “criminal classes” but also with white collar crime and in relation to miscarriages of justice, with more articulate and educated people being dragged into the system and becoming more aware of the realities.

Does the ritual and ‘majesty’ of the law and the culture it may promote, impact in any significant way on the miscarriage of justice landscape? Perhaps there are two respects in which arguably it does: –

The first of these aspects is that the logic of the legal profession and the distance of the legal world from the realities of some of the communities they serve are felt by some to constitute a risk of injustice through the application of an “artificial logic”. This view was summed up by one solicitor in a way that seemed to embrace reality in a way that the legal system often denies: -

“OK so you don’t know where you slept that night..... It’s not said but there’s an implication that the lifestyle means you’re guilty.....You said you went to the garage at 10.30, we’ve got CCTV footage that says you went at 11.05.... I don’t think I could remember what I did a week ago without some sort of prompting and I lead an organised existence to some extent – but if you don’t.....’We don’t have a watch, time is irrelevant to us, we never work, we don’t send our kids to school, time is not a factor in our existences’. So you’re judging peoples’ lifestyles.....the way they recollect things and so on, on a different criteria and its only if you could do it in the context of their lifestyle that you could understand it.....they’re not living what middle class judges and barristers think is a normal life, an organised existence with a diary and all the rest of it. You superimpose that upon some peoples’ lives and you might as well be talking about Martians and Earthlings it’s so different – you can’t therefore judge these people and draw assumptions about what they did or didn’t do based on that” (S1)

There are many examples of barristers’ decisions that appear to make little sense to people outside the profession. Sheila Bowler was horrified at her barrister’s suggestion before her re-trial that an alternative scenario be put to the jury in addition to their main case - the true scenario. The alternative scenario being that Sheila was present when an accident happened as her aunt went to relieve herself by the river. Such ideas do lead people to question whether barristers understand juries in the way they think they do. Sheila’s barrister took a great deal of convincing that posing an untrue alternative

scenario and inviting the jury to choose between this and the real one would “undermine every word of Sheila’s evidence, and betray the integrity and honesty of all her character witnesses” (Devlin and Devlin 1998: 353-4). As one solicitor describing the QC at Sally Clark’s trial put it, barristers sometimes seem not to be in touch with how ordinary people think; that ‘ordinary people’ do not necessarily think legally even if they are told to: -

“He made the mistake that I’m now convinced most members of the bar are making in these cases, of assuming that all they’ve got to do is to show that the evidence is not beyond reasonable doubt and their client will walk – and it just isn’t true. And the essence of my objection is that very phrase (used in the QC’s closing speech) ‘There is suspicion here but not proof’. Now anybody but a barrister would know that that is saying to the jury ‘he thinks she’s guilty but he thinks he’s conned us into getting her off’. Why barristers can’t see that simply beggars belief. Probably because they don’t live in the real world.....the whole ethos of the way the bar operates is to isolate it from everyday life so far as their working lives are concerned. Their clerks protect them from solicitors and the law protects them from having any contact with ordinary human beings who are involved in the action except by some sort of remote osmosis. (S5)

Sion Jenkins “seven second defence” at his first trial (see page 160) provided another example of a barrister’s tactic presumably supposed to have a dramatic effect on the jury, an assumption that most people would find bizarre; the logical step for most people being likely to be ‘if you have a defence then use it’. This element of theatre is part of the “majesty of the law”, the idea of skilful advocates performing before the court to swing the argument for their clients.

The arbitrators of ‘fact’ are it seems faced with making their decisions in an artificial magisterial environment where information can be presented in many ways, some of which may involve elements of theatre or tactics which may not accord with their normal mode of thinking.

The second sense in which the majesty of the law might impact on wrongful conviction lies in the danger of promoting a culture of superiority that supports an unquestioning approach to its systems and decisions. The law demands respect through its traditions rather than its actions, deference to hierarchical structures enable lawyers and judges, especially High Court Appeal judges to go unquestioned, regardless of the quality of their decisions and rationale.

The adversarial system is one of the key cultural foundations and unchanging traditions of British Law; it promotes the use of all kinds of arguments and tactics including imposing one cultural perspective over another in the way S1 described above. There is a long standing acceptance that proof and truth are fluid, ill defined and interpretive concepts both in the academic world (Duff et al 2004) and in the practitioner's world (Morison and Leith 1992) and this was widely accepted by participants in this study, although some simultaneously held the 'magically legal' belief that the prosecution did in reality have to prove its case to the standard of beyond reasonable doubt (although the usual terminology today is that the jury or magistrates should be 'sure' of guilt).

The two medical experts interviewed both expressed some concerns about the nature of legal truth finding. Both felt the notion of experts examining the evidence to try to reach an agreement rather than being presented in adversarial stances might be a useful change to explore. Most significantly both made the key point often associated with the clash of scientific and legal cultures (see Nobles and Schiff 2000) that legal culture looks for definitive reasons or at least arguments that can be construed as definitive reasons, while in the reality of science and medicine this may be very difficult to ascertain. EW1 for example made a comment which might be very relevant to the prosecution's simplistic approach to Nick Tucker's initial ("inconsistent") comments following the accident (see Appendix 3): -

"There's not always a physical explanation, there may be a social explanation or elements of both. For example the way a person with a head injury reacts may be influenced by a range of factors." (EW1)

Science and medicine embrace the uncertainty principle and a 'culture of conjecture' whereas the law imposes a final conclusion on a disputed argument and defines that conclusion as 'proof' or 'safety': -

"You've got to admit in these cases that what isn't known isn't known. Dealing with a live patient is different....you give a certain treatment and if it works, or works in part, you've bought some time and you get colleagues in and you try something else....but in a court of law it's different, there's a lot of conjecture that is brought forward as though its an opinion based on established fact when it isn't.....Conjecture; you can't do without it – could it be this or that or what do you think it could be/? It's all could it be, whereas when we get into court they don't say that anymore they say it is." (EW2)

The adversarial system, in which the majesty of the law resides, promotes case construction in an active and competitive way. Despite this most lawyers interviewed felt it to be a better system than the inquisitorial model common in Europe although most admitted to knowing little about that model. (Police officers were split in their view but more inclined than lawyers in this small sample to favour an inquisitorial model). What was striking was the paucity of ideas about how the system might change, it was far from perfect but generally felt to be the best that could be done and there was little scope expressed for any ‘middle way’ between adversarialism and inquisitorialism. The foundation of the adversarial system in crown courts is the jury and again despite the well known problems and wealth of ideas about possible changes to the jury system (see for example Derbyshire et al 2001) there was little support for change from lawyers. There may be some signs that the ‘majesty of the law’ is moving a little closer to the people but the overall culture remains firmly rooted in traditions and while problems are readily recognised, including the uncertainties around legal proof and truth, ideas for change are few and far between, the majesty of the law provides a powerful vehicle that supports the application of magical legalism.

One issue that concerned some people who maintained wrongful conviction was the apparent closeness and conviviality that often exists between prosecution and defence barristers sometimes coming from the same chambers (although all barristers operate independently). To defendants this often seemed like an unhealthy collusion, to most barristers they were simply doing a job and performing a role which would never be influenced by any relationship to their colleagues. This professional/personal divide which enables adversarialism to function can be a mystery to those outside the profession as with the ability to switch from prosecuting with vigour in one case to defending with vigour in the next – what one barrister (B1) described as ‘the dinner party question’.

‘The Dinner Party Question’

Panic (1992: Ch 5) provides a strong justification for the “cab rank rule” – the principle that barristers take the next case that comes along regardless of whether it is to prosecute or defend and regardless of the nature of the case, assuming it is within the barrister’s area

of competence. The cab rank rule has a moral basis aimed at giving everyone impartial access to justice: -

“Without the cab rank rule, few advocates would accept instructions from those accused of rape or child molestation, either because they would find it distasteful to be associated with such persons, or because of the pressure from society directed against those who act for such clients.....Unpopular people would be unable to obtain competent representation and serious injustice would result” (Panic 1992: 141)

Panic’s analysis is a cogent one but the issue is addressed entirely from the way the dinner party question is often phrased; ‘How can you defend someone like that especially when you think they are guilty’ and not from the other angle ‘How can you prosecute someone you think might well be innocent’. The second question is a more difficult one to answer on an ethical basis if one believes that it is better that the guilty go free than the innocent be convicted - why would anyone try to present as strong a case as possible to ‘prove’ an innocent person guilty? For many in the legal world this action is entirely acceptable because it concurs with the rules of the game, the ethical foundation appears to be that the game should be played to the rules not that the result is necessarily the correct one. Thus, as the appeal system reflects, the conviction of the innocent is acceptable provided the rules of the trial have been observed – the institutionalised enactment of magical legalism.

Participants largely agreed that barristers gained a lot in experience and balance by both prosecuting and defending and it seems that this was part of the process of learning to be objective or, to put this less objectively, learning to extricate any feelings or ethical scruples from the professional role. Certainly those wrongly convicted often questioned the morality of prosecuting barristers and sometimes the commitment of their defence barristers. There is always a question mark over how far it is possible to put aside prejudices or leanings even for barristers. Some barristers now work only for the CPS and others specialise in prosecution or defence later in their careers, perhaps indicating some leanings either way: -

“I have seen prosecutors that have prosecuted so long that they think everybody is a con – that’s all they see” (S4)

Barristers and solicitors tend to justify this way of working partly with the kind of rationale described by Panic but also by attributing to the jury an ability to assess guilt or innocence beyond their own abilities: -

“I’m not sure that most lawyers look at it in terms of guilt or innocence in that way because I’m not sure it’s possible to determine whether somebody’s innocent or guilty yourself because its somebody telling you they didn’t do it and you have a prosecution case that says they did.....it’s for the Court to decide whether somebody’s innocent or guilty and often I’m not sure that you should or do have a view about it yourself” (B2)

Barristers know much more information than juries are likely to, yet their professional role somehow enables them to divorce themselves not only from the decision but sometimes, it seems, even from forming a view and certainly from allowing a view to influence performance: -

“Whether you prosecute or defend, if you come to a view about the evidence and it affects your performance as an advocate you shouldn’t be doing the job” (B1)

There is clearly an argument and a principle within this approach which is about promoting justice and preventing miscarriages. There is also an irrationality to it – if an advocate cannot come to a decision about guilt or innocence, with all the additional expertise and inside knowledge of the case he or she has, then why is there such faith that a jury will be so capable and reliable in doing this? The point here is made to illustrate the magical legalism required to believe in jury infallibility, not to say that lawyers should form a view that prevents them presenting the arguments fairly for or against a defendant. However lawyers should not hide behind a partisan position that undermines the presumption of innocence and threatens to fight for a conviction at all costs (a principle acknowledged in the CPS Code for Crown Prosecutors Para 2.3).

The problem for those maintaining wrongful conviction was that prosecution tactics often became so adversarial that they strayed beyond direct evidence into character assassination and manipulation (see Chapter 8). In some cases, Sion Jenkins (Jenkins and Woffinden 2008) and Sally Clark (Batt 2005) for example, the prosecution were prepared to change their case as the trial proceeded. Similarly the determination of the CPS and prosecution barristers to resist appeals with vigour even when the weakness of cases has been exposed (see Chapters 5 and 14) was seen by a number of participants as adversarialism taken to an unethical level. There is a danger that the moral foundations

and collegiality of the legal profession can blur the point at which it is reasonable and acceptable to continue in a one dimensional professional role:

Conclusion

If aspects of legal culture and the adversarial system, or the sometimes over zealous application of it, have contributed to the creation and sustaining of wrongful convictions then this risk is likely to remain. It is hard to detect any widespread desire to change the nature of adversarialism or control the more cavalier aspects of its application (Part 6 will consider whether and how this could be done). Professional detachment was portrayed by most lawyers as essential but some also acknowledged that they should be wary of losing the human aspect of the job, which gave legal culture a human face that people in disadvantageous positions, whether wrongly accused or otherwise, could relate to: -

“I don’t get emotionally involved but I have a lot of feeling for some of the clients, for their personal plight, whether they’re guilty or not actually, I do get very close. It’s a very privileged position you see because they’ve got nobody else – you get to know them, you get inside them and I like to know how they think. So I try to see it through their eyes and articulate what they think.....through their eyes I can understand....it gives you mitigation, defence, everything.” (S4)

Journalistic Culture and Wrongful Convictions

In the history of the correction of miscarriages of justice the role of the media has been crucial in discovering new evidence and creating public awareness, without which the systems own mechanisms for ‘rectification of error’ would not have been adequate. Despite the advent of the CCRC the media role remains a vital resource for investigations that might seek out new witnesses or fund expert reports and make a case that can be used by the CCRC or defence lawyers (see for example the TV programmes listed under ‘References’). This section however reflects on the views of journalists in this study and suggests a trend away from the kind of journalism that has made these vital contributions.

The Decline of Investigative Journalism.

Writing in the prisoners' magazine "Inside Time" (Dec 2007) Louise Shorter, a former producer of BBC's "Rough Justice" programme, pointed out how investigations by the programme had led to 17 serious convictions being overturned in the programme's 27 year history. Rough Justice had been dropped by the BBC in Nov 2007 and independent television's equivalent programme "Trial and Error" had been shelved some years before. For some the media role in respect of investigating cases declined in part as a result of the establishment of the CCRC: -

"A result of that was to keep things out of the media.....somewhere along the line a lot of journalists have got the message that these things are being dealt with" (J1)

Investigative programmes however, although less in number and very selective in the cases they featured, were very different to most CCRC investigations, being more proactive in searching for new evidence and free of legalistic and statutory restraints on remit. Moreover they brought the issue into the public consciousness in a way that may be being lost in a world of "law and order" rhetoric: -

"The perception is that there's less of it about but I would guess that that perception is almost valueless.....There's no longer a Rough justice programme, it's seen as old hat, it becomes unfashionable, we've done that, things move on. ."

(J1)

"There isn't the same level of public pressure, if there's any public pressure at all, you don't see the clamour, you don't see headlines saying 'quick get this person out of jail'" (J2)

Ironically as one journalist put it there are too many "good cases" and therefore the public suffer a kind of fatigue with the subject, thus the worse the problem gets the less attention it receives – there is now a very limited market for this kind of media intervention and market forces become the overwhelming consideration: -

"The effort and care which went into the programme's investigations are precisely the reasons why Rough Justice is being dumped.....The crass value for money criterion was not being fulfilled. Yet Rough Justice is a perfect example of what public service broadcasting, which the BBC is supposed to espouse, is all about"

Marcel Berlins The Guardian 12/11/07

It was a major theme for journalists interviewed that investigative journalism generally and miscarriage of justice issues especially, which required time consuming, detailed,

intensive and consequently expensive work, were in decline across the board in the face of the modern market culture: -

“You’ve got very small staffing levels being squeezed, you’ve got consultants coming in from outside looking at the media as if it’s a production line and saying well journalists are producing 2 or 3 stories a day – that’s what you should be aiming to do. So people are not going to be able to do investigations” (J2)

“The main obstacle to journalistic enquiry is resources; if you don’t keep in touch then you don’t really understand what’s going on..... if ultimately you don’t get out there and talk to people you won’t do a full job, so that’s what we’re losing” (J3)

“Miscarriage of justice cases are expensive... It is easier to follow a news agenda than go ‘off diary’. Perhaps this is why there seem to be fewer high profile miscarriages now (J4)

Today’s journalists therefore work under pressure to produce sound bites in an era of information overload; they are mostly commentators rather than investigators. The media focus is on what sells - on personality, individuals and on celebrity; “looking at evidence does not sell newspapers or TV programmes” (J1). The rectification of miscarriages of justice may suffer from a wider culture of ‘dumbing down’ which weakens the power of public pressure: -

“The media are on a 24 hour cycle, there’s so much information people have forgotten about it tomorrow, what’s the point of all this investing in a two page spread....in a sense the media’s lack of interest is reflecting our audience; politicians can’t get people to vote, people are getting on with their lives, lots feel powerless, we’re going to take care of number one and our friends and family” (J1)

Another aspect of risk and cost increasingly faced by journalists and particularly if dealing with controversial convictions, is the potential legal comeback if media outlets challenge the integrity of powerful groups or individuals. This means that lawyers advising organisations are cautious and, as some journalists had experienced, the system needs a lot of convincing before challenging the authorities, who may then be liable to sue: -

“Legal action is an enormous risk these days and if you’re criticising police officers they will sue you – you’re talking serious money on costs as well as damages.” (J1)

“The other thing that you have to remember is the growing power of the law within the media, forget our free press – they’re frightened of putting anything out – it’s another massive, massive internal issue.” (J3).

These concerns will not be helped by comments made by Lord Chief Justice Phillips at the appeal of Barry George, questioning the propriety of programmes broadcast by the BBC on the case shortly before the appeal (Duncan Campbell Guardian 12/11/07). The Court of Appeal has never been keen on the idea that the media might reveal the failings of the criminal justice system.

Issues of cost, risk and marketability therefore have played a major role in reducing the power and motivation for the kind of journalism that had led to many high profile cases being overturned and creating the kind of massive public awareness that led to the Royal Commission in the early 1990s (see Chapter 12). Furthermore the agencies of the criminal justice system have adapted their modes of communication to re-enforce this cultural change:

“Far and away the most difficult part of investigating a miscarriage of justice is persuading people to talk to you, either on or off the record. The police culture for some forces is not to talk to journalists except through official channels, i.e. the Press Office who are invariably unhelpful in these cases. There is a huge difficulty in trying to be balanced because the family and friends of the victim are unlikely to want to re-visit the case.....Any journalist who comes along questioning whether the right person has been convicted will not be popular. This overrides any thought that the person convicted may not be the one who did it...The police are hand in glove with the victim’s family and persuade them that the person accused did it – that’s quite a poisonous area” (J4)

“One of the biggest changes I’ve found for investigative journalism is PR – not being able to talk to people without having to go through public relations officers. Over the last 5-10 years that’s really changed a lot. Before you could talk to officers of the council, police officers direct, you could get to know someone and get information. PR changed all thatIn the long run it’s going to be a bad thing because everyone will be talking the same. Also it helps people hide things very well; I mean you know the way police officers talk nowadays” (J2)

Obtaining resources for investigative journalism is clearly more and more of a problem but, as the above comments reveal, so too is the other life blood of this crucial activity, the ability to gain access to information which can uncover the truth sometimes hidden or blurred by the official line. These and other factors naturally affect the motivations of those working in journalism.

Current Motivations for Journalists

One solicitor retained some optimism in relation to the current media role and stressed again its underlying importance: -

“The media are more interested than they used to be...We got PACE because of ‘World in Action’....the judiciary wouldn’t have given it to us, they wouldn’t have campaigned for it, it was the media that did it. Jonathan Jones wouldn’t have had his appeal had there not been everybody from the media occupying every single seat and staring at those judges, I’m convinced....it frightened them to re-look at the way they operate.” (S4)

Certainly there are many journalists who despite the prevailing culture retain a principled approach and a wish to uncover the truth in cases of injustice. J3 described how meeting victims of injustice like Mike O’Brien both convinced him of the cause and led to other concerns and information. The victims of injustice being one group who are certainly not governed by PR. There is for some a need to believe in the cause, investigating being “a decision of the heart as well as the mind” (J3). J2 described his journalistic ethos in terms of openness to “asking any question about any fact or interpretation or any story” and where potential wrongful conviction was concerned stressed the importance to giving a voice to those who had very little chance to put their story. For some however the motivation of some journalists was changing with the culture: -

“I think the motivation of journalists has changed, I think people of my generation used to go into journalism for all sorts of reasons often loosely political reasons...and the root of all these things would be a sense of injustice or a sense of justice.....I don’t think, looking at my younger colleagues now, that that’s the motivation....the media’s a business now and people take that on board and they’re not as idealistic as I think an earlier generation of journalists would have been....nowadays if that was your motivation you wouldn’t be in television or newspapers, you might be doing work on the internet or whatever but I don’t think you’d be a journalist” (J1)

Media culture however is increasingly about what sells and this involves selectivity in what issues are chosen for emphasis, this can according to one police officer impact seriously on investigations of high profile events: -

“There are cases where the media are actually driving investigations – you can see SIOs are doing what the media want them to doI find it absolutely incredible.

The overall effect of current media culture can be to take the easy root and perpetuate the sometimes negative popular trends rather than seek the truth, but the responsibility lies with all of us: -

“People feel strangely comfortable with the idea of crime and that crime is increasing because that’s what they expect, that’s what they think is happening, and if the media is telling them that then it just says you’re right. If you try and sell somebody something contrary to what’s currently in their mind – it’s like asylum seekers, if the press says they are leeches and using our services and they’re a drain, then people can believe that – that’s what they want to believe. But if newspapers go out and look for all the good things and try to persuade people against their prejudices it’s hard. That’s why newspapers don’t do it.....Newspapers exist because people read them and people who say they hate them read them – we’re all part of it, we’re all part of the mistakes, we’re all part of the good things and the bad things” (J2)

Conclusion

Police, journalistic and to some extent legal cultures are adjusting to a changing world – a world increasingly based on the market forces of economy, efficiency and effectiveness and driven by a penal populism that promotes impressions of certainty and gives assurances of effective justice. Knowledge and information proliferate providing stronger evidential support for both guilt and innocence. However the expanding and increasingly competitive media market is more inclined towards sensationalism, personality and ‘entertaining’ sound bites than in-depth analysis which might permeate the veneer of ‘establish truth’ and undermine the sensationalised personality issues that fuel the market. Legal cultures retain the rationale of adversarial principles and in so doing can become equally bound up and pragmatically willing to embrace the social forces that suit the adversarial confrontation. The current police culture may be very different to the thuggery that led to the forced confessions and planted evidence in many past cases. It may however be a culture of pragmatism based on social and psychological forces capable on occasions of perpetuating a more subtle and resistant distortion of truth; all achieved with the best possible safeguards. Few cases illustrate this better than the extraordinary case of Sion Jenkins, the subject of the next chapter. The Jenkins case, it will be argued, illustrates not only the dangers in police cultures but also the dangers within legal and media cultures and how these can combine to form what might be termed as a process of misleading collective ‘groupthink’. This again utilises ‘magical legalism’ and other psychological ploys to create a widespread certainty of guilt despite substantial evidence to the contrary.

CHAPTER 14

SION JENKINS: 'GROUPTHINK', 'MORAL DISENGAGEMENT' AND THE ORWELLIAN NIGHTMARE

This chapter describes the events around the conviction and subsequent acquittal in this long running case. The case, it is suggested, is a pivotal one in understanding a modern miscarriage of justice and the social forces that can create and sustain such a situation in contemporary times. The concepts of "Groupthink" (Janis 1982) and "Moral Disengagement" (Bandura 1999) are used to give a social psychological perspective on these events, including the media response, and some reflections are then made on the parallels with certain ideas in George Orwell's 1948 novel "Nineteen Eighty-four". Information for the chapter was derived from court reports, newspapers, websites, TV programmes and articles on the case and discussions with some of Sion Jenkins' supporters. Since this chapter was written Sion Jenkins and Bob Woffinden have published a book on the case giving a very thorough and expansive analysis of Mr Jenkins' experience, the evidence in the case and the media responses (Jenkins and Woffinden 2008). A few minor adjustments have been made with reference to the book.

An Open and Shut Case?

"We were very concerned as a family about our security particularly in relation to the empty property next door and a series of incidents that had taken place there. All of which had been reported to the police."

Mrs Lois Jenkins speaking at a press conference in the days after the murder of her foster daughter Billie-Jo. (Channel 4 "Trial and Error" 1999)

The family believed that the gate at the rear of the garden was being used as access for intruders attempting to break in (Channel 4 News 9/2/06). One such attempt had resulted in damage to the patio doors. This was in part the reason why the Jenkins' 13 year old foster daughter Billie-Jo was re-painting the doors at the time that she was brutally murdered with an 18 inch metal tent peg in the afternoon of 15th February 1997. The

numerous reports of prowlers and intruders in the area included a claim from Billie-Jo herself that she had been followed in the weeks before the murder (Channel 4 1999).

The murder had occurred during a 15 minute period (Approx 3.20-3.35pm) when Billie-Jo was alone at the house. The Jenkins' 10 year old daughter Lottie reported that the side gate to the garden, which leads directly onto the patio, was open on their return to the house, suggesting that an intruder might have either entered or left that way. Had an intruder entered that way he or she would have passed the coal bunker where the tent peg had been left out. This slightly unusual detail is strengthened by Lottie's description that she noticed the gate was open because she could see the rabbit hutch (Channel 4 1999), the gate was normally kept closed.

It was an apparently motiveless murder which had left Billie-Jo in pools of blood with her skull shattered in a what had been a ferocious and frenzied attack (Channel 4 1999). However the police had an early lead in the investigation: More than thirty witnesses reported sightings of a man acting strangely in and around the local park close to the Jenkins' home between 3 pm and 4 pm. The man seen fitted the description of a mentally ill man that the social services had been intending to section under the Mental Health Act the day before the murders. Unfortunately they had been unable to find him. The rules governing compulsory admission to hospital under section require that the person be considered a danger to themselves or others. The man concerned had a long psychiatric history (one of the witnesses in the park was a psychiatric nurse who had treated him in hospital), this history it has been suggested included at least one occasion of violence and threats towards a young girl that her family had reported (Woffinden 2000). Some of the witnesses also reported that the man had a prominent scar on his face and initial reaction in the press linked the murder of Billie-Jo to an attack on a 12 year old girl in the same area a few weeks before. The girl had been sexually assaulted and left with a plastic bag over her head. Fortunately she survived and was able to recall the scar on her attacker's face (Jenkins and Woffenden 2008: 62-69).

Curiously it later transpired that the same man had been in the local Debenhams shop the day before the murder, a shop visited by Billie-Jo herself that same day. The staff of the shop reported that he had been in the shop several times that week and that he had bought a spoon only to ask for a re-fund the next day. The staff described him as a "weirdo". On

the day before the murder he left in the shop “some crazed writings in the form of a letter to the Governor of the World Bank in which he referred to paedophilia and the protection of children” (Woffinden 2000: 21).

Many of the sightings of this man seemed to put him about 5-10 minutes walk from the Jenkins’ home. However people in the park would not have been likely to be checking precise times on their watches. Furthermore some statements suggested he was nearer to the house at the relevant time. Mr Robin Powell described to the police in the days after the murder how he had guided his son away in a different direction because the man he saw looked so disturbed and menacing. This sighting was only about 2 minutes walk from the house. Furthermore the owner of a guest house just 11 doors away from the Jenkins’ home described the visit, around 3pm on the day of the murder, of a clearly disturbed man who began talking about accommodation but then walked off in the direction of the Jenkins’ home (Channel 4 1999). Another witness apparently reported seeing a man running down the road covered in blood and paint (www.justiceforsionjenkins.org.uk/mrb). In April 1999 (two years after the murder) Channel 4s’ ‘Trial and Error’ reported an equally significant statement from a Mrs Barnett who claimed to have heard a man ‘in obvious distress’, panting, cursing and making strange repetitive noises while running down the path at the end of her garden. According to ‘Trial and Error’ the path is a scramble from the Jenkins’ home and was an “obvious escape route”.

Initially the police could not find this man, but he was apprehended within two days, one report suggested that “he seemed strangely to have disposed of most of his clothing” (Woffinden 1998). When he was arrested he reacted very violently including attempting to strangle a police woman (Jenkins and Woffinden 2008: 66). On the 19th February the police visited his parents and one of the officers involved recorded that the “father regrets his son may have been responsible” (Woffinden 2000). This man who later became known as Mr B. was also found to have plastic bags in his underpants and about his person, later examination of his past psychiatric history revealed an obsession with stuffing pieces of plastic into gaps including human orifices. (This eventually became ‘media knowledge’ for example Channel 4 News and BBC2 “Newsnight” 9.2. 06, Paul Harris ‘Daily Mail’ 10.2.06). Apparently Mr B often used pieces of plastic to seal openings in order to block out poison and contamination from imaginary enemies

(www.justiceforsionjenkins.org.uk). The police however were unable to interview Mr B. at the time as his psychiatrist maintained that he had no memory of events and was too floridly psychotic to be interviewed (Woffinden 2000).

The circumstantial case against Mr B. seemed strong: Legally circumstantial evidence may sometimes be conclusive (Choo 2006: 5). It would be reasonable to speculate that a jury would be impressed with the row of co-incidences and witness accounts that should have been available to them. However what made the circumstantial evidence in this case so exceptional was the discovery of a piece of black plastic bin liner that had been forced into Billie-Jo's nose. Some kind of implement had been used to force the plastic deep into the nose and into the nasal cavity (www.justiceforsionjenkins.org.uk) and the neighbour who came to help and removed it remarked "I was astonished at how deeply it was in the nose" (Jenkins and Woffinden 2008: 53). If Mr B was not responsible then surely any other conviction would have to explain this curious occurrence. What were the chances of another person, in the same area at the same time that this rare and tragic event occurred, sharing the same obscure obsession with forcing plastic into human orifices? The killer had, it seems, left a unique calling card. Surely therefore this was an open and shut case if ever there was one?

However the police, perhaps making a "close perpetrator assumption" (see Chapters 5 and 8), were already focusing on Mr Jenkins, helping him to construct a detailed statement over three days following the murder: -

"Small variations in these accounts would haunt me for years. On Thursday evening I signed my forty two page statement. I had not read what DC Hutt had written. I had been speaking to him for nearly three days. I had pushed myself physically and emotionally to give the police everything they wanted. I had signed it in the belief that it was safe to do so"

(Jenkins and Woffinden 2008: 93)

An Alternative Scenario

Chronology of Events: -

15/2/97 Billie-Jo murdered at the back of the Jenkins' house.

27/98 Foster father Sion Jenkins convicted of murder.

15/9/99 Channel 4 "Trial and Error" programme questions conviction

Dec 1999 First appeal rejected.

16/1/2000 BBC 1 "Trail of Guilt" programme describes the investigation as a positive forensic achievement.

12/5/03 Criminal Cases Review Commission (CCRC) refers case for second appeal.

July 2004 Appeal Court quashes conviction and orders a re-trial.

20/4/05 – 11/7/05 Re-trial – Jury fails to reach a verdict after nearly 28 hours deliberation

31/10/05 – 9/2/06 Second re-trial. Jury fails to reach verdict after 39 hours deliberation over eight days. Conviction is formally quashed by Judge.

No doubt frustrated by being unable to interview Mr B., the police rightly checked out other possibilities. On 22nd February, a week after the murder and after already spending a curiously long time taking statements from Mr Jenkins, they received a preliminary view from the forensic science service that microscopic blood specks on the clothes of Billie-Jo's foster father, Sion Jenkins, had been found and they could be consistent with impact on a surface that was wet with blood. Consequently Mr Jenkins was arrested on 24th February, interviewed over two days in the presence of his solicitor and released on bail the next day.

While this evidence seemed to be a powerful breakthrough, there seemed to be no time interval when Mr Jenkins could have committed the murder. The Jenkins' had four other daughters as well as their foster daughter and Saturday 15th February 1997 was a typically hectic day in the life of such a family. Sion Jenkins returned with two of his daughters Lottie and Annie around 3.20 pm having picked up Lottie from a clarinet lesson and dropped off two of her friends. All three left again within a few minutes to go to buy white spirit, leaving Billie-Jo still painting the doors. That Billie-Jo was still alive on their arrival has never been disputed, Annie aged 12 described how she spoke to her before leaving, indeed there did not appear to be any time frame previously when Mr Jenkins was alone with Billie-Jo that afternoon.

Annie and Lottie, aged 12 and 10 years old respectively, were interviewed the day after the murder and the interviews were videotaped, their evidence if believed excluded the possibility that their father had committed the murder. When Lottie was asked in the interview whether there was any time between when she and her father left the house she

said “No, I like came out and he came out just after me and then shut the door”. Annie is a little less clear in her interview about her recollection of details; at one point she says “we just all walked out together” but then suggests she waited for a short time with Lottie for her father to join them. When asked how long they waited she said “A few minutes, about two minutes, one minute”. Later in the same interview she suggests that her father was not in the house during this short period but “next to the Opel, next to our other car” (Court of Appeal Judgement 21. 12. 1991: 7). If this is correct it would explain the apparent contradiction between Annie’s account of waiting by the car for a minute or two and the recollection of both girls that their father left the house into the front garden at the same point in time as they did. More importantly if this is correct it would leave Billie-Jo alive at the back of the house and eliminate any possibility that Sion Jenkins had killed her.

Probably in a state of shock after the murder, Mr Jenkins had given some incorrect and confused accounts to the police of what happened during this short return to the house, initially saying he did not go into the house then later accepting that he did. Furthermore the quick departure from the house appeared suspicious as the trip taken to buy white spirit was unnecessary, there being some found later in the back of the utility room. In addition a circular route was taken around a local park. The explanation given was that there was first a debate about whether to paint anymore that day and then the discovery that no-one had any money on them. The prosecution were to interpret this as “simply getting the children A and L away from the scene and giving himself time to think” (Court of Appeal 1999: 4). In another context it could just be seen as the typically complicated interactions of a large family on a busy day. Whatever interpretation might be made of this, the children’s evidence amounted to significant alibi evidence for their father that would need to be somehow undermined if a case could be made against him.

On his release on 25th February Sion Jenkins was told that if he returned to his family his children would be taken into care (Woffinden 2000: 21). Consequently he left for his parents’ home in Aberystwyth where he remained until rearrested and charged on 13 March.

With Mr Jenkins out of the picture the police began some intensive work with the rest of the family. On 25th February, following her fathers arrest, Annie was interviewed again by the police. She continued to maintain however that her father had followed her out “a

few seconds afterwards” and when reminded that in her first interview she had said she waited a few minutes she replied it “really wasn’t long, it was like, it was really short. I think it was like an amount of time for someone to close the door and lock it and then follow on afterwards” (Court of Appeal 1999: 8). Given this “unhelpful” consistency the police decided that the next day they would tell Mrs Jenkins about the bloodstains, their approach seems to have been unequivocal: -

“The relevant pocket book entry reads: ‘Told them to feed into Mum’. On the following day Mrs Jenkins was informed. The pocket book entry records that the officers spent two hours convincing her that her husband had murdered Billie.”

(Court of Appeal 1999: 8)

The Court of Appeal Judgement of 1999 then describes a gradual change in the evidence of Annie and Lottie and in the, previously supportive, attitude of Mrs Lois Jenkins: -

3rd March (more than two weeks after the murder and the children’s first videotaped interviews). – Mrs Jenkins told the police that Annie now said that her father had run down the steps in a funny mood and told them to get in the car and that he had refused to let her back in the house. Also she claimed Annie had said he had been cross with Billie.

7th March – Mrs Jenkins made a statement that Sion had a bad temper and had been violent towards her and the children.

17th July Mrs Jenkins claimed Annie had repeated basically the same story as on 3rd March.

27th November Mrs Jenkins reported that Annie had said she was pressurised by her father such that she was not sure what to say to the police.

22nd December Mrs Jenkins reported that Lottie said she could not recall the details of her return home after the clarinet lesson

Extensive research on witness testimony and memory however gives a clear preference, in terms of reliability of recall, to information given soon after the event rather than long after (McKenzie and Dunk 1999: 183). The potential of suggestion to influence memory

especially in children is also well documented (Boakes 1999: 114, Mortimer and Shepherd 1999: 47). However the above claims about things said by the girls came only from their mother, Lois, and never directly from the girls themselves to any other party. Furthermore the girls, when re-interviewed by the CCRC in 2002, could not recall making any such comments and continued to support the version of events that effectively exonerated their father (Jenkins and Woffinden 2008 Ch 33 and 48)

On 17th March the police had consulted a psychiatrist and a social worker/family therapist about a further interview with the children. Their advice sounds disturbingly familiar to the “therapeutic” interventions used in “trawling” operations by various police forces in relation to historical sexual abuse cases. Richard Webster (2005) has comprehensively described this process of inviting accusations (which in some cases offered social work support to assist ‘disclosure’) and interpreting the lack of accusation as a problem of denial. In this case the advice of such experts, as described by the Court of Appeal, is similar in the “catch 22” assumption that the accounts given the day after the event must have been wrong: -

“They advised that Annie had had her own thoughts reconstructed by the appellant, and now needed to have them deconstructed to allow what she knew to become evident”

(Court of Appeal 1999: 9)

If this is true, the appellant (Sion Jenkins) must have achieved this reconstruction immediately following the traumatic events in order to ensure that both daughters could give him such robust backup the very next day in police interviews. The police on the other hand had a great deal of time to “deconstruct” the evidence as they communicated over a long period with Mrs Jenkins and the children including the meeting following the expert advice which was conducted by the police without social workers present on 20th March. At this meeting the whole family were informed of the blood evidence (although it seems they already knew via Mrs Jenkins) and of the fact that the police had discovered that Mr Jenkins had fabricated some information on his application for his current Deputy Head Teachers job.

This discovery of the fabricated application seems to have been interpreted as the last necessary piece of the jigsaw as far as charging was concerned. On 13th March Mr

Jenkins was arrested and charged with obtaining a pecuniary advantage by deception and on the 14th March he was charged with murder.

The outcome of these events was that it was unclear to the defence what the children might now be saying and consequently the defence felt unable to use their evidence. As will be seen below the eventual media response to Sion Jenkins acquittal in 2006 was that the jury had not heard all the evidence. The press were however to neglect to say that the original trial had deprived Mr Jenkins of his only alibi witnesses not to mention almost all of the relevant and crucial information about Mr B.

At Sion Jenkins' first appeal in 1999 Anthony Scrivener QC submitted that the inevitable result of the police conduct was that the evidence of Annie and Lottie would be undermined. A report from consultant clinical psychologist Dr Valerie Mellor was particularly critical of the conduct of the meeting on 20th March and its potential to "adversely affect the reliability of their recollections" (Court of Appeal 1999).

The Court of Appeal judges despite their open account of the process, much of which is described above, could find nothing to criticise in the police inquiry: -

"However, we have no hesitation in rejecting the suggestion that the police embarked on a deliberate campaign to influence the children and taint their evidence so as to damage the defence of the appellant. They were entitled to seek to persuade Mrs Jenkins that her husband was the killer. On the basis of the finding of Billie's blood on his clothing, the case reasonably appeared to them to be overwhelming."

(Court of Appeal 1999: 12)

Perhaps at the time, notwithstanding the presence of Mr B, it was not unreasonable for the police to be convinced by the blood. Although even in the most positive prosecution scenario the time available for Sion Jenkins to fly in to the most violent rage of his life, commit the murder, place plastic deep in the victim's nose, clean off any visible evidence and return to the car in an apparently normal state is at best only about two minutes. However while the police focus on Mr Jenkins at that stage might have been understandable, the Court of Appeal's refusal to allow Mr Jenkins' first Appeal in 1999 was not. The question of how the blood got onto Mr Jenkins' clothing was by that time highly disputed by numerous experts.

The Blood Evidence.

“The court room is the worst place in the world to try to determine scientific truth”

(Dr David Drucker speaking on “Newsnight” BBC 2 11 June 2003 in relation to the acquittal of Mrs Trupti Patel.)

The failure through 3 trials and 2 appeals for anything conclusive to be established in relation to the 158 microscopic blood specks found on Sion Jenkins clothes tends to give considerable support to Dr Drucker’s assertion. A layman’s ‘common sense’ assumption, given the nature of the attack, would be that the person responsible for shattering the victim’s skull with numerous blows with a heavy metal tent peg would be covered in visible blood. As the journalist Bob Woffinden describes: -

“If you or I had battered someone to death in a fit of temper with a metal tent peg and the crime had been almost immediately discovered they’d have been bringing the evidence to court by pantechinon. In this case there was almost nothing”

(Woffinden 1998: 28)

Some professional experts back this view: Consultant neurosurgeon James Palmer described to Channel 4 (1999) how the scalp bleeds so profusely on incision that gowns and goggles are frequently sprayed with visible blood during surgical procedures.

“Having seen the scene I’m surprised that the attacker wouldn’t have been more covered in blood and even possibly bone fragments”

(James Palmer Channel 4 1999)

Evidence in other cases supports this view, for example forensic expert Steve Hayward in relation to the “Cardiff Newsagent Three” case (BBC Wales 1996). The similarity with this case is that the victim had also been struck repeatedly over the head with a metal object (probably a shovel).

The prosecution experts maintained at trial that a spray of microscopic blood, invisible to the eye, would result from impact with a surface wet with blood and that the large drops of visible blood would be projected away from the attacker. They conducted experiments using a pig’s head that demonstrated this possibility sufficiently to convince the jury in the first trial in 1998. Channel 4’s ‘Trial and Error’ (1999) however consulted Professor Neil Strickland of the Royal Veterinary College who pointed out two fundamental, and

from a scientific point of view one would have thought quite basic, flaws in these experiments. Firstly the skull of a dead animal does not have the circulation to produce jets of blood and secondly the structure of a pig's skull is very different from that of a human, in fact he asserted: -

“I would have said almost any animal apart from the pig would have been a better comparison to the human skull”

(Prof. Neil Strickland, Channel 4 1999)

From the first trial onwards defence experts put forward the view that the microscopic specks of blood resulted from a spray exhaled in Billie's dying breaths or exhalation of air from the lungs after death. At the third trial an experienced nurse described how this type of event quite commonly occurred after death often accompanied by a sudden noise. She frequently warned relatives that this might happen as it could come as a shock (Hastings Observer 17/1/06).

According to journalist Bob Woffinden, describing the first trial, the lack of evidence was obscured by “conflicting theories of advanced neurosurgery, which concern abnormal breathing patterns associated with brain injury” (Woffinden 1998). The conflicting theories continued throughout all three trials and two appeals without resolution. A full account of these debates would require considerable scientific expertise and an expansive volume of information. A very basic summary is as follows: -

The pathologist Dr Hill concluded that the cause of death was severe head injury. The lungs were hyper-inflated due to blood obstructing the airways.

Two forensic scientists for the defence Mr McKirdy and Mr Webster carried out experiments to show that a substantial exhalation of air could expel blood from the nose so as to create a pattern of very fine blood spots. In support a specialist in respiratory diseases Professor Douglas maintained that the speed of airflow was the crucial factor rather than the amount of air expelled (Court of Appeal 1999: 5)

A neurosurgeon Mr Sinar for the defence felt that the nature of the injuries suggested that Billie may well have still been alive when Mr Jenkins found her.

Dr Hill for the prosecution felt death was more likely to have been instantaneous but that it was hard to be precise. He accepted that movement of the body (which according to Sion Jenkins' account he had done) could have released trapped air but that the amount suggested by the defence experts was "wholly unrealistic" (Court of Appeal 1999: 5). The paediatrician Professor Southall backed this view and the view that anyone present would have noticed if Billie was still breathing. The Court of Appeal Judgement (1999: 6) states that neither Mr Jenkins, the neighbour who came to the scene shortly after him or the ambulance crew saw any sign of life. However the tape of Sion Jenkins' 999 telephone call, replayed on both ITV and BBC News on 9 Feb 2006 tends to suggest that he thinks she might still be alive, he certainly makes no statement that she is dead.

Professor Trimble for the defence described how traumatic shock can confuse and impair memory. This is relevant to Mr Jenkins' recall of Billie's condition as well as some of his descriptions of events which the police interpreted as lies.

After the trial as part of the "Trial and Error" investigation an expert in breathing patterns Professor David Denison maintained that he was certain that there had been a misunderstanding of the evidence at trial. Vigorous breathing was not necessary as narrowing of the airways can cause air to flow much faster and blockages such as the blood and plastic in her nose would increase the speed of flow further. He conducted over 100 experiments, all of which obtained the same result. Just one eighth of a normal breath he concluded, would produce a spray of tiny droplets identical to those on Sion Jenkins' clothes and that the smallest movement of the body could release the air (Channel 4 1999).

At the first appeal in 1999 the judges did not accept that the confusion around the nature of air flow (there had been extensive discussion of 'minute' flow and 'peak' flow at the trial) rendered the conviction unsafe even taking errors into account: -

"We therefore doubt whether even in isolation, the mistakes made by the experts rendered the conviction unsafe".

(Court of Appeal 1999: 11)

The judges stood by the assumption that if a substantial exhalation of breath was required (an assertion now questioned by Professor Denison) that "nothing of that sort was

observed”. It is of course perfectly possible that Sion Jenkins was present when this happened but in his shock and confusion could not specifically recall it or even notice it.

The Appeal Court did allow Professor Denison’s new development of the defence argument to be heard despite acknowledging “considerable force” in the prosecution’s submission that they should not consider it because it was just fine-tuning of previous arguments. In addition two neurosurgeons Dr Sinar and Dr Campbell gave more information on how even a seriously injured and unconscious person will snort, sneeze and cough in an attempt to clear the airways. They also pointed out that people with head injuries often have clenched teeth and the tongue may block the airway preventing breathing through the mouth, hence causing air to be expelled faster through the nose.

For the prosecution Dr Hill asserted that no evidence could be found of the type of blockages required to fit Professor Denison’s model. While Mr Wain and Professor Widdicombe suggested that the position of Billie Jo was such that the blood would not have been projected as it was. There is an assumption here that Sion Jenkins did not move the body into different positions when he found her and cradled her in his arms. These arguments however convinced the Court of Appeal in 1999 and the appeal was dismissed. What the experts could not agree on was thus decided categorically by judges as it had previously been by 12 members of the public.

This left Mr Jenkins’ with the need for yet more new evidence in order to convince the Criminal Cases Review Commission (CCRC) to refer the case back for a second appeal.

In May 2003 the CCRC did refer the case back to the Court of Appeal. There was new scientific evidence and crucially the CCRC had re-interviewed Annie and Lottie who backed up the version of events they had given the day after the murder. The Court of Appeal requested that the CCRC investigate further the issues surrounding Mr.B. and for the first time the medical records of Mr B. were revealed including the psychiatric reports concerning the obsession with plastic bags and human orifices.

The appeal was successful on the basis of yet more scientific evidence about likely obstructions to the airway and how these could have affected breathing rather than on the issue of Mr B or Annie and Lottie. Professor Robert Schroter, a bioengineer and other

experts showed that Billie-Jo had an airway blockage known as pulmonary interstitial emphysema, after air was forced under pressure into the membranes separating the lobes of the lungs. The presence of this condition proved two crucial things that showed that the scientific evidence at the trial and first appeal was wrong or incomplete; firstly that Billie-Jo did not die instantly and secondly that she had suffered a blockage in her airway (Jenkins and Woffinden 2008: 292). The experts maintained that the blockage could have been caused by a spasm of the larynx when a trickle of blood went down her throat as she fought for breath. High pressure in the lungs meant that any movement of the body could have released the blockage and caused the spray of tiny droplets (Sandra Laville The Guardian 10/2/06). It was on the basis of this that the conviction was quashed and the first re-trial was ordered.

The Plastic and Mr B.

The piece of plastic was removed from Billie-Jo's nose by a neighbour who came to assist after Mr Jenkins found her (Court of Appeal 1999). The issue was not raised at the first trial (1998) or first appeal (1999) as the association with Mr B seems to have been missed despite the fact that when picked up by the police he had pieces of plastic in his underpants and around his person. Somehow the link seems to have been missed and the distasteful issue of the plastic in the nose was not revealed to the jury. The defence may have seen this even as potentially prejudicial to their client if the jury were to draw the wrong conclusions about it.

It was only at the time of the CCRC referral in 2003 and second appeal in 2004 that defence experts closely examined the neighbour's statement. They discovered that she described considerable difficulty in removing the plastic and concluded that it must have been forced deep into the nasal cavity with the aid of some form of object. On this basis the defence sought access to the medical records and psychiatric reports concerning Mr B. These revealed the obsessions he had with pieces of plastic and human orifices. The Court of Appeal were somehow unimpressed by this incredible 'coincidence', largely because of confusion around sightings, hence they ordered a re-trial on the basis of the new scientific evidence rather than this or the CCRC evidence from Annie and Lottie. The police had claimed that witness statements about when and where Mr B had been seen ruled him out as a suspect, however in 2002 The CCRC examination of the

HOLMES computer records of the investigation showed that this was not necessarily the case nor could it be shown that all the clothes he was wearing on the day had been tested for blood (Jenkins and Woffinden 2008: 278)

At the second and third trials the jury were not allowed to see or hear the psychiatric reports on Mr B. They were aware of the plastic in the nose and that Mr B was found with pieces of plastic on his person but the defence were not allowed to reveal the true nature and extent of his obsession. It was not the allegations of domestic violence made by Lois Jenkins that constituted the crucial evidence that the jury did not hear as the media were to assert. It was the “extraordinary evidence concerning another suspect” (Mr B) (Bob Woffinden interviewed on Channel 4 News 9. 2.06) that was the most significant gap in the information provided to the jury. Despite this, two juries still did not convict Mr Jenkins.

The legal basis of not revealing Mr B’s records is that Mr B was not on trial, Mr Jenkins’ trial was not to be allowed to become that of Mr B. However it is interesting to speculate whether, had both men been tried on separate evidence in separate places with separate juries, at the time of the first trial, whether both would have been convicted on two entirely different versions of reality? If Mr Jenkins was (perhaps properly) to be denied the right to ‘try’ Mr B. within his own trial then it is surely unfair to subject him to one, let alone two more trials when the juries cannot consider such overwhelming evidence of an alternative scenario. The Court of Appeal and the CPS decisions to pursue a second and third trial could never be considered fair without some exercise of Orwellian ‘doublethink’ (Orwell 1948).

A Prosecution Irrational in its Persistence.

It is the assertion of this thesis that the first trial of Sion Jenkins resulted from a one-dimensional focus on one suspect largely to the exclusion of other considerations and other leads. The case demonstrates a classic “case construction” where each aspect of the events is interpreted in a way that supports the prosecution position and anything that points elsewhere is sidelined. Somehow the extraordinary factors concerning Mr B were absent from the first trial and the first appeal. While the first trial amounted to a serious

miscarriage of justice what happened over the following eight years became profoundly irrational.

The weight of the evidence simply did not support Mr Jenkins' conviction from a purely logical viewpoint. However to take a more conservative view, the notion that this case could be proven "beyond reasonable doubt" is fanciful. To maintain such a position would require nothing less than an exercise of George Orwell's notion of "doublethink", "the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them" (Orwell 1949: 223). Yet, in theory at least, the police, much of the legal establishment and the media have held this position throughout three trials and two appeals. After the first appeal failed, despite significant new scientific evidence, the CCRC eventually referred the case back to appeal. The appeal was allowed but a re-trial was ordered. Despite the jury's lack of detailed knowledge about Mr B. the re-trial resulted in a hung jury. Juries in murder trials usually conclude guilty verdicts, this result surely, combined with all the preceding events, could only logically suggest that there was more than reasonable doubt. The CPS decision to pursue a third trial seems to suggest a desire to convict Mr Jenkins at all costs. The CPS must have been increasingly aware of all the doubts, disputes and uncertainties that have been played out over the years and at the same time apparently continued to believe that the legal process in this case still has the capacity to provide a fair trial and proof beyond reasonable doubt. In summary those doubts and disputes are as follows: -

1. The uniquely bizarre link with an alternative suspect given the plastic bag evidence creates the massive statistical improbability of two people, in the same locality at the same time as a rare event, sharing the same complex and disturbed need to force plastic into human orifices. By the time of the second appeal at least, the CPS were fully aware of this matter.

[The prosecution's best attempt to explain this seems to have been to suggest that Mr Jenkins did this to stem the flow of blood (Paul Harris, Daily Mail 10. 2. 06). While this is not entirely inconceivable it is highly unlikely given that Billie would have been bleeding profusely from the head in an uncontrollable way (blood was apparently on the walls, garden trellis and all over the patio). What is even more unlikely is that an implement would have been used to force plastic deep into the nasal cavity if the purpose

was to stop bleeding. Furthermore the extraordinary co-incidental link with Mr B's obsession would still remain.]

2. The prosecution's position on the blood evidence was at best unresolved despite the input of over 30 experts, in reality new evidence had made their case on this unsustainable. Categorical decisions made by judges or juries cannot be reliable when expert evidence is so disputed.

3. The time frame for Sion Jenkins to commit the murder and present himself as if nothing had happened is hardly plausible

4. The effective elimination of the evidence of Mr Jenkins' daughters Annie and Lottie deprived Mr Jenkins of his main defence witnesses. The treatment of Annie and Lottie over the days, weeks and months following the murder, may have reflected what is sometimes termed "retroactive interference" where memory can be changed, confused or contaminated by information gained subsequently through leading questions or conferring with others (Cohen 1999). Children are particularly susceptible to such influence especially if put under pressure: -

"Inappropriate conversational behaviour by an interviewer risks confirming and compounding the frailty of children's testimony; introducing error, distorting and even destroying the child's account."

(Mortimer and Shepherd 1999: 59)

In fact the supposed changes in their evidence came not from them but from their mother and as adults they later indicated that they had not changed their story to the independent CCRC and their re-collections continued to alibi their father.

Given this set of circumstances the sheer persistence of the prosecuting authorities in their actions against Mr Jenkins and the media's continuing implications of guilt seem to defy logical explanation. What follows is an attempt to give a partial explanation of this apparent persistent irrationality in terms of the conceptual frameworks of "Groupthink" as described by Irving L. Janis in 1982 and "Moral Disengagement" as described by Albert Bandura in 1999. The two concepts are closely linked; Groupthink relies upon a process

of moral disengagement while moral disengagement is more powerfully enacted in cohesive groups.

Groupthink

Irving Janis (1982) described the concept of 'groupthink' in relation to a number of US foreign policy fiascos in the preceding decades. Referring in the main to the inner groups surrounding US Presidents he used the term to try to explain why highly intelligent, educated and well informed people pursued policies that seemed wildly irrational and doomed to failure. To give one example the invasion of Cuba by 1400 Cuban exiles in 1961 resulted in the almost immediate surrounding of the force by 20,000 Cuban troops. The contingency escape plan if this happened involved an escape to the mountains to join other rebels. The mountains however were 80 miles away from the Bay across swamps and jungle. The American led plan was according to Janis the result of a loss of rational judgement epitomised by 'groupthink'.

“Groupthink refers to a deterioration of mental efficiency, reality testing and moral judgement that results from in-group pressures”.

(Janis 1982: 9)

Groupthink has two central features: Firstly that the decision making groups are highly cohesive and secondly that they are based on a high desire for concurrence. This concurrence-seeking discourages or excludes any significant degree of critical thinking.

Janis lists seven major defects in decision making that arise from 'groupthink': -

1. Discussion is limited to a few rather than a full range of alternatives.
2. The objectives to be fulfilled and the values implicated by the choices are not surveyed.
3. The group fails to examine the risks inherent in the action initially preferred by the majority.
4. Any actions not originally favoured are neglected.

5. Little attempt to get expert opinions on alternatives
6. Selective bias towards factual information that supports preferred policy
7. Failure to have contingency plans to cope with setbacks.

This description has clear parallels with the notion of ‘case construction’ (McConville Sanders and Leng 1991) and seems to be reflective of the approach taken in the investigation of Billie-Jo’s murder especially in relation to the focus on one scenario at the cost of any other leads. Innes (2003) observed that case construction is most pronounced at the last phase of the enquiry as the emphasis is on “trying to predict and neutralise any alternative accounts or mitigating factors that the defence counsel might choose to offer” (Innes 2003: 215). In this case the process continued at every stage of the nine year scenario, especially in relation to drawing more and more scientists in to dispute every doubt the defence might present. Adversarialism is at the heart of case construction and helps foster the cohesiveness required for groupthink. The investigation only sought ‘truth’ that backed their version of events. Perhaps most significantly the prosecution refused to review their position in spite of doubts and confusions that arose over the years. The initial preferred policy had to be pursued at all costs.

While comparisons between this case and the political leadership scenarios described by Janis are not exact, there are certain key aspects of the groupthink theory that seem to have significant parallels. The key features of groupthink as described by Janis are closely related. Those that are most relevant to this case are discussed below, namely high cohesiveness, group pressure for concurrence seeking, shared illusions of unanimity and invulnerability, suppression of personal doubts and docility fostered by suave leadership.

High Cohesiveness

The cohesive nature of policing which stems from the nature of the work has been well documented (Chan 1996, Holdaway 1983, Reiner 2000). Furthermore a major murder investigation sets up a large team dedicated to a serious and often difficult task. There may be pressure from the public and from within the force to achieve results (Innes 2003: 94). What actually went on within the investigation is of course only known by those

involved, however some insight was provided by the BBC 1 programme “Trail of Guilt” broadcast on 16th January 2000. The programme was made with the full co-operation of Sussex police following the rejection of Sion Jenkins’ first appeal, and represents a celebration of the investigation. Key players in the investigation such as Chief Superintendent Jeremy Paine and forensic expert Dr Adrian Wain speak with certainty about the evidence, and re-enacted scenes show excited detectives making discoveries such as Sion Jenkins’ falsified application form. The significance attached to this piece of information is apparent from the film.

Just how cohesive the team was is only known by those involved but what the whole process shows is that if groupthink provides any explanation its influence was pervasive. The Crown Prosecution Service (CPS) have supported the prosecution to an unprecedented degree by pursuing a third trial, the court of Appeal has been reluctant to accept the alternative scenarios or criticise the police or CPS. DCS Paine stressed in a media interview after the second appeal that there had been no criticism of the police despite the quashing of the conviction (www.justiceforsionjenkins.org.uk). The cohesiveness of the prosecution group was maintained by the implication that this was a technical setback and the original position was sound.

At the second appeal the Court of Appeal Judges seemed to be doing all they could to maintain the illusion that the case was really about scientific technicalities rather than fundamental flaws. They ordered a re-trial on the basis of more scientific evidence, rather than on the remarkable revelations that were emerging about Mr B. (then known as X). Lord Justice Rose stated: -

“As to X there is nothing in the material before us to suggest that this aspect of the matter renders the conviction unsafe”

(Court of Appeal Judgement 2004)

The denial of statistical probability that is reasonable to assert in relation to the plastic bag evidence is extraordinary even regardless of timing of sightings which the CCRC had shown not to rule out Mr B. It is unclear whether this is a genuine belief stemming from the pervasive nature of groupthink or whether it is pure cynicism. It certainly denies the notion of reasonable doubt and echoes similarly bizarre statements from the Court of Appeal such as that produced in order to maintain the conviction of Michael Stone in

2005. In this case the Court of Appeal concluded that the prison informer Damian Daley, who provided the only remaining evidence against Stone, was on this occasion telling the truth. Notwithstanding his career criminality, self confessed lies and drug addiction, Daley was telling the truth because he said that he gave evidence because he just felt “guilty sort of thing towards that little girl”. This to the Appeal Court was not only believable but “devastating to the defence” (R v Stone EWCA Crim 105, 2005 Para 86). That such a serious matter could hinge on such a bizarre belief in Daley’s sudden turn of honesty and compassion illustrates the potential of the most senior judges in the land to draw utterly irrational conclusions. How intelligent, highly educated people do this is the pre-requisite question in the notion of groupthink.

The groupthink in the inner circle of US Presidents did not remain internal but mobilised an entire set of international actions of huge significance with little resistance from other institutions in US society. Similarly if groupthink is occurring in police investigations it can permeate strong allies in the CPS and the judiciary. Furthermore in this case, as will be shown below, the same one-dimensional approach seemed to absorb the vast majority of the British media

Concurrence Seeking

Cohesiveness clearly requires concurrence, and in groupthink, alternative ideas and critical thinking outside of the accepted position are strongly yet subtly discouraged. The adversarial approach may enhance this by tasking the defence with the role of thinking in alternative ways. Arguably it is the job of the police to establish a case not to undermine it. Again one can only speculate as to whether alternative critical thinking was encouraged in this investigation but the assurance of the man leading the investigation was categorical, speaking before the second appeal DCS Paine commented: -

“I would not have charged him with murder unless I was utterly convinced he was guilty of this crime. I remain convinced of it”

(Bennetto 6/3/04 The Independent)

This message was subtly reinforced even after the acquittal of Sion Jenkins (on the basis of a second hung jury) on 9th Feb 2006. A police spokesman reminded the public of

“what this case is really about, a teenager called Billie-Jo” and the official line was that the case would be reviewed not necessarily re-opened (BBC TV and ITV News 9/2/06). This subtle implication of guilt was swallowed almost wholesale by the main news media. BBC and ITV 6pm news on the evening of the acquittal acknowledged the disputed blood evidence but failed to mention the alternative scenario of Mr B which one might reasonably speculate had been a significant factor influencing the last two juries, even given the limited information they had available to them. (Later programmes Channel 4 News and the BBCs Newsnight did mention this matter but without the degree of emphasis it might warrant). In fact a considerable proportion of both channel’s coverage focused on the distress of Billie-Jo’s natural family. ITV showed an interview with her Uncle, who made it clear he believed Mr Jenkins to be guilty, and both channels showed the same message in comments from her aunts who had just staged an assault on Sion Jenkins. To offer people who have just committed a criminal offence the immediate chance to say how proud they are of their actions is probably a first in television news.

Concurrence with the police view was taken further by ITV in obtaining the view of their crime correspondent Albert Kirby, a former senior detective. Considering the scene of the crime Mr Kirby was troubled by the lack of access at the back of the house for any intruder to enter. This was a somewhat curious statement given “Trial and Error’s” view that intruders had entered through a gate at the rear and that the path at the back was an obvious escape route. It was particularly curious given that Mr Kirby made the comments standing on that very path. As for entrance from the road Mr Kirby concluded that: -

“The chances of somebody walking down that road and knowing that there was a girl by herself at the back of the house really begs more questions than it answers”

(ITV News 9. 2. 06)

What ITV failed to question or even raise at all were the remarkable circumstances surrounding Mr B. and his presence at various times somewhere in the park directly opposite the front of the house.

The newspapers the next day were virtually unanimous in their coverage of accusations made by Mrs Lois Jenkins about domestic abuse by Mr Jenkins making much of the fact that some of this information had been excluded from the jury. This was the information that the juries did not hear, no mention was made about the very limited information

given concerning Mr B' or the unused witness statements that put him very close to the scene of the crime at the relevant time.

One cannot know whether consensus seeking dominated the police enquiry internally but there is little doubt that the consensus message was strong enough to dominate the CPS, much of the higher judiciary and the media.

Shared Illusions of Invulnerability and Unanimity

As has been discussed above in relation to Jonathan Jones and others (Chapter 5) this would not be the first murder where the certainty of a 'close perpetrator assumption' might be a factor in leading the investigation up the wrong avenue. Professor Martin Innes described on BBC's 'Newsnight' (9. 2.06) how this statistical probability would have been a natural police approach and in a rare discussion of possible flaws in this investigation John Cooper QC acknowledged that the case may have been constructed in a tunnel vision fashion: -

"Make your decision first and then find reasons for it.....it seems that it may well be a situation whereby an individual has been selected and then every aspect of evidence, however irrelevant it might be, is put into the pot to add to the poison. There's a concern that that might have happened in this case"

(John Cooper 'Newsnight' 9/2/06)

It seems in this case that this likelihood became a near certainty when the blood spray was discovered. This however seems to have become not only the prevailing view of the prosecuting authorities but one that remained persistent despite numerous developments. The message from the police was always that they could not be wrong and the CPS seemed to be sure that their public duty was to continue with the prosecution without any self-critical analysis. Even after the acquittal, with estimates of £10 million to the public purse being quoted, the Chief Crown Prosecutor for Sussex, Sarah-Jane Gallagher, was invulnerable to any criticism and confident in justifying their action: -

"I believe in this case we have fulfilled our role as we should have done "

(Sarah-Jane Gallagher speaking on Channel 4 News 9. 2. 06)

In the criminal justice system, and it seems especially in this case, the prosecution authorities are invulnerable to any criticism either professionally or in the media and that invulnerability and unanimity may be more of a reality than an illusion. Given the overall strength of this prosecution group message it is significant, that aided by the efforts of the defence team, two juries were able to resist succumbing to the message of the authorities and give some credence to the balance of evidence in a way that the CPS could not.

Suppression of Personal Doubts

Both juries in the last two trials were placed under considerable pressure to come to a decision, both were invited to reach a 10 to 2 verdict and both deliberated for over a week (28 and 39 hours respectively). The second jury was told by the judge on the sixth day that there was no time limit. Arguably the courts were not encouraging the application of reasonable doubt, although in fairness the judge in the second trial did clarify the meaning of that term at the jury's request. However, even if the final jury had concluded a guilty verdict, surely a state of reasonable doubt would have existed by that stage. As discussed above if the police had any doubts they certainly suppressed them very effectively.

Perhaps one indication of the way reasonable doubts had been suppressed was reflected in one of the few articles on the topic that were relatively sympathetic towards Mr Jenkins. Peter Wilby writing in 'The New Statesman' acknowledged the one-sided media coverage and the dangers of trial by media and the fact that his magazine was the first to question the conviction in 1998 in an article by Bob Woffinden. However Peter Wilby's conclusion that "the strongest argument for his (Jenkins) guilt was the lack of other plausible suspects" (Wilby 'New Statesman' 20. 2. 06) illustrates how the issue of Mr B has been sidelined in reports on the case. This is all the more surprising given that Woffinden's 1998 article had drawn some initial attention to evidence concerning Mr B.

The closing speech of Nicholas Hilliard QC, the prosecution barrister at the second trial, is interesting in respect of suppressing doubts. The prosecution had for much of the time portrayed the blood evidence as central to the case. Mr Hilliard's comments might be interpreted as suppressing his own doubts about this evidence or more likely trying to suppress the possible doubts of the jury. The interpretation that had been built up around

the circumstances and reactions of Mr Jenkins was used to suppress any doubts about what had largely been portrayed as the central issue. Mr Hilliard apparently warned the jury not to be distracted by the scientific theories (a curious request after they had listened to so many hours of expert debate) because: -

“There is a compelling case against the defendant before you get to the scientific evidence”

Furthermore the real doubt lay in mysteries of the criminal mind that they had not been able to examine: -

“Sometimes the reasons are complex, the reasons may be locked deep away in the personality of the killer”

There is perhaps here an implication that the in-group of the prosecution has knowledge of Mr Jenkins that the jury does not, an insight into the mind of a dangerous man. Despite the jury’s months of listening to scientific debate therefore: -

“It all goes to demonstrate how this case is nothing to do with blood spots, lungs or air pressures at all”

(Nicholas Hilliard QC quoted on ‘Hastings Today’ website of Hastings Observer 17/1/06)

It is not sufficient for groupthink to suppress the reasonable doubts of the ‘in-group’; success depends upon suppressing the doubts of those outside the inner group.

Docility Fostered by Suave Leadership

To describe people within the prosecution group as docile or suave in this instance is of course unfair and presumptuous without substantial inner observation. What can be said is that key figures such as the forensic expert Dr Wain and DCS Paine, who led the inquiry, seemed to have played significant roles according to the programme “Trail of Guilt” (BBC1 16/1/2000). Furthermore both have been very clear in their certainty of Sion Jenkins’ guilt in comments to the media in that programme and on news clips (see above). The prestige and position of such people would be likely to set the tone for any investigation.

The website www.justiceforsionjenkins.org.uk claimed that Mr Paine had something of a personal vendetta in this case especially after the successful second appeal that seemed to strengthen a determination to maintain the conviction at all costs. A sentiment not surprisingly echoed by Mr Jenkins himself after his acquittal. The website claims that the Jenkins case “launched the celebrity career of Jeremy Paine” through his appearance’s on the BBC ‘s ‘Crimewatch’ programme in relation to the case. He later became a presenter on the programme in Sept 1999, the same month as the ‘Trial and Error’ programme was broadcast and two months before the first appeal. Any unravelling of the Jenkins’ case would not be helpful for someone in Mr Paine’s position.

Whether these factors had any influence on creating some form of docility or lack of critical expression in others is of course largely speculative, although it may be reasonable to suggest that some potential causative factors were present.

This discussion of groupthink differs from that of Irving Janis primarily because it makes assumptions about the in-group whereas Janis had access to documents or persons who could give more specific examples of the process. What supports the notion of some kind of process of this nature within the investigation is the degree to which the official “convictionist” line has been followed throughout the majority of the legal profession and the media. This process has adopted a certain moral interpretation that has been widely absorbed.

Innes (2003) describes police work as “a form of expressive symbolic communication.....a system of authority in society and mapping out of moral boundaries” (Innes 2003: 21). The police and the legal profession might be said to hold the official moral sanction. Where this moral position results in perceived injustice the position frequently has to be justified in some way. On occasions these justifications may be reasonable, on other occasions the injustice may simply be denied or unreasonably justified. This latter situation, it might be argued, requires the process described by Albert Bandura (1999) (largely in relation to inhumane political actions) as “moral disengagement”.

Moral Disengagement

‘Groupthink’ attempts to explain why intelligent, educated people might follow irrational courses of action that have extreme consequences. ‘Moral Disengagement’, as explained by Bandura in 1999, attempts to show how people who regard themselves, and are generally regarded and respected by others, as moral, decent and law abiding can nonetheless inflict inhumanity on others without offence to their conscience. In fact their actions become moral ones: -

“Moral disengagement may centre on the cognitive re-structuring of inhumane conduct into a benign or worthy one”.

Bandura (1999: 193)

The division of labour, limitations on roles and responsibility and relationships between organisations and institutions help to neutralise personal responsibility or problems of conscience: -

“Many inhumanities operate through a supportive network of legitimate enterprises run by otherwise considerate people who contribute to destructive activities by disconnected sub-divisions and diffusion of responsibility”

(Bandura 1999: 193)

While Bandura’s discussion was illustrated largely by political or foreign policy actions that he saw as inhumane, the notion also seems to apply to many miscarriages of justice and the Jenkins case is used here as an illustration. The lack of any apology, any regrets or acknowledgements of responsibility or indeed of any personal suffering that has resulted is dramatic in this case. In fact quite the opposite reaction has taken place both in the prosecuting authorities and in the media. The ‘moral high ground’ has somehow been completely retained by the system.

Bandura’s framework suggested six techniques for achieving moral disengagement: -

1. Moral justification
2. Sanitising or euphemistic language
3. Advantageous comparison

4. Diffusion or displacement of responsibility
5. Disregarding or minimising the injurious effects of one's actions
6. Attribution of blame to and dehumanisation of those who are victims of 'official' action.

As with aspects of 'groupthink' these overlap somewhat and some are more relevant than others to the situation under discussion here. For clarity however the discussion will use the six headings to discuss 'moral disengagement' in relation to the Sion Jenkins' case.

Moral Justification

The overwhelming message of moral justification that has been promoted in the Jenkins case is that the conviction was right. As discussed above the police and CPS remained adamant throughout the nine years of the conviction, and by strong implication afterwards, that they had got it right. The matter was not about injustice to Mr Jenkins but about justice for Billie-Jo, the CPS had acted according to their duty and the police would do their duty to review the case but not necessarily re-open the investigation.

The media's moral justification was initially largely focused on the natural family of Billie-Jo and what they, rather than Mr Jenkins, had suffered over the years (BBC and ITV primetime News 9/2/06). Interviews with relatives including Billie's uncle and natural father (ITV 9/2/06 and BBC Radio 4 17/2/06) hinted at a civil action against Mr Jenkins and gave a clear message of their belief in his guilt. Billie's father expressed anger that the third trial judge had refused to postpone the trial yet again to allow yet more scientific evidence to be considered. This involved the suggestion that the microscopic blood spray may have included elements of skin and bone. Given the rest of the scientific evidence and its disputed nature and the extent of Billie's injuries this would not in any event have been likely to undermine the defence (Jenkins and Woffinden 2008: Chapter 43). He also stressed the claims about domestic violence, some of which had not been heard in court. However such claims do not seem to stand up to the scrutiny of a rigorous analysis of how they came about (see Jenkins and Woffinden 2008: Chapter 48)

It was the allegations of domestic violence that headlined virtually every newspaper the day after the acquittal. The idea that this implied guilt in relation to the murder was implanted by headlines reflecting that of the Daily Mail 10/ 2/06 “What the Jury was not Told”. What the jury was not told about the details of Mr B was notably absent, neither was it stressed that the jury had been allowed to hear numerous attempts at character assassination including hearsay evidence of alleged incidents of violence by Sion Jenkins towards Billie. What might have been a constructive discussion about the safety of using hearsay evidence (a new provision of admissibility under the Criminal Justice Act 2003) and the effect on the presumption of innocence was also notably absent. The allegations made by Mrs Lois Jenkins were not new, they came about initially during the police process of convincing Mrs Jenkins of her husbands guilt (see above) and had been in the newspapers following his initial conviction (Channel 4 1999). This along with stories devoid of any foundation at all, notably the Sun’s “Foster Dads Sick Lust for Billie-Jo” (The Sun 6/ 7/98).

Whatever the extent of truth or otherwise in Mrs Jenkins’ allegations, and they are all strongly refuted by Mr Jenkins (Jenkins and Woffinden 2008), they are arguably irrelevant to the question of murder. While the stories are unpleasant, nothing remotely comparable to the murderous, frenzied and repeated attack on Billie-Jo is ever suggested by these accounts. The presentation of this overwhelming message however shows that moral disengagement is also pervasive. The media uses the weapon of the allegations to give almost total moral support to the clearly implied message of the prosecuting authorities and to their actions. In fact the implication is that the system has been over generous to the accused by not allowing prejudicial evidence to be heard. As Bob Woffinden expressed, writing in 1998 about the Jenkins case: -

“..the dodgier the conviction, the greater the smear job conducted immediately afterwards.....In this case the prosecution pulled out all the stops in its character assassination.”

(Woffinden 1998: 28)

Perhaps the most blatant attempt to reverse the message sent by two juries and assert moral justification through implied guilt was not surprisingly reflected in ‘The Sun’ (11/2/06). Under the headline “You Coward” the paper claimed that Mr Jenkins had refused the offer of an interview in return for taking a lie detector test. Here was ‘proof’

for Sun readers that the system had been right all along. In fact Mr Jenkins was wise to resist putting his trust in either a newspaper so obviously out to trap him or a test which some research suggests has a rate of error of around 30%. (Zimbardo and Leippe 1991: 306-7)

Sanitising Language

On the day of the acquittal John Cooper QC speaking on Channel 4 News 9/2/06 assured the public that the CPS had “various goes” at convicting Mr Jenkins “quite properly”. The police talked sensitively about Billie-Jo and the CPS referred back to the wording of their evidential and public interests tests in a conscientious and unapologetic tone (BBC and ITV News 9/2/06). However sanitising or euphemistic language is usually used to reduce the impact of negative admissions (e.g. Co-lateral damage). In this case the authorities made no negative admissions thereby avoiding the need for such indulgences.

The way the legal system uses sanitising language has however been graphically explained in the past by Paul Hill of the ‘Guildford Four’ in his book “Stolen Years”

“I learned to say for example that I ‘retract’ my confession. No, that will not do: I do not ‘retract’ my confessions. I take them, screaming, and I rip them up and throw them in the face of the policemen who framed me and the judge who sentenced me. That is my ‘retraction’.”

(Paul Hill 1990: 60)

Advantageous Comparison

The technique of advantageous comparison is epitomised in the expression commonly used in relation to the legal system or the police force “it is not perfect but the best in the world” thus enabling the fallout of any failing to be minimised. Any harmful actions are taken to avoid a greater problem and justified by the level of threat posed.

Sion Jenkins is therefore even if ‘technically innocent’ portrayed as a threat through character assassination and by expressing allegations of domestic abuse as if established fact (for example Tony Parsons ‘The Mirror 12/2/06). The prosecution authorities have

tried their best to protect society from this threat. Moreover while the police remind the public that “this is about a teenager called Billie-Jo”, Mr Jenkins is criticised for not saying enough about Billie in his short statement to the media following his acquittal. Channel 4 News Presenter John Snow asserted that it was “most extraordinary to come out of that case and not mention Billie-Jo” (Channel 4 News 9/2/06). It was left to his interviewee Bob Woffinden to point out that he had in fact mentioned Billie and that for the wrongly accused it is often the case that “the criminal justice system does not give you the capacity to deal with ordinary emotions”. This issue is expanded below under ‘Dehumanisation of the Victim’.

The art of advantageous comparison enables the “investing of harmful conduct with high moral purpose” (Bandura 1999: 196) and can nullify any embarrassment or pangs of conscience that the authorities might incur.

Diffusion or Displacement of Responsibility

Perhaps the best example in the Jenkins case of diffusing responsibilities comes from the CPS. Their job is to test the quality of the evidence and assess the public interest in any prosecution. Their continuance of the unfounded case against Sion Jenkins caused enormous suffering to him and those close to him and cost vast sums from the public purse (£10 million was usually quoted as an approximate figure). The ordering of a retrial by the Court of Appeal could be seen in the same light although the CPS could have dropped the case before the second trial and certainly should not have pursued a third trial. The comments from the Chief Crown Prosecutor for Sussex however were not only unrepentant but self congratulatory. It was not a question of cost it was a question of doing what was right. Everything referred back to the interpretation of the prosecution test, in these terms: -

“The decisions were the correct ones” the important role of the CPS is to “weed out cases that are fanciful”

(Sarah-Jane Gallagher CPS, Channel 4 News 9/2/06)

There was no expression of regret or sympathy expressed in the clip. (The possibility that this could have been edited is acknowledged). Responsibility was most effectively

displaced, not to any person or agency but to the rules that could not be criticised or questioned. This process of referring the problem directly back to the system that caused it has been described in terms of “autopoeisis” in relation to miscarriages of justice (Nobles and Schiff 2000). In Bandura’s terms this bureaucratic mentality reverses the moral imperative: -

“What was once morally condemnable becomes a source of self valuation. Functionaries work hard to become proficientand take pride in their destructive accomplishments”

(Bandura 1999: 196)

“The best functionaries are those who honour their obligation to authorities but feel no personal responsibility for the harm they cause”

(Bandura 1999: 198)

Groupthink also provides a good resource for the diffusion of responsibility through the unity and cohesiveness of the group especially where its influence has pervaded the wider community.

Disregarding or Minimising the Injurious Effects of Action

It should be apparent from the preceding discussion that little or no sympathy has been expressed either by the authorities or the media for Mr Jenkins or those close to him. The efforts at suggesting that he is a guilty man who has escaped justice provide the perfect cover by suggesting that he is in fact very fortunate. Moral sentiments can then be reserved for Billie’s natural family, for whose misfortune the authorities are in no way responsible.

This has not always been the case, with many miscarriages of justice sympathy and support, in the media at least, has been widespread. It is perhaps the pervasive groupthink and morally disengaged posturing of so many elements of society for so long that enables this wholly unsympathetic position to be maintained in the Jenkins case.

Attribution of Blame and Dehumanisation of the Victims of Official Action.

“Self censure for cruel conduct can be disengaged by stripping people of human qualities”

(Bandura 1999: 200)

In the BBC Programme “Trail of Guilt” (2000) DCS Paine describes Sion Jenkins as an arrogant man who will not admit his guilt. The dominant treatment of the domestic abuse allegations in the media and the assumption that these allegations are true, clearly suggest where the blame for the events lies.

The more subtle examples of the dehumanisation of Sion Jenkins, mainly in the media, are however highly significant not least because in some instances the process is based on an interpretation of Mr Jenkins’ reactions and comments that is grossly distorted and unfair.

Channel 4 News (above) was not the only media outlet to criticise Sion Jenkins for not saying enough about Billie-Jo on leaving the court, it was also mentioned earlier on the same programme that he “did not pay any specific tribute to his foster daughter”. It was a short statement in which Mr Jenkins needed to cover a number of issues. He did mention Billie largely in the context of justice for Billie through a new police investigation. He may well have felt that over emphasis on the victim might have been interpreted as insensitive given the attitude and attention being given to her natural family. The media were however merciless in their criticism as probably they would have been had he made ‘too much’ of a reference to Billie. Typically Carol Malone in the ‘Mirror’ accused him of emerging from the court “full of self pity and indignation” and that he “barely mentioned Billie”: -

“No , Sion Jenkins was much more worried about HIS terrible ordeal and the injustices that had been inflicted on HIM” (Emphasis in the original)

(C. Malone ‘The Mirror 12. 2. 06)

Mr Jenkins had suffered 6 years imprisonment (including serious attacks from other inmates), the loss of contact with his family including 4 daughters (whom along with Billie he did mention), the pain of endless wrongful accusation and endless stressful waiting for crucial court decisions. Despite this he was clearly not entitled to any

indignation or self pity whatsoever. [Writing later in his book Mr Jenkins says a great deal about Billie Jo and his feeling towards his family (Jenkins and Woffinden 2008)]

Many of the papers reflected on the account of domestic abuse that Lois Jenkins had sold to the Daily Mail (published 10/2/06). Jonathan Brown writing in the Independent (13/2/06) re-prints part of Mrs Jenkins' description of Sion in the days after the murder:

“Sion seemed strangely cold and distanthe offered no comfort....no trace of emotion”

(Lois Jenkins quoted in Brown, The Independent 13/2/06)

Again what may be a quite typical description of a person in grief and shock is portrayed in a sinister context. The de-humanisation of Sion Jenkins involves a fundamental falsehood – that grief, indignation at injustice and self pity at the loss of so much, are not reasonable and natural human reactions but indications of a cold and heartless individual - the kind of individual who might be capable of murder.

The strength of this illusion is apparent even in an article which is relatively sympathetic to Mr Jenkins. ‘The Sunday Telegraph’ (12/2/06) printed a long article written by Sion Jenkins four years earlier while in prison. The article is accompanied by a shorter article by Theodore Dalrymple that explains how the trauma of suffering a miscarriage of justice and being subject to the criminal justice system may make sensitivity and closeness to others more difficult. This he maintains may explain why Sion Jenkins' writing appears unemotional and why his “words chill by their detachment”. While injustice and imprisonment may well affect people that way the problem is that the article by Sion Jenkins is simply not as described but in fact includes many emotional and affectionate references to his family. He writes of his sadness at being denied the opportunity to attend the funeral of Billie, he writes of his love for his family including Billie and how he felt “heavy with the burden of grief at Billie's death”. Naturally he also reflects on his own situation but this is not divorced from closeness to the family: -

“For those wrongly convicted of murdering someone they love it is the worst of all scenarios. On the one hand, you are in shock and suffering the anguish of dealing with what has happened, yet every feeling of hurt and vulnerability is made doubly worse by your own arrest and conviction”

(Sion Jenkins quoted in Dalrymple, Sunday Telegraph 12/2/06)

Given the pervasive groupthink and moral disengagement that seems to have occurred in this case it was inevitable that whatever Sion Jenkins said, or did not say, would by necessity have to “chill by its detachment”

An Orwellian Nightmare?

“The key word here is *blackwhite*. Like so many Newspeak words, this word has two mutually contradictory meanings. Applied to an opponent, it means the habit of impudently claiming that black is white, in contradiction to the plain facts. Applied to a Party member, it means a loyal willingness to say that black is white when Party discipline demands this. But it means also the ability to *believe* that black is white, and more, to *know* that black is white, and to forget that one has ever believed the contrary.”

George Orwell “Nineteen Eighty-Four” (1949: 221)

George Orwell’s vision of a future society where all human pleasure, expression and rational thought has been reduced to the all encompassing “intoxication of power” (p 280) of the ruling ‘Party’ remains a seminal warning to human societies. The symbolic notion of the all powerful, all ‘knowing’ “Big Brother” remains part of our cultural language. The fact that our society is not that of Orwell’s vision is arguably in part indebted to the warnings inherent in the novel. The position of Sion Jenkins, while certainly a ‘nightmare’, was not that of Winston, the tragic hero of the novel. Winston did not have a committed defence team able to draw on innumerable experts from around the world to support his case, he did not have experienced journalists and TV producers willing to search out evidence on his behalf and he did not have a jury of ordinary people with at least the opportunity to resist the urging to convict.

The lessons of “Nineteen Eighty-Four” however are lessons for all societies at all times, they are essentially lessons about thinking and how easily, yet powerfully, thinking can be distorted. Furthermore Orwell’s message is that the manipulation of thinking and language is frequently the lethal weapon of the powerful. People who maintain that they have been wrongly convicted frequently describe a sense of powerlessness and disbelief

at what they experience from the legal system, as they feel that their view of reality and rationality is reversed by the authorities: -

Comments from participants in this study provide some examples: -

With reference to the Court of Appeal: -

“It’s a bloody nightmare, common sense seems to have been chucked out of the window. It’s Alice in Wonderland and Animal Farm all rolled into one”

(Nick Tucker)

Referring to recollections of the prosecution barrister’s speech: -

“I’ll be the first to admit that there is no direct evidence against the defendant but you know sometimes it’s what we don’t know rather than what we do know that’s important. That’s pretty much exactly what he said, inviting the jury to speculate on what hadn’t been tendered as evidence!”

(Jonathan Jones)

Referring to a trial judge dismissing a whole day’s testimony from an “unbalanced” witness, in distinctly Orwellian tones: -

“Ladies and Gentlemen of the Jury, yesterday did not happen”

(Mike Attwooll recollecting Mr Justice Jowitt)

What then might be the echoes of the Orwellian nightmare in the events surrounding Sion Jenkins?

Reality as Convenience: The Power of Doublethink.

“Doublethink” like “Blackwhite” in Orwellian terms requires the ability to believe two contradictory notions at the same time. Legal theorists frequently speak of the gulf between legal truth or proof and factual truth or proof (Duff, Farmer, Marshall and Tadros 2004) or legal truth as opposed to scientific or media truth (Nobles and Schiff 2000). Despite this the notion of proof beyond reasonable doubt is apparently believed by legal actors and generally accepted by the media. The same people simultaneously believe that better advocacy rather than necessarily evidence can be crucial to winning or losing a case and no doubt, had it happened, that a majority jury guilty verdict in a third trial after 39 hours of deliberation would constitute guilt beyond reasonable doubt.

The key to doublethink in this context is to use the version of reality that fits the requirements. It does not deny the truth that criminal trials seek to prove cases beyond reasonable doubt but it does deny the reality that, when this cannot be done, that principle can be effectively abandoned. Hence Appeal Judges can see nothing that suggests Mr B might have been involved in Billie-Jo's murder or similarly, in Michael Stone's case, they can see nothing that suggests that Damian Daley might have been anything other than truthful about Michael Stone's 'confession' (see pages 299-300 above). There is no contradiction in the assertion that Sion Jenkins influenced the testimony of his children in a few hours but the police did not in a matter of months or in saying that Mr B had no time (15 minutes) to commit the murder whereas Mr Jenkins (max 2 minutes) did. Neither does anyone suggest that Mr Hilliard's conclusion that the case had nothing to do with blood spray (see page 304 above) is an absurd affront to a debate that has gone on for the last nine years – an unequivocal statement that black is white.

In the legal world is vested the power to abandon one reality and seamlessly adopt an alternative one, the internal discipline that enables and preserves this technique is that the reality reverse must never be acknowledged. To ensure that this does not happen it is necessary to believe the new reality as wholeheartedly as the old and to be able to move between the two as circumstances require. The power to do this is invested in the intellectual and trusted elite such that the doublethink can in turn pervade much of the media and many of the public. Any attempt by the defendant however to use such a technique of 'having it both ways' will be immediately interpreted as inconsistency, evasion and mendacity that supports the case against them.

The use of 'doublethink' requires the cohesiveness and concurrence thinking of the 'groupthink' framework. There are no revolutions in the legal world even though many defence lawyers privately and, even in a polite and measured way, publicly, are appalled when they witness blatant injustice. Adversarialism is not true opposition but a specific function of a highly cohesive profession (Morison and Leith 1992).

The 'party line' must be cohesive and the principles on which it is founded must be preserved at all costs. Hence the CPS in Mr Jenkins' case can maintain that they have acted entirely correctly in the relentless pursuit of an innocent man by restating their evidential and public interest test without addressing the key question of whether their

interpretation of that test, or the test itself, has been reasonable. In Orwellian terms the mind must develop a blind spot whenever a dangerous (non cohesive) thought presents itself: -

“The process should be automatic, instinctive. Crimestop they called it in Newspeak”

(Orwell 1949: 291)

The art of Crimestop is rarely more skilfully articulated than in certain Court of Appeal judgements which, as in the Jenkins and Stone cases, provide a comprehensive and apparently fair analysis while simultaneously arriving at conclusions that defy reason (nothing to link Mr B with the crime, Daley must be telling the truth etc). The finest legal minds are not surprisingly the masters of crimestop: -

“It needed also a sort of athleticism of mind, an ability at one moment to make the most delicate use of logic and at the next to be unconscious of the crudest logical errors. Stupidity was as necessary as intelligence, and as difficult to attain”.

(Orwell 1949: 291)

The Need for Hate Figures

Cohesiveness in the face of injustice requires not only doublethink but also moral disengagement which in turn requires moral justification. As discussed above the foundation of this justification is in the dehumanising of the defendant. This technique has also been described as a necessary requirement for the application of the death penalty by juries in the USA (Haney 2005).

The society of “Nineteen Eighty-Four” had institutionalised the figure of Goldstein as the enemy of the people and the figure of hate. The ritual of the ‘two minutes hate’ when Party members scream their disgust at an image of Goldstein is enacted on a daily basis and one of the features of this process is that it is so difficult not to join in (Orwell 1949: 13-19).

“The horrible thing about the Two Minutes Hate was not that one was obliged to act a part, but that it was impossible to avoid joining in. Within 30 seconds any pretence was always unnecessary”

(Orwell 1948: 16)

Following Mr Jenkins’ acquittal the media seemed unable to resist the compulsion to join in with several days of, albeit more subtle, hate directed at the victim of an injustice. The notion of injustice was lost, as the evidence had been, in an avalanche of accusations about domestic violence, fraudulent application forms and wholly unsubstantiated claims of sexual impropriety (see also Jenkins and Woffinden 2008: Chapter 47). The picture was created of a cold and self centred man on the basis of what he did *not* say. The public were bombarded with a carefully edited, guilt implicated, version of ‘what the jury did not hear’. The third trial of Sion Jenkins had gone with remarkably little reporting (only the local paper, the Hastings Observer, seemed to be reporting with even the slightest consistency) yet suddenly the media was all knowing, much to the incredulity of the one journalist who had followed the case throughout: -

“Who are these journalists writing these articles? I can tell you one thing, they weren’t at the trial”

(Bob Woffinden quoted by Zoe Smith ‘Press Gazette’ 16 Feb 06)

The prosecuting barrister Mr Hilliard had invited the jury to look for “reasons locked away in the personality of the killer” (see page 304 above). On behalf of the prosecuting authorities the media attempted to reveal those reasons by using largely false and irrelevant ‘evidence’ in order to promote the illusion that the prosecution had been right all along,

The Ministry of Justice

In Orwell’s “Nineteen Eighty-Four” society the Ministry of Peace concerns itself with war, the Ministry of Truth produces lies and propaganda and the Ministry of Love is the place of torture and death. It is an undeniable fact that the institutions of justice on occasions produce gross injustices. The tragedy of past injustices, and the vast literature of research evidence into the causes of these, does not seem to eliminate the systems’ ability to reproduce injustice.

Despite the failure in the end to convict Mr Jenkins (a note of hope for public reason) the prosecuting authorities have managed to emerge not only with immunity but with the moral high ground. This has been achieved with the echoes of doublethink and dehumanisation inherent in the Orwellian nightmare. The Orwellian society relied on conformity, on an unquestioning faith in 'Big Brother'. This faith required the illusion that whatever the circumstances or outcome of any event the authorities still held, by necessity, not only the power but also the moral high ground.

The case of Sion Jenkins leaves many in society believing in the illusion that it was only the almost unreasonable fairness of the system (in putting some limits on the character assassination process) that has led to his acquittal. The system has inverted the true picture to gain the moral high ground in classic Orwellian style and could fittingly reward itself with an Orwellian style slogan "Failure is Success".

This case study has attempted to show the relationship between the concepts of 'Groupthink', 'Moral Disengagement' and concepts such as 'Doublethink' and how these have interplayed in a contemporary miscarriage of justice. The notion of "magical legalism" has been used in this thesis to encompass such psychological ploys. Such concepts do not dominate British society in the sense described in "Nineteen Eighty-Four", but to deny their presence and potential to create harm and injustice would be as naïve as to suggest that they are all pervasive and dominating our every thought.

Apparently Mr Jenkins has been sustained through his ordeal by a strong Christian faith. In holding this faith he may have some notion of the nature of heaven. He will already by now be acutely aware that hell is the absence of reason.

CHAPTER 15

IDEOLOGY, FAITH AND ILLUSION

“Ideology....is not challenged or even questioned because it is so apparently “right” for the majority in a particular time and place. Those in authority present the program as good and virtuous, as a highly valuable moral imperative. The programs, policies and standard operating procedures that are developed to support an ideology become an essential component of the System. The System’s procedures are considered reasonable and appropriate as the ideology comes to be accepted as sacred.”

Zimbardo (2007: 226)

This chapter takes the kind of analysis applied to the Sion Jenkins case a little further by considering how the legal system maintains its ideology and within that, its illusions: Illusions that are accepted as realities within society generally and may help facilitate and justify injustice.

Preserving the Ideology

Zimbardo (2007: 9-10) argues, as Orwell’s novel “1984” portrays, that ideology emerges from the desire for power; the establishment of ‘systems of power’ which as in the “1984” society, then gain a momentum of their own and a potentially insidious hold over human conduct. It is not just the immediate situation that people are in or their personal disposition that creates complex behavioural patterns, but the systems of power in which they operate and the rules that govern those systems. For Zimbardo, and one would guess also for Orwell, the ‘bad apple theory’ – the idea that things go wrong as a result of the actions of a few errant individuals is primarily a way of deflecting blame and attention away from the system itself and those who control it. In fact the essence of the problem is in the barrel itself and those who design it. The system defines the reality of those within it and establishes the context in which they act (Zimbardo 2007: 10).

The “bad apple theory” is sometimes applied in relation to miscarriages of justice, usually when certain police officers indulge in malpractice. However, as the preceding chapters have attempted to illustrate, such practices have been tolerated and in many ways

supported by the criminal justice system. The actions of certain groups of police officers in relation to cases such as the Newsagent 3, the Darvell brothers, the Merthyr 3, the Cardiff 3 and Jonathan Jones over a ten year period in South Wales were considered untouchable within the legal community, were apparently unnoticed or considered acceptable by the CPS, uncensored by the Court of Appeal and unquestioned to this day by the higher echelons of the police service (see page 263). The shaky foundations of the cases against many others, including those featured in this study, were not seriously examined for flaws by the CPS but firmed up by prosecution strategies often based on character assassination, selective and misleading science, unreliable witnesses and numerous other adversarial ploys (See Part 3). In the case of Sion Jenkins the illusion that buried the very straightforward evidence that should have eliminated him as a suspect permeated not only the legal system but most of the media as well. There may or may not be 'bad apples' but in all cases it is the criminal justice system in its entirety that holds responsibility for wrongful convictions.

The ideology of the criminal justice system may have the purpose of preserving a system of power and prestige, which has come to be seen by many as virtuous - so virtuous in fact that its mission has become a 'transcendent' one (Kelman H.C. and Hamilton V.L. 1989: 30) where the interests of the system and its 'higher purpose' place certain actions outside the realm of ordinary morality. Hence, to use a crude and basic example, Lord Denning could assert that: -

"We shouldn't have all these campaigns to get the Birmingham six released if they'd been hanged. They'd have been forgotten and the whole community would have been satisfied"

(Lord Denning quoted in Dyer C. "The Guardian" 6 March 1999)

It is not such unusually blatant and shameful comments however that are the real problem, it is the quiet absorption and acceptance of actions that support unfounded prosecutions and maintain wrongful convictions. In 'transcendent missions' the higher purpose of preserving the system means that cover-ups become routine (Kelman and Hamilton 1989: 30). It cannot therefore be 'officially' accepted that there are a myriad of ways that the criminal justice system can go wrong, instead an impression of certainty has to be maintained: -

“The system has a vested interest above all else, like commercial and media organisations, they exist on the basis of confidence. Look at what strikes hardest at the BBC – it’s wrongly naming a ‘Blue Peter’ cat because we cannot be caught out of line. What strikes at the heart of the criminal justice system more than anything else is getting it wrong” (J1)

There are of course many cases where the system admits that the conviction is unsafe but this is rarely achieved on the basis of a rational overview of the situation but on the basis of factors that are beyond the responsibility of the agents of the criminal justice system. Thus, as for example in the Newsagent Three Case (see Chapter 6) it is the personality problems of individuals who falsely confess not the morality of police officers who acted oppressively or prosecutors and judges who could not or would not see through obviously dangerous evidence creation. Similarly it is disputed science that allows the Court of Appeal to order a re-trial in a case like that of Sion Jenkins, not the failure to take regard of statements that effectively make his guilt impossible or give adequate regard to alternative suspects. Public faith in the system is the key to preserving the institutions, their power, prestige and functionality. A sense of mystique assists this aim by distancing the law from the general public and this is achieved by legal ritual and by enhancing the obscurity of the legal process and legal argument: -

“It is very difficult for defendants at appeals to follow the argument, because they’re not talking about the real issues, they’re debating tangential points, not the obvious flaws in the case. And it’s all done to defend the system; it’s not even about adversarialism and winning or losing really that’s just the outer impression. What it’s all about is showing that the system has worked. Yes they’ll let a few out now and then on a carefully controlled basis, so that it all looks like it’s being very fair. But they’re quite happy to keep innocent people in prison to support the ideology – to maintain everyone’s faith in the ideology” (B3)

Believing the Ideology

Ideology requires belief in the system not only for the community that the ideology supposedly serves but also for those who directly enact it. Thus they can believe in the system and believe that problems in the system are about technical fine tuning rather than fundamental distortions of justice. As the journalist David Rose observes, the notion of “technicalities” is a useful one for helping the system give an impression of ultimate fairness while camouflaging underlying truth: -

“I had seen from covering miscarriages of justice in England and Wales what can happen when belief – not blind prejudice, but honest well-founded supposition – takes precedence over evidence: the imprisonment of innocent people, perhaps for many years. I had also learned that what police officers and prosecutors sometimes call ‘technicalities’, breaches of the rules that govern issues such as the conduct of interrogations or the disclosure of exculpatory evidence, are not merely ‘technical’ at all. Often they just happen to be the place where a more fundamental miscarriage of justice becomes visible, the point at which the iceberg of the wrongful conviction of a ‘factually innocent’ person breaks the legal surface.”

(Rose 2007: 316)

There are of course many different perspectives held by many different lawyers or police officers but to varying degrees there is a mindset which embraces the ideology of the system and accepts the legalisation of the concept of truth – magical legalism. This mind set is not universal but it is common, it has to be for the system to be perpetuated as it is, and even those who are uncomfortable with it have to work within it. The legal system depends upon subservience and livelihoods depend upon observing that – criticism of judges by lawyers is usually muted and almost invariably private rather than public. The etiquette of the court room and the legal hierarchy requires polite deference even in the face of quite unreasonable decisions. To progress and survive within this system requires the absorption of its authority structure and a loyalty to it. For the ideology of the law to prosper the ideal mind set is a bureaucratic mind set with many of the features of ‘groupthink’ and ‘moral disengagement’ (see previous chapter) that have been identified with social actors in political and organisational power structures: -

“They are so close to the centre of power....that they identify with the authority structure and are caught up in its glory and mystique. They thus tend to exaggerate the authorities’ moral claims on their loyalties. Such functionaries, like the powerless, do not expect to be held personally responsible but not because they see themselves as helpless pawns. Rather they see themselves as agents and extensions of the authorities and therefore assured of their protection”

(Kelman and Hamilton 1989: 29-30)

This absorption of belief in the system not only affects the way wrongful convictions are perceived but also makes the way the system deals with them appear acceptable or, as described in the previous chapter, even virtuous. A number of participants alluded to this

mindset and one solicitor described how he saw it in relation particularly to senior barristers: -

“A lot of them, you know, John Smith (false name), very clever guy, he’s a High Court Judge now,...he didn’t see the case as a miscarriage of justicehe couldn’t stand back and be critical of the way the system had dealt with this case.....he was so enmeshed in it as a criminal QC that he couldn’t think in a critical or academic or objective way about the way in which it was faulty and it was failing. And it failed in that case....he couldn’t see it; he was so tied up in it from the age of 25 or whatever when he became a barrister. They just see it as the only way that anything’s ever been done, that’s the way it is, that’s the system, don’t criticise it, and don’t think that it could be done any better. It’s almost like a faith thing, you know, I believe in this, everybody else who plays this game believes in it, don’t start questioning my belief.” (S1)

This seems to be a perceptive observation, effectively seeing magical legalism as an act of faith that creates certainty out of uncertainty. The result for many innocent defendants, can be that, to use Rose’s terminology above, the iceberg of wrongful conviction never breaks the legal surface; -

“Barristers love the rule base...you can only get to the end if you know the way through the maze....You talk to a leading QC and you know exactly where he’s coming from....this case is not going anywhere, I might feel its a miscarriage of justice and you might feel it is...but the way in which we’ve got to present it to the appeal court, we’re just not going to get there...there’s just not enough legal points there to survive.” (S1)

Believing in the system therefore means accepting that innocent people will be and often remain convicted: The moral disengagement required for this position is aided by displacement and diffusion of responsibility and dehumanisation of the victim and it may mean that there are multiple case constructions or narratives in play for different actors; a situation most acutely felt of course by those maintaining their innocence: -

“I think some police officers and lawyers think I’m guilty, some don’t think I’m guilty and some don’t actually care. At the end of the day I think the majority of them think ‘I’ve done my job – move on’. To use another analogy it’s like people who work in a bank, when they’re working with money it’s not money to them, it’s just something they work with. In the same way they don’t look at it as dealing with people, they’re not dealing with people’s lives, they’re dealing with a “criminal” – it’s a label, just something that they deal with. And if they do believe you’re innocent then you’re up against the Old Boys network again – I’m not

going to stick my head up above the parapet and be the only one....again it's an entrenched culture"

(Ian Thomas)

It should be acknowledged at this point that there are many in the criminal justice system who do struggle for justice with great endeavour and commitment and that the adversarial system, while making their task monumentally difficult, does nonetheless provide some avenues and accommodations for their efforts. At the same time however it could be argued, and frequently is, especially by the wrongly convicted, that the legal system legitimises the promotion of injustice and unethical behaviour by employing barristers to argue a case regardless of the doubts that they themselves might have: -

"Because if there are any doubts there, how can you actually go ahead wholeheartedly believing that you're right? You can't do it if there are any doubts, that's immoral, unethical, and unfair and effectively a blatant disregard and abrogation of your responsibility towards the public"

(Ian Thomas)

Many lawyers and others would justify such a position and they would justify it by reference to their belief in the principles and practices of the law. Many of these principles and practices have an ethical and rational basis and without them fundamental human rights would be lost. The problem however, which leads to the profound human rights abuse of wrongful imprisonment, is that some key concepts have become, or always have been, illusions. The acceptance of key principles as established facts is a falsehood that requires an ongoing application of "doublethink" (Orwell 1948).

The Illusions of the Law

'Magical Legalism'

The concept of magical legalism (Cohen 2001:108) was introduced in the Introduction to this study (see page 4) and has been utilised as a key conceptual theme. The magical legalism of the criminal justice system is this: -

As long as the test that the powers that be have deemed appropriate is applied in some form then we can be confident that all is just and well.

This is the principle that enables representatives of the CCRC to claim that around 96% of applications are shown not to be miscarriages of justice (Leigh 2004: 2, CCRC Annual Report 2003-4: 6) when any ‘common sense’ view, including that stated by the CCRC themselves (see page 190) would accept that the test applied is so restrictive that wrongful convictions are only revealed if certain very demanding and often arbitrary revelations are forthcoming. Similarly it is the principle that enables the CPS to defend the taking to trial, and even more significantly re-trial, cases that are evidentially weak, as in the case of Michael Stone whose second trial relied only on the evidence of one plainly unreliable prison informant, and furthermore to defend their position, as in the Sion Jenkins case when any rational view of the evidence should indicate that no case could be proved (see previous Chapter). The CPS stated the same approach after Barry George was cleared of the murder of TV presenter Jill Dando on 1st Aug 2008: -

“Mr George now has the right to be regarded as an innocent man, but that does not mean it was wrong to bring the case. Our test is always whether there is sufficient evidence for a realistic prospect of conviction”

(Hilary Bradfield CPS quoted in Duncan Campbell ‘The Guardian’ 2/8/08)

Technically Hilary Bradfield is correct if the CPS test is interpreted without the application of any common sense notion of the risks of re-convicting an innocent man, given the implication of guilt that a jury might register from the pursuit of a re-trial, and if the test is interpreted as permission to try your luck with dubious evidence and, as in Mr George’s case, assertions about the character of the defendant. As in the re-trials of Sion Jenkins, the magical legalism is revealed in the lack of any ethical analysis of the CPS actions. The test is technically defensible, it depends on what those applying it think at the time – therefore they cannot be wrong - the bureaucratic logic conveniently disengages the ethical imperative. ‘Doublethink’ is then required to claim an ethical allegiance to the principles of justice; Sir Ken McDonald QC Director of Public Prosecutions (Head of the CPS), speaking at the Conference marking the 10 year Anniversary of the CCRC at Birmingham University on 10 May 2007, stressed the vital commitment of the CPS to the presumption of innocence, to a level playing field between defence and prosecution and to fair trials and disclosure. There is little doubt that these

are genuinely held beliefs within the CPS yet there seems to be no questioning or analysis of their own role in the ongoing catalogue of miscarriages of justice. If any questions are raised they are simply fended off by falling back on the magical legalism of the ‘Test for Crown Prosecutors’ (as indeed they did in declining to participate in this study see Appendix 6). Yet in many cases of miscarriage of justice the CPS has a case to answer: -

“How could a jury believe that Jonathan Jones did that murder when there was no evidence to get him into Wales on the day? It could not be done other than by smoke and mirrors....That seems to me to bring into doubt the mounting of these cases by the prosecution as well, to get a result, and that’s not what it’s meant to be about” (J1)

Another important principle stressed in Sir Ken McDonald’s speech was that the “protected right to appeal should not be negotiable”. In fact the right to appeal is entirely negotiable in Crown Court cases, being dependent on a judge or the CCRC agreeing that there are sufficient grounds to allow it. However beyond this, the key question is not the purely due process one of whether an appeal is allowed or even technically fair according to the rules (a trap that human rights organisations can sometimes fail to see), the real questions lie in the reasonableness, thoroughness and honesty of the appeal judgements themselves. Once again magical legalism can allow appeal judges to announce a conviction “safe” however limited or flawed that judgement may be. Then society can sleep peacefully in the knowledge that we are not torturing innocent people with wrongful imprisonment, because our society does not do that – we have rights and due process.

This is not to deny the importance of due process but to recognise that it is not a panacea in itself. It is to recognise the risk that due process can be used as a facade that protects unethical decision making while re-enforcing the ideological mythology that the system cannot be wrong. (This is not a new notion; the day to day manipulations of due process have been described in relation to police investigations by McConville et al in 1991 and in relation to the courts by McBarnet in 1981).

The appeal illusion, and it follows the fair trial illusion, rely upon another profound illusion that defies common sense and enters the world of the sacred – the notion of jury infallibility.

Jury Infallibility

“The real reason for keeping the jury’s deliberations secret is to preserve the confidence in a system which more intimate knowledge might destroy”

(Glanville Williams 1963: 205)

Most, though not all, participants in this study felt that the jury was an important and valuable institution and most lawyers at least felt that juries usually came to the right decisions and moreover that their decisions should not be overridden by judges unless there is some new evidence or legal argument. For most this notion of something new could be applied somewhat more liberally than it generally is in terms of granting appeal rights. Few favoured any changes to the way the jury operates; in fact ideas on this were rarely expressed, despite a wealth of alternative arrangements that could be considered (see Derbyshire et al 2001). It should be self evident however that the endless variables in the nature and quality of evidence, the presentation of cases in trials, the interactional factors that occur in groups such as juries and the characters and prejudices within those groups, that the idea that the jury is infallible – the basis of the finality which the appeal system seeks to uphold – can only be an illusion: -

“The trouble is you can’t speak to juries, I would love to know whether my evidence assisted the jury, whether it was clear enough to understand. Because it’s a big problem if you have consultants in any field disagreeing with each other, how the hell is a lay person who is not familiar with the field going to decide”
(EW2)

Not only is the jury’s task sometimes close to impossible but it is open to systemic influence:

“Now I think you could not be on a jury and hear all the things that I’m aware of and not have reasonable doubt, there’s no way. Now how could it be that the criminal justice system conspires, in quotes, to bring about that state of affairs because it has done, and why would it want to? (J1)

Even if the jury heard all the evidence (an often quoted myth) rather than the edited version they actually hear, the assumption that they could infallibly assess, balance and evaluate it all is demonstrably nonsensical. There is a workability factor which makes a myth of this kind extremely helpful to the system – without it the fear is that there would be too many appeals and they would be too complex (Nobles and Schiff 2000). The ideology of the system however does not allow such an admission to be made; rather it

requires the 'doublethink' of believing in a notion that forms the basis of a fair and reliable system while simultaneously knowing that that notion is demonstrably false. It is demonstrably false in many ways but any study of major miscarriages of justice will reveal that first appeals and sometimes second or third appeals often fail, it is only later when something deemed 'significant', 'new' and *legally valid* is discovered that the conviction may be declared unsafe, something that has usually been obvious for many years to people who have studied the case outside of a prosecution mindset. Without this "technicality" the fact that the jury got it wrong has to be excluded as a possibility. Therefore unless something new comes along innocent people remain convicted.

The jury illusion relies upon complex rules of evidence which, while in the main appropriate safeguards, are none the less prone to being afforded an inappropriate level of faith. One clear example of this is the notion of judges' warnings applied to such issues as eyewitness testimony and the use of prison informers. It is good that judges warn juries to be cautious of this type of evidence but the widely supported belief (evident to some extent in this study and apparent in practice) that such warnings are adequate to the understanding of such complex and misleading issues is an illusion. Furthermore the criminal justice system can be cavalier about the quality of evidence of this kind that can be used. The eye witness testimony used to convict Barry George for example, failed every principle that should govern its use but even then it should have been deemed too weak to be presented to a jury who despite warnings may, in convicting Mr George, have considered it worthy of supporting the case: -

"There were 5 'star' witnesses, none of those made a positive identification (the only one who did) saw a man four and a half hours before the murder for 5 or 6 seconds. Seventeen months later she picks out George and then gives evidence at trial.....I find it surprising that someone who has a glimpse of only 5 seconds, identifying a face of someone she's never seen before, after 17 months would express a very high degree of confidence"

Professor Tim Valentine (Psychologist) speaking on Channel 4 "Dispatches"
4/11/07

On the same programme author and journalist Brian Cathcart added that this witness saw the man she identified as George from under an umbrella in the rain, while he was wiping the windscreen of a car (Mr George did not drive or own a car). Moreover even in the unlikely event that this was Mr George, a sighting four and a half hours before the crime

does not put him present anywhere near the time of the crime. This was the quality of evidence that the CPS were content to put before the jury at trial in 2001 and the Court of Appeal were to conclude was “properly admitted and properly left to the jury” at the first appeal [EWCA Crim 1923 (2002) Para 74]. When such evidence is used and convoluted as it was in this case it becomes clear that the notion of a fair trial is at best tenuous. The common sense analysis of a number of television programmes broadcast on the case also explains why the Court of Appeal felt it necessary at the second appeal (R v George EWCA Crim 2722, 2007) to express concern about these broadcasts. Such programmes expose the illusions of the criminal justice system through a common sense analysis, and consequently pose a threat to its ideological integrity.

The illusion of jury infallibility is justified on the basis of another closely related and fundamental illusion - the presumption of innocence and the need for proof beyond reasonable doubt (being ‘sure’).

Being “Sure” – Proof beyond reasonable doubt

The many social trends and legislative changes that have eroded the presumption of innocence have been discussed above (Chapter 12). But the illusion that cases will be proved beyond reasonable doubt, even if juries consider themselves to be “sure” as they are now requested to be, is more longstanding and profound. The innumerable problems that may arise in investigation, evidence and legal process have been discussed at length in Chapter 2; even if a jury, judge or magistrate is ‘sure’ it does not mean that they have reached sureness without being misled, or without misunderstanding issues. Neither does being ‘sure’ mean that their assessment of demeanour and witness honesty is in fact reliable, indeed psychological research suggests it is often very unreliable (see pages 55-57).

‘Proof’ in the legal sense is an indefinable, compromised and intellectually debated concept (see Duff et al 2004), this is probably unavoidable but while this debate goes on the system, in particular the appeal system, utilises the illusion that proof has been achieved – the doublethink of simultaneously believing two opposing realities.

The practical justification given, as articulated by Lord Justice Judge at the CCRC 10 year Anniversary Conference in May 2007, is to question the right of appeal judges to over-rule jury decisions. On the face of it this is an egalitarian, community rights based argument but the practicality of it is that it provides a perfect 'virtuous' principle for the system to support its ideological need to uphold wrongful convictions. It is not entirely a question of workability, which would in any event have ethical problems, because cases would still have to be judged on their merits even if jury decisions were re-visited. Moreover whether the floodgates open should depend on whether they should be opened in the interests of justice and fairness, not on workability. Perhaps then the system would be more obliged to prevent miscarriages of justice at the prosecution stage.

Professor Zander, who had sat on the RCCJ in the early 1990s, addressed this issue with Lord Justice Judge at the conference. His argument seemed to suggest that doubts in a case should be considered, by judges and the CCRC, even if this threatens to undermine the jury decision (a position taken in 1993 by the RCCJ). There are two good reasons for this: Firstly because without this option innocent people will remain convicted, which is a worse evil than undermining a particular jury decision, and secondly because the principle of the presumption of innocence and regard to reasonable doubt should take precedence over workability and procedure. In other words the presumption of innocence and the need to be sure should cease to be an illusion.

For the criminal justice system to prioritise justice rather than its own ideological interests it needs to function not on finality or sureness but on the uncertainty principle.

SUMMARY CONCLUSION TO PART 5

Part 5 has posed the question ‘Could it happen now’ – to what degree has the problem of wrongful conviction been successfully addressed and what risks remain?

Chapter 12 discussed the recent and current political climate in which legislation has eroded traditional legal safeguards and promoted a managerial approach to justice. This managerial approach reflects a ‘crime control’, ‘cost effective’ and ‘targeting’ mentality which, it has been argued, may increase the risk of ‘error’ within the police, CPS, the CCRC, the Court of Appeal and negatively impact on defence provision and legal aid. The emphasis is drifting away from a need to recognise and be cautious of the risks of ‘justice in error’ towards a desire to increase efficiency in terms of conviction rates. While there are acknowledgements of the need for safeguards, the overall atmosphere may promote the belief that the criminal justice system is an efficient process convicting only the guilty, rather than an inherently problematic and complex process riddled with risks and uncertainties as argued in Parts 1 and 3 of this thesis.

Chapter 13 discussed occupational cultures in this social and political context. The changes and safeguards introduced in policing were recognised and commended but need also to be seen in the context of managerial targeting and institutional ‘guilt assuming’ tendencies. Such a culture can lead to over trusting the assumptions made and furthermore may lead to the manipulation of safeguards to ensure the ‘legal sustainability’ of convictions rather than factual or evidential reliability, making the correction of injustice much more difficult.

Legal cultures, while influenced by political changes in terms of legislative reductions in safeguards and ‘efficiency’ measures, remain steeped in traditions and practices that remove the law from the community through its image of ‘majesty’, its rules, rituals and modes of thinking which sometimes seem like another world to defendants and perhaps also to juries and the public. Adversarialism is still on occasions applied in an over-zealous way which can distort truth seeking and can include constructing misleading ways of considering expert medical and scientific evidence, yet ideas for change or calls for accountability remain notable by their absence.

Journalistic cultures have also succumbed to the 'cost efficiency' ethic in the burgeoning media market. This has led to a decline in investigative journalism and the opportunities to undertake the complex investigations into potential miscarriages of justice that have been crucial in the past. More seriously still, the culture of journalism seems to be drifting increasingly towards feeding customers 'what they want' rather than promoting the evidential truth. In the worst cases this results in feeding prejudices at the cost of reality.

Chapter 14 illustrated, with a study of the Sion Jenkins case, how the 'convictionist' approach of the police and prosecuting authorities and the focus on prejudice rather than evidence in large sections of the media led not only to a grossly manipulative case construction but also an exceptional persistence in pursuing a conviction in defiance of the evidence. This contemporary case showed how the distortion of truth and the willingness of prosecuting authorities to use any tactic, regardless of its evidential validity, is as strong today as ever and moreover that the media and public potential to be convinced by such tactics, or prepared to use them for commercial advantage, is perhaps greater than ever. In such a context the innocent have much to fear.

Chapter 15 built on the above arguments to discuss how the legal world preserves an ideology which protects its position and deflects any responsibility for injustice towards others, be they expert witnesses, victims of injustice themselves or 'bad apples within the system. Wider responsibilities within a system that processes and perpetuates injustices are not only disregarded but justified through a bureaucratic mentality and an, albeit usually unstated, view of the 'transcendent mission' which must ensure that the image of the law remains virtuous and thus retains public confidence and protects vested interests. The mythology of concepts such as jury infallibility, which dominates the appeal process, and proof beyond reasonable doubt, which justifies that appeal approach, must therefore be perpetuated even if this requires such psychological techniques as "doublethink", 'groupthink' or 'moral disengagement', as employed for example in the Sion Jenkins case. Overarching these ideas is the conceptual idea of magical legalism which enables actors within the system to have faith that the stated rules and standards of the system will ensure justice, despite the potential for error, distortion and uncertainty described throughout this thesis.

In short therefore the argument forwarded in Part 5 is that, despite genuine improvement in some areas and a genuine desire for justice and fairness being widespread within the various professions involved, there are nonetheless numerous social, psychological and political forces that are combining to present a whole range of risk factors. These factors are both ancient and modern but can be shown in contemporary cases such as for example Sally Clark, Barry George and Sion Jenkins. The current situation politically, culturally and legally is that wrongful convictions remain a serious risk today and their rectification is equally if not more problematic than in the past.

PART 6

CONCLUDING REFLECTIONS

“The criminal sanction is at once prime guarantor and prime threatener of human freedom. Used providently and humanely it is a guarantor; used indiscriminately and coercively it is a threatener. The tensions that inhere in criminal sanctions can never be wholly resolved in favour of guaranty and against threat, but we can begin to try”

Herbert Packer “The Limits of the Criminal Sanction” 1968

(Quoted in Sanders and Young 2007: 53)

CHAPTER 16

THE RESEARCH QUESTIONS AND THOUGHTS ON CHANGES NEEDED

At the beginning of this thesis four inter-related research questions were presented. Three of these are very clearly linked to each other and have been addressed in various parts of the thesis. The conclusions can thus be summed up with brief reference to the preceding discussions. The fourth and most difficult question concerning what changes can be made to prevent or rectify wrongful convictions needs more discussion in this chapter. Chapter 17 then concludes the thesis with some brief comments on the human cost of wrongful convictions.

Research Question 1

Why have wrongful convictions continued to occur despite systemic reforms and an extensive body of knowledge about the causes?

In essence the answer to this question lies in the criminal justice system's failure to embrace the uncertainty principle.

Chapter 1 evidenced the continuing problem of miscarriages of justice while Chapter 2 used available literature to give a detailed account of the inherent risks involved in the criminal justice system. It was argued that the nature of policing and investigation, the nature of evidence, be that from science or from people, and the legal process itself are all prone to misleading influences. The presence of safeguards in legislation and process, and technical advances, may prevent many errors or malpractices and in some areas create greater certainty, but nonetheless many potential pitfalls remain. Part 3 examined the many ways in which such pitfalls can come about through false and misleading case constructions which may progress with a momentum that can influence thinking in ways that may bypass or adapt safeguards both in investigation and trial. Part 4 showed how

wrongful convictions thus acquired can be sustained through the appeal system. Part 5 then demonstrated how some of the social, psychological and political factors of current times, and the influence of these factors on occupational cultures, might perpetuate or increase this natural propensity to 'justice in error'. The example of the Sion Jenkins case, it has been argued, illustrated the power of consensual distorted thinking in a contemporary context, showing perhaps a greater than ever resistance within the criminal justice system and public/media consciousness to conceding to the reality of injustice. The continuing beliefs in the illusions of the criminal justice system were identified as a continuing danger.

Research Question 2

What are the underlying experiential, interactional and institutional processes involved in the creation and sustaining of wrongful convictions?

Parts 3, 4 and 5 all explored occupational cultures and the modes of thinking and working within these cultures. Study data largely re-enforced the evidence from literature but also gave contemporary reflections. Police and legal cultures remain to a large extent limited in their acceptance of wrongful conviction as a concept that remains a serious risk, and journalistic interest has declined. Numerous modes of thinking have been identified that might foster this situation. These include traditional deference to established institutions, the over-riding wish to protect the system from disrepute, the tendency for certain assumptions to take undue hold, the unity towards groups and institutional values, the influence of managerial culture and governance and the changing nature of the media market. The notion of 'magical legalism' has been presented as a psychological ploy that justifies a form of 'doublethink' that supports belief in the certainty of the system in contradiction to the evidence of uncertainty. This is particularly applied in sustaining wrongful convictions.

Research Question 3

How might the current social and political landscape affect the potential for wrongful convictions to be created and sustained?

This question was addressed in Part 5 of the thesis and summed up in the ‘Summary Conclusions’ to that section (pages 332-334). Importantly again, social forces that reflect major risks are identified in Part 5. Crucially these social forces and processes combine well established elements of false case construction with what is arguably a newer, more virulent ‘convictionist’ approach that can pervade the media and public as well as the legal system. At best the current attitudes to wrongful conviction are variable and inconsistent; at worst they reflect a change from concern about injustice towards disregard, denial or illusion. Magical legalism is gaining ground at the expense of the uncertainty principle.

Research Question 4

What changes might help prevent or rectify wrongful convictions?

It was apparent from interviews and other data sources in this study that different players have different ideas and priorities about what needs to change in the criminal justice system or indeed whether anything needs to change at all. Furthermore this critique has expressed concern about long established institutional practices, complex interactions and evidential issues and major social trends such as managerialism and the nature of the modern media world. These are just two factors that make definitive answers to this question not only difficult and controversial but also in danger of sounding wholly unrealistic and superficial. One might wish that managerialism had not permeated modern society over the last 15-20 years but it cannot be simply abolished. On a different level, legislative changes of rules about, for example revealing previous ‘bad character’, are now established and supported by many within the system. Thus while opinions on these matters can be stated they are likely to remain nothing more than that. On the other

hand an in-depth study that is critical yet draws no suggestions for change runs the risk of being descriptive rather than analytical, and negative rather than constructive.

In trying to plot a course between a potentially superficial 'wish list' and a conclusion that is wholly negative and defeatist, Three theoretical ideas are used to frame some suggestions for change: -

Firstly suggestions have been thought about in terms of the "Freedom Model" of criminal justice proposed by Sanders and Young (2000 and 2007). The goals and principles of the system should prioritise those actions that enhance overall freedom within the framework of justice and fairness. This is not purely utilitarian in the sense of the greatest good for the greatest number but promotes the premise that justice and fairness are crucial to the freedom of all and cannot be sacrificed without eroding freedoms for all. Thus the freedom model would not, for example, support the utilitarian notion of upholding wrongful convictions in order to preserve the image of credibility in the system for 'the greater good'.

Secondly suggestions have been thought about in very general terms in the theoretical context of a new Royal Commission on Criminal Justice, concerned with wrongful convictions, which would have the opportunity to look at some of the deeper more fundamental problems. What kind of general themes might such a Commission consider if established today? Clearly such a body would want to commission research into various ideas and issues and the suggestions below, which are only those that arise from this research, are perhaps best seen as areas for further research and are stated in the main in fairly general rather than specific terms; this is not to downplay the urgency that is really needed to address the issue.

In today's political climate, as described in Chapter 12, the idea of a Royal Commission being established by the government might be thought fanciful and its outcome might well prove to be compromised and ineffectual. Nonetheless it can be argued that there is as much justification for such a body as there was for the announcement of the RCCJ in 1991. The RCCJ came about directly as a result of the Guildford 4 and the Birmingham 6 cases. On balance it could be argued that recent high profile cases such as Sion Jenkins and Barry George, coupled with controversial 'groups' of cases such as the cot death and flawed science cases (Sally Clarke, Angela Canning, Donna Anthony, Ian and Angela Gay etc) and the historical abuse "new genre" of injustices (Home Affairs Committee

2002), along with the unremitting pressure on bodies like the CCRC, University Innocence Projects and campaign groups, demonstrate as urgent a need to address the problem as existed in 1991.

Thirdly the suggestions below attempt to illustrate some practical implications of adopting the uncertainty principle and some ways in which it might be applied in practice. The acceptance of uncertainty is closely linked with an acceptance of the presumption of innocence but one that does not employ magical legalism in order to re-define that presumption as amounting to merely the observance of process. The uncertainty principle is an uncomfortable one in criminal justice, it threatens traditions and finality and it may threaten conviction rates or even crime control. However for the reasons outlined at the beginning of Chapter 17 it is crucial to a rational and free society.

Taken in this context and given limitations of space, suggestions will be outlined in brief and general terms: -

Political Changes

The government should re-focus its rhetoric in public and policy documents to give priority to protecting the innocent from wrongful conviction. This should take precedence over achieving targets in relation to convictions or cost savings. Specifically the government should reverse plans to focus legal aid funding on a smaller selection of larger firms and encourage quality in legal aid work rather than efficiency, partly by taking measures to preserve smaller firms with a commitment and expertise in such areas of work. In addition the government should seek ways of more effectively funding legal aid for those seeking to make a case for appeal.

The government should be proactive in reviewing the effectiveness of the appeals process encouraging both the CCRC and the Court of Appeal to be more open to any notion of “lurking doubt” as well as any new evidence or argument. Legislation should be founded on protecting the wrongly convicted as the first and foremost principle of the appeals process. Any change to the CCRC test of referral should reflect a change in the Court of Appeal’s remit. In order for the CCRC to be a truly effective body, the standards and principles of the Court of Appeal should be addressed through legislation that ensures thorough and fair review of all potential miscarriages of justice. Procedural unfairness

should be maintained as strong appeal grounds because of its frequent relationship with false evidence and its importance in protecting all citizens from arbitrary and unjust treatment: -

“That is surely a truer mark of a free society than one which has a lower than average crime rate”

(Sanders and Young 2007: 551)

The philosophical message from government should be that the first priority of both government and legal systems should be to do no harm – to avoid actions that deny rights and freedoms and to recognise the inherent dangers of wrongful convictions. Thus the dual emphasis should be on prevention, coupled with effective rectification of potential error. Given that there will always be a counter argument that too much caution in conviction fails to give the public freedom in the sense of protection from crime, rectification becomes even more important within a freedom model: -

“Overall it seems that the social freedom to be achieved by affording only minimal rights of appeal is largely speculative and relatively slight. By contrast the freedom lost to people who are factually innocent but convicted is tangible and significant”

(Sanders and Young 2007: 550)

The government should seek to tackle the problem of accountability within the legal system by establishing a more effective and more independent complaints system within the legal profession. This would include judges and appeal judges who should be subject to both independent and peer review. The concept of a Royal College of Detectives should be explored with the aim of establishing standards which are less subject to political or internal pressures and able to impose accountability for poor or unethical investigations, including striking off detectives who malpractice. The Independent Police Complaints Commission (IPCC) should review its role and relationships in the light of such changes and the CPS should be proactive in prosecuting any professionals who are involved in dishonest practices that convict the innocent, including in appropriate instances, its own staff.

The government should seek innovative ways of involving the media in the prevention of injustice. Provisions such as Clause 17 of the Criminal Procedure and Investigation Act 1996 (CPIA) which prevent defence teams disclosing material provided by the police to investigative journalists should be revoked. This would encourage media involvement

and furthermore the CCRC should be encouraged to work in partnership with responsible media investigations where appropriate, rather than promote the idea that the media are no longer a necessary resource in this area. Equally the government should support the CCRC, with both funding and direction, to be more proactive in using their investigatory powers and less conservative in their attitude to referral to appeal.

The government and legal profession should re-visit the question of disclosure. This may lie in a return to full disclosure, although this may again prove unworkable. It should however, in serious cases at least, be a duty of the defence to consider the content of undisclosed material and to view that which is thought potentially important, rather than leaving such decisions to the prosecution. The CPS and police should be obliged to hand over all material requested without delay or procrastination. In the same vein the complex area of Public Interest Immunity and in particular the way this is used in prison intelligence, should be critically reviewed and monitored by specialists who understand the complexities in this area, as should the workings of police and prison authorities generally in the area of prison informants and intelligence.

Legal and Police Training

With the notable exception of the recently established and developing Innocence Network in UK universities, specific training on the issue of miscarriages of justice seems to have been lacking both for the police and legal professions. This should be clearly established as a major policy initiative and should include study of psychological research on such matters as eyewitness testimony, demeanour, false accusations and the frailty of human memory, study of traditional causes and modern misleading case constructions, potential flaws in scientific evidence and close scrutiny of actual cases with input from the victims of injustice, their representatives and organisations. The Innocence Network has established a sense of partnership with these groups (and with professionals) and this should be sought within the ongoing training of lawyers and police officers. Such training, backed by a change in governmental priorities and rhetoric in this area should seek to embed a culture that recognises uncertainty rather than dogmatic finality.

Legal firms undertaking legal aid or appeal work should be encouraged to take on students or lawyers in the early stages of their careers especially to work on cases where

injustice is suspected. Legal aid provisions should support this with the aim of encouraging a vocational ethos towards justice rather than a purely pecuniary one.

Thus when working in an uncertain, complex and potentially emotional area there is a need for the constant re-visiting of values. One of the primary values for protecting the public, it is contended here, should be to do no harm, to enhance individual freedom first and foremost by protecting the individual from unjust interventions by the agencies of the state – this should be established as the “Hippocratic oath” equivalent in the legal profession.

Legal Changes – Towards a more Ethical Adversarialism

It is not within the scope of this thesis to debate the pros and cons of the adversarial system verses the European inquisitorial system, and the response within interviews when this matter came up was very limited. In particular while views varied, hardly any participants expressed much knowledge of the inquisitorial system and the majority were certainly not arguing for such a change. Equally, few could conceive of a middle way between the two systems. However this thesis has made many implicit and explicit criticisms of adversarialism, especially where it is applied in an over-zealous manner: Consequently in making suggestions for improvement such criticisms cannot be ignored.

From the standpoint of protecting the innocent, and for all its faults, the adversarial system has one great theoretical advantage – the presumption of innocence – and one great practical advantage – a defence representative whose job is to help the defendant present his or her case. The great disadvantage is that there also exists a prosecution, tied in with the investigators, who can easily come to see their role as achieving a conviction and if this is done beyond an overarching concern for the actual truth, the presumption of innocence is rapidly eroded. The measures suggested below would be designed to help move the presumption of innocence from the realm of illusion, some way at least, towards the realm of reality.

The CPS “Test for Crown Prosecutors” requires that a case should be referred to trial if a properly directed jury, magistrates’ bench or judge “is more likely to, than not to convict the defendant of the charge alleged” (CPS 2004: Para 5.3). This “realistic prospect of conviction” test could thus be described as a test that takes forward a prosecution on the

basis of a 51% or more estimate of the likelihood of conviction. Whether this test needs changing or whether such a move would make any positive difference is debateable, however this thesis has endeavoured to show how, in some cases, the CPS not only proceeds to trial with very weak evidence, but is prepared to bolster weak cases with such ploys as character assassination or dubious cell confessions. Moreover, still today in high profile cases, such as Sion Jenkins, Barry George, and Sally Clark, and in the past - all the 'focused' cases in this study for example; the CPS is loath to concede that the evidence has been shown to be fallacious. Consequently they have opposed appeals with an unrelenting vigour and in some cases pursued re-trials when much of the original evidence and/or investigations have been discredited. This approach has not only caused extreme trauma to many innocent people but has wasted a great deal of public money and arguably brought a great deal of discredit to the legal system.

One participant, Nick Tucker, suggested that the CPS should be abolished and replaced with a more neutral body concerned with assessing the evidence rather than assessing the prospect of conviction. This would introduce a substantial element of the inquisitorial system into the process. At the least, the CPS should review its approach to the adversarial contest, reassert its original purpose of independent scrutiny and re-visit the presumption of innocence as its primary principle, even if this reduces the chances of achieving conviction targets. Judges should support this principle by utilising to a much greater extent, their power to stop trials where the evidence is weak. The example of Mr Justice Ogmores in 1994 in stopping the trial of Colin Stagg (for the murder of Rachel Nickell) following "deceptive conduct of the worst kind" in the police investigation, (which even then had not induced any kind of confession) probably saved Mr Stagg many years of wrongful imprisonment as well as saving a great deal of public money from being wasted and the criminal justice system from further disrepute (Johnson 2006). In December 2008, following identification of DNA evidence, Robert Napper pleaded guilty to the crime for which Mr Stagg had been accused, remanded in custody for over a year and put on trial. Sixteen months after the crime for which Mr Stagg was accused, Robert Napper killed another young mother and her child (BBC 1 18/12/08). One can only speculate how many crimes may have been committed by the real perpetrators of serious crimes while the wrong people are incarcerated. Had, at least some, of the judges in the cases focused upon in this study been prepared to support the presumption of innocence in a similar way to Mr Justice Ogmores the savings in cost and more importantly human

suffering would have been immeasurable. Judges and the CPS should therefore be obliged to reject weak cases or cases founded on illegally or unethically obtained evidence.

In the same respect judges especially at appeal should be prepared to consider the notion of “lurking doubt” and effectively be more open to re-visiting jury decisions as recommended by the RCCJ in 1993. Similarly the Appeal Courts and judges at trial should be much more proactive in protecting defendants against inadequate defence performance or bizarre tactics and willing to allow appeals more freely where this has happened.

Both the CPS and judges should be more wary of the quality of evidence, for example the potential subtle manipulation of witnesses by repeated statement taking, the influence on child witnesses and the befriending of families by the police in ways that might distort their loyalties and perceptions. This had happened to such an extent in the Sion Jenkins case that his children had begun to refer to a policewoman as an ‘auntie’ (Jenkins and Woffinden 2008: 165). The Jenkins case also illustrated the unreasonable use of bad character (not previous convictions) in the later trials. The bad character, revelation of previous conviction and hearsay measures established by the Criminal Justice Act 2003, should in the interests of prioritising protection of the innocent be repealed, if they are to be retained, they should only be allowed in very exceptional circumstances and judges have the power to decide this. Potentially should an original conviction be wrongful, revealing previous convictions can compound the injustice by encouraging a second wrongful conviction (see case of Mr Q at Appendix 7 for an example of where this may have happened). The power to make the presumption of innocence a reality lies with the judges and to some extent with the CPS. Legal training and selection should be primarily aimed at developing people who hold such values.

The will within the legal community to reform or safeguard the jury system seems to be very limited despite research summaries such as Derbyshire et al (2001) which provide many concerning insights and ideas for change. One solicitor (S4) felt strongly that the defendant should have the right to jury challenge in the selection of juries but ideas such as juries giving reasons were generally felt to be too problematic and unworkable by lawyers. This view was not generally shared by those maintaining wrongful conviction. Sue May for example felt ‘passionately’ that each jury member should give confidential written reasons and that inadequate or inaccurate foundations for conviction thus revealed

should be grounds for appeal. Perhaps as a minimum in serious or complex cases juries should be given more information on such issues as demeanour, eye witness testimony and the dangers of prison witnesses and other informers, rather than simply a judge's warning which is then permanently assumed to have been adequate. Such information could be specific to the case. If the somewhat bizarre anomaly of police collaborative testimony is to be retained (see pages 62-63) then juries should also be warned of the dangers of this.

Many wrongful convictions both old and recent have been founded on erroneous or disputed science. Both experts in this study suggested that a meeting of experts before the trial in a non-adversarial context might be a valuable way forward. Scientific evidence could then be presented holistically outlining what is agreed and what areas of disagreement remain. It might also be possible at this stage to consider how best evidence can be presented in an understandable form. There are no doubt potential flaws in this approach but the task of establishing a more effective and less risky approach to scientific evidence is a potentially fruitful and important area for research. Lawyers, judges and juries all need to be more aware of the dangers of interpreting and dealing with scientific evidence.

The above proposals are, it is conceded, lacking in detail and requiring much more development. There is likely to be an element of naivety in such an exercise given the complexity of the system under review. It is for these reasons that the focus has been on general principles rather than detail. As one solicitor in the study put it "it's all about getting the right people working in the system" (S4). This cannot of course be achieved entirely but cultures can change people and vice versa. The over-riding need within the criminal justice system is not specific reforms, useful as these may be, but a genuine commitment to a freedom and harm prevention model that aims to turn the traditional rhetoric of the legal world closer to reality in practice. The first step is for all actors within the system to accept that they are part of the problem and that they have a duty to constantly re-visit the values that should be observed to protect the innocent.

While there is a duty for all to try to prevent wrongful convictions it must also be recognised that error is inevitable within the criminal justice system and consequently its rectification is a duty which should not be compromised by illusory ideas of the systems infallibility or careless homage to workability. That message needs to come from

government and from the agencies of the system at all levels. In a model of justice that seeks to enhance a free society the first priority of any criminal justice system should be to do no harm. This requires an acute awareness of the potential uncertainties of investigations, however well undertaken. Such an awareness of uncertainty should permeate consciousness throughout the system such that wrongful convictions are less likely and, when they do occur, they can be rectified with much greater speed and certainty.

CHAPTER 17

THE HUMAN COST

Readers of the previous chapter might well feel that the arguments neglect victims of crime and the need to avoid creating a system that allows the guilty freedom to abuse the public and the system. This sentiment was echoed by former Prime Minister Tony Blair:

“It is perhaps the biggest miscarriage of justice in today’s system when the guilty walk away unpunished”

(Blair 2006 quoted in Naughton 2007: 21)

Such a sentiment is reflective of a political climate that undermines the principle that this thesis has been founded upon; often stated in the famous comment attributed to William Blackstone in 1858: -

“It is better that 10 guilty persons escape than one innocent suffer”

It is true that a system designed primarily to protect the innocent will inevitably result in some guilty people escaping conviction. However as Sanders and Young assert, the aims of the criminal justice system are not all equally and simultaneously achievable: -

“Many people, especially politicians, like to pretend that they are all equally achievable, but we have seen that this is desperately misleading”

(Sanders and Young 2007: 43)

Compromise may always be necessary but the priority, it is argued here, should remain with Blackstone’s principle, for three reasons:-

Firstly wrongful convictions by their nature mean that the real perpetrators have avoided conviction and may in some cases pose a serious risk to public safety.

Secondly the first priority of a free society should be to ensure that the State does not commit crimes or wrongs against its own citizens. All societies suffer crime to some level but a far greater danger lays in corruption, incompetence or distorted values within

the authorities of the State. Once the power of those authorities acts against citizens without due cause, then those citizens have no protection or recourse. Any awareness of history, and indeed current affairs around the world, should provide warning that any moves in this direction pose the greatest risks of destructive actions by human beings against other human beings. The actions of individual 'rogue' citizens, dangerous as they may be in some instances, bear no comparison with the potential harm of a State where the authorities abandon respect for the human rights of citizens. Human rights cannot exist in a crude utilitarian form; they have to be individualised as well as collective.

Thirdly wrongful conviction and imprisonment of innocent people is the grossest of human right abuses short of torture and murder (although it could be argued that it can come close to these latter two prohibitions – see below). This is the reason, along with the points above, why Tony Blair is wrong and William Blackstone is right. Creating other victims does not protect victims. Unfair accusations even of a trivial kind can cause great consternation. When the false accusation is of a serious nature, even murder (or some would say worse still, sexual offences), the experience is almost unimaginable to many people. It may be that this is one of the reasons why the reality of the situation is often denied or played down.

In recent years the experience and rights of victims of crime has come to greater prominence both in academic criminology and in policy terms (Goodey 2005, Walklate 2007). Rock (2007: 38-9) describes how victims could be seen as the forgotten people absent in the foundational writings of criminology and how their needs have been subsumed to the general public interest within the criminal justice system, at least until recent times.

The victims of miscarriages of justice remain largely the forgotten people; they are absent from policy considerations and almost entirely absent from the wealth of mainstream academic literature on victims and victimology. However they suffer all the categories of misfortune described in the literature (see for example Rock 2007, Walklate 2007): Direct victimisation (physical, financial and emotional injury), secondary victimisation (negative or insensitive treatment by the criminal justice system), indirect victimisation (of families and associates) and in some cases victimisation through vulnerability. Furthermore they are often blamed for their own misfortune or wrongly targeted through their lifestyles, actions or personalities, for example Darren Hall of the Newsagent Three

(see Chapter 5) and Sion Jenkins (Chapter 14) in this study or Colin Stagg (page 344 above) – mirroring the notions of victim blaming and victim precipitation that have been applied to some crime victims (Rock 2007: 43-50).

Perhaps above all, apart from the obvious additional suffering of being tried and imprisoned, victims of injustice suffer the same psychological traumas that other victims suffer – insecurity, troubled relationships, shock, stress disorders and violation (Hoyle and Zedner 2007, Grounds 2004). The sense of violation is exacerbated further for miscarriage of justice victims; they suffer not just violation of property, space or physical wellbeing but the violation of their personal image, reputation and sense of self. Furthermore this violation is enacted not by a rogue element within society but in the name of society; by the very forces of the State that exist to protect citizens. There is no sympathy or support for these victims, only vilification, at least until the miscarriage is identified or corrected.

Condry (2007) has described the experience of families of serious offenders, the sense of shame, the shattering of lives, fear of hostility from various quarters, fears for the safety and welfare of relatives in prison, the loss of or damage to relationships and so on. Families of miscarriages of justice victims suffer similar effects but, if they believe their loved ones to be innocent, this is combined with an overwhelming sense of anger and injustice and the frustration of powerlessness and disbelief in the face of the system that will not listen to their outrage at what has happened.

The emotional and personal aspects of wrongful conviction have received little attention in this thesis. In the light of this and to re-enforce the rationale for the argument above, the thesis will conclude with the voices of some of those who have suffered at the hands of the system that they formerly believed was there to protect them: -

On Friday 16th March 2007 Sally Clark was found dead at her home aged 42, just four years after her release in 2003. The view of her family was expressed in a press statement following the inquest on 7th November 2007: -

“Sally was unable to come to terms with the false accusations based on flawed medical evidence and the failure of the legal system, which debased everything she had been brought up to believe in and which she herself practiced. Having suffered what was acknowledged by the Court of Appeal to be one of the worst miscarriages of justice of recent years, it is hardly surprising that her ordeal over 10 years, culminated in the diagnosis of “Enduring Personality Change after

Catastrophic Experience”, “Protracted Grief Reaction” and “Alcohol Dependency Syndrome” and that she was never able to return to being the happy, kind, and generous person we all knew and loved”

Press Statement 7 Nov 2007 retrieved from www.sallyclark.org.uk on 10/10 08

One solicitor (S6) closed his interview for this research with “one last thing”: -

“There are miscarriages of justice and they do continue and the other thing that I personally am concerned about is the devastating impact on the people who suffer them, as well as wider family and friends. I’ve yet to work out the figures but take four of the people who I’ve represented who had convictions overturned for murder, they did 50 years in prison between them and they probably between them didn’t survive 10 years after being released, and it’s a huge problem. (S6)

Mike O’Brien has managed to re-build his life since release but not without continuing to suffer from Post Traumatic Stress Disorder (PTSD), as have many others (Grounds 2004).

Mike describes the devastating effects in his book (O’Brien and Lewis 2008) as do others, such as Sion Jenkins (Jenkins and Woffinden 2008) and Paddy Joe Hill of the Birmingham 6 (Hill 1995). In interview Mike described the condition: -

“I’m re-living the trial, re-living the death of my daughter and the funeral of my father (both died while he was in prison)...I still do to this day.... like a video camera and its nearly 20 years ago but that’s what I was re-living all the time in prison. I had terrible mood swings, one minute I was tearful, the next I was angry, then calm, then I wanted to rip everyone’s’ head off and do damage..it was a horrible feeling.....I’m still on heavy medication now, wrongful imprisonment has caused damage in my brain.”

(Mike O’Brien)

Mike’s co-defendant Ellis Sherwood has suffered even greater problems since release in 1998, as described in Mike’s book: -

“His health was shattered too. Just before Christmas 2001 he suffered a stroke. He was 33. I couldn’t believe it. I went to the hospital to see him. He was paralysed down one side and unable to talk.....His Mum reckoned the legacy of an unjust prison sentence had taken its toll on his mental and physical health. She said he had been stressed since he came out, and he was still bitter and jumpy”

(O’Brien and Lewis 2008: 195-196)

The whole process of wrongful imprisonment is a nightmare that defies description except perhaps to those that have experienced it: -

"You're in hell that's the only word for it and you can't get out of it....it's like you can't breath, you're surrounded....over-powered with this force....you're absolutely speechless....I got that bad that I put towels up at the window so it was black, so I couldn't see nothing; I felt claustrophobic so I had to be claustrophobic....I'd sit there in the dark. Then the screws made up a rule that you can't put towels up at the window. So that's how you feel, you're just dreaming, you can't say anything, you can't hear anything – you're just brain-dead"

(AN)

The physical and mental toll of such experiences impacts on the direct victims of injustice but is also devastating to family and friends: -

"I suspect physically, mentally and emotionally it's inevitably gonna have had a long term effect on me. Whether that means it shortens my life or I suffer more illness or whatever, it's another bridge to be crossed. If we get to that stage I'll never be able to say whether that's the reason for it or not.....but you know I'm very acutely aware that it could effect me in that way.....I know the stress very badly effected my family – physical illnesses manifested themselves....I can never be sure how much it had an effect on the long term ill-health of my mother and father"

(Ian Thomas)

"I definitely know I'm really damaged, there's days when I feel, you know I'm just damaged, and it's effected my family and children, it's left its mark on us all. My Mum died, I know she wasn't very well but I think it brought her death on definitely. I'd never left my Mum all my life – She couldn't understand why this was happening"

(Sue May)

As Jonathan Jones also described (see quotation page 115) wrongful conviction can destroy long established and valued personal foundations and identity; Sheila Bowler and Nick Tucker to take just two others from all the examples in this study: -

"An entirely innocent woman of 62, widely acknowledged to be a pillar of respectability, was just twelve weeks widowed and privately grieving for her late husband when she was engulfed in a terrifying nightmare. She was deprived of her freedom, locked up for four years and subjected to the indignity of being handcuffed, herded about, bawled at and strip searched for drugs.....her health has been jeopardised and her family life stalemated.....her previous impeccable reputation has been vilified, her previously untarnished name banded about in lurid headlines.....blackening the name of Sheila Bowler to audiences of millions"

(Devlin and Devlin 1998: 364)

“Before this I was in the forces, I would willingly lay down my life for my country – now I wouldn’t piss on it if it was on fire, I really wouldn’t. The long term effects on my health will only be known when it’s over but you know it stands to reason that the physical and mental stress will probably have a shortening effect on my life.....I suffered from PTSD that still comes back to haunt me every now and then, things trigger it off and all my family and friends have been effected. You certainly find out who your friends are, the shallow ones drop out and then you find new ones take their place”

(Nick Tucker)

The damage of wrongful conviction is not only profound, it is permanent and a potential threat to everyone: -

“It can happen to anyone, it is so easy for it to happen and you’re totally powerless – your life is in the hands of other people who just don’t care for you. Your family who love you and care for you haven’t got a clue what to do, where to go and how to clear your name, and it’s so frustrating. You know and they know the truth and all and, well it’s worse than a nightmare and it will never go away. It won’t...I could never go forward in my life and forget all this – you know it’s there all the time.”

(Nettie Hewins)

The majority of people featured in the focused cases in this study experienced reserved judgements, from the Court of Appeal; resulting in weeks of waiting to hear whether or not they would be allowed to resume their lives. In the cases of Sue May and Nick Tucker the wait was 8 weeks before their appeals were turned down and weeks of unbearable tension were transformed to feelings of despair: -

“It was a terrible experience coming away from the Court of Appeal back to New Hall prison....the awful despair when it goes wrong – I thought I was going to die in that sweat box (prison vehicle with small locked cubicles)....we got lost and I was in that sweat box for hours and hours without water or anything”

(Sue May)

At the end of the appeal of Mike Attwooll and John Roden in March 2008, Mr Justice Latham turned to the men and commented that they would try not to take too long announcing the decision as he was aware that they had waited 14 years for this. Some observers and family members took this as a hint of a hopeful outcome. In fact they

waited over 5 weeks for the decision to be announced. The families, who along with the two defendants, also endured the almost unbearable tension of that period, travelled to London from Wales for the eventual decision, only to arrive 10 minutes late and find that the judgement had simply been handed out at 10 o'clock. It was all over and years of struggle and weeks of tension had come to nothing. While exact sources of information must be retained for confidentiality there is no doubt that the judges had made a definitive decision by, at the most, two weeks after the appeal. A decision could have been given and the reasons given later if necessary. As it was, the stress on the men and their family (a number of who have suffered health problems at the time and since) was strung out for another three and a half weeks. This thesis has argued for a realistic acceptance of uncertainty in criminal justice matters and a genuine and meaningful re-evaluation of the principles originally conceived to protect the innocent. These are principles concerned with humanity. A starting point would be an end to such insensitive and gratuitous cruelty.

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- TV and Radio Broadcasts
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APPENDIX 1

Police forensic personnel and crime scene documentation

APPENDIX 1

Different Personnel Who May At Some Stage or Other Be Involved in the Forensic Investigation

- The Force Control Room
- The Divisional Control Room
- Uniform Relief or Shift
- Crime Desk of the Basic Command Unit (BCU)
- Uniform Beat Crime Officer
- Volume Crime Scene Examiner
- Crime Scene Attender
- Crime Scene Analyst
- Case Investigation Team
- Duty Criminal Investigation Department (CID) Operational Officer
- Area CID Team
- SOCO (Scenes of Crime Officers)
- Forensic Physicians
- Fingerprint Bureau
- Crime Management Department (CMD)
- Major Crimes Unit (MCU)
- Senior Investigating Officer (SIO)
- Exhibits Officer
- Police Search Adviser (POLSA) Officers
- Specialist Photographers
- Technical Support Unit (TSU)
- Crime Scene Co-ordinator
- Scientific Support Manager (SSM)
- Crime Scene Manager (CSM)
- National Crime and Operations Faculty (NCOF) Liaison Officer
- Pathologist
- Forensic Scientist
- Other Experts
- Specialist Advisers:
 - Firearms
 - Document Analyst
 - Forensic Odontologist
 - Medical/Psychological/Psychiatry Experts
 - Forensic Linguistic Expert
 - Veterinary Scientist
 - Fire Investigator
 - Accountant
 - Computer Analyst
 - Forensic Anthropologist
 - Forensic Archaeologist

The Documentation Relating to the Investigation of The Crime Scene and The Removal of & Submission of Material for Examination.

- Incident Report Book (IRB) or Pocket Book
- The Crime Report
- Scene Examinations Form
- Narrative Report

- The Crime File
- Photographs of Scene
- Videotape
- Photographic Log
- Diagram/Sketch
- Latent Print Lift Log
- Evidence Recovery Bag
- Form-MGFSS:(Manual of Guidance for the Preparation Processing & Submission of Files; Forensic Science Service)
- Entry/Exit Documentation
- The Crime Scene Log
- Scene Release Documentation
- The Actions Log
- Scene Managers Notes
- Scientific Support Co-ordinators Notes
- Post Mortem Examination Notes
- Administrative Worksheet

(Adapted from Forensic Practice in Criminal Cases. Townley L & Ede R – 2004 p 110-111)

APPENDIX 2

Examples of potential contamination of scientific evidence

APPENDIX 2

Examples Of How, Despite Training, Evidence May Be Contaminated.

- Packaging being opened by investigators wishing to examine the item or to show it to a suspect in interview as 'persuasive evidence', e.g. a police officer had two items of clothing out on her desk, one after the other. This provided an opportunity for contamination of the second item, belonging to the suspect, by fibres from the first, belonging to the victim. To avoid this happening, SSDs invest in paper packets, bags or envelopes with a see-through window.
- The placing of a hand or finger inside an exhibit bag.
- Blood or semen is inadvertently transferred to other surfaces of an item, e.g. by folding items without separating the surfaces, so that the surfaces contact each other.
- A suspect being placed in a cell used by another suspect and sharing the cell blanket.
- A police officer having contact with both the victim and a suspect.
- A suspect being placed in the same vehicle which had transported the victim.
- Shaking or disturbing an item of clothing which is not on its own.
- Poking a finger through a stab or bullet hole in a given item or surface.
- Scraping of a body part, clothing or item across a bloodstain.
- Removing debris.
- More than one item being placed in one bag.
- Insecure packaging, e.g. use of staples instead of adhesive tape.
- The first officer attending (FOA) coming into contact with both the victim and the suspect cross-contaminating the two, e.g. attending to the victim then arresting the suspect, arresting the suspect and then attending to the victim.
- The FOA failing to ensure that the same vehicle does not transport the victim and the suspect at different times.
- The same forensic examiner inspecting items from the suspect and the victim without decontamination in between.
- The same room in a laboratory being used to inspect items from the suspect and the victim without cleaning in between. Where possible, laboratories will keep separate rooms for suspect and victim material inspections.
- The same tools, such as a fibre collection kit being used to collect trace evidence from the suspect and the victim.

APPENDIX 3

Summaries of ‘Focused’ Cases

APPENDIX 3

SUMMARY NOTES ON FOCUSED CASES

Detailed case studies of the cases of Jonathan Jones, Michael Attwooll and John Roden, and Sion Jenkins are included in the main script (Chapters 5, 10 and 14 respectively) and thus are not summarised here. The case of AN is not included here in order to respect his wish for the case not to be identified. AN was convicted in the 1980s of murder and has now been released on licence. His appeal was lost despite widespread legal and media support and belief in his innocence which remains to this day. Further details of most of the cases below also occur in the main script. Due to the complexity, and relatively little known details of the case of Ian Thomas, a larger section of his campaign document has been included here.

Shorter summaries are given for Mike O'Brien, Annette Hewins, Susan May, Nick Tucker, Sally Clark and Sheila Bowler.

Michael O'Brien

Mike O'Brien was convicted along with two other young men of the murder and robbery of a newsagent at the back of his home in Cardiff in October 1987. The main evidence was the confession of one of the other co-defendants. This vulnerable young man maintained his admissions during the trial and continued to hold various versions of this position for 8 years when he finally admitted to his father and a BBC journalist that he had falsely incriminated himself and the other two defendants. Other evidence was based on the testimony of a number of people who were either prison informants or people being questioned themselves about the murder. All of these prosecution witnesses later admitted to BBC reporters that they had lied under pressure from the police. In addition a police officer D.I. Lewis claimed to have overheard an incriminating conversation between two of the defendants.

Following a BBC Wales programme in 1996, expert reports were commissioned on the psychological make up of the co-defendant who falsely confessed. Furthermore a report by the Thames Valley Police evidenced that the three had been denied access to solicitors, interviewed off the record, detained for illegal periods and handcuffed to hot radiators. The reliability of the incriminating conversation between two of the defendants that a senior detective claimed to have overheard was also seriously questioned especially as evidence was emerging of D.I. Stuart Lewis' tendency to create this type of evidence.

The CCRC referred the case to appeal in 1998 and the conviction was quashed in December 1999. The Court of Appeal relied upon 4 experts, including the prosecution expert, who all maintained that the confessions and evidence of the co-defendant could not

be relied upon, especially when combined with the mistreatment of all the men in police custody. The court did not attach much significance to the retractions of all the prosecution witnesses and refused to attribute any blame to individual police officers.

Since his release Mike O'Brien has become an active campaigner on behalf of other miscarriages of justice and has campaigned for a public enquiry into miscarriages of justice in South Wales. He has recently written a book "the Death of Justice", (2008) with journalist Greg Lewis about his experiences.

Annette (Nettie) Hewins

Nettie Hewins was convicted of "arson with intent" in relation to a fire in Merthyr Tydfil in October 1995 in which a mother and two young children died.

Her niece, Donna Clark, had been charged with murder in February 1996 largely it seems on speculation about her movements and her relationship with the victims husband. A 16 year-old girl who was with Donna on the night of the fire was arrested at the same time. She was transformed from being a suspect to a prosecution witness after oppressive questioning which, had she remained a suspect, would have been unacceptable under the rules of the Police and Criminal Evidence Act (PACE 1984). She was subjected to 16 police interviews, she made no incriminating statements in the first 12 and all such statements in the later interviews were retracted or shown to be inconsistent in court.

Nettie had been questioned in February 1996 and released; from then until June 1996 she fronted a major campaign to assert Donna's innocence. She was arrested and charged with murder in June although there was no more basis for this than there had been in February. The only connection made between Nettie and the crime was that she had taken Donna to a petrol station on the night of the fire to buy electricity tokens. It was claimed that petrol was transferred at this time although no evidence was ever adduced to support this; in fact forensic tests suggested that the fire had been started with unleaded petrol whereas Nettie had put leaded petrol in her car.

The Court of Appeal cleared Nettie in February 1999 on the basis of "insufficient evidence". Donna's conviction was quashed soon afterwards.

Susan May

Sue May was convicted of the murder of her elderly aunt who she found dead in her own home in March 1992. The state of the house suggested a burglary attempt although nothing had been stolen. Susan was a loyal carer to her aunt who she visited daily to assist.

Following failure to progress in tracing a burglar, the police built a case around three stains on the dining room wall, one of which contained Susan's fingerprint and which they said was blood. They speculated on a financial motive although there was no basis for this claim. Also Susan was alleged to have made a statement to the police relating to scratches on her aunt's face about which she could only have known if she was the murderer. Evidence of witnesses who saw and heard a car outside the house around midnight was not disclosed to the jury at trial; neither was fibre evidence and unidentified fingerprint evidence that pointed to Susan's innocence.

Investigation by the CCRC revealed that forensic science notes about the stains had been extensively altered and that no records exist to show the stains were tested on the day claimed. Furthermore testing by two independent experts obtained negative results for blood when testing the stains. The CCRC also discovered that the policeman who told Susan how her aunt had died had recorded details of injuries in his notebook and may therefore have revealed these – the notebook has since been lost. In any event Susan has always denied making any comment about scratches. Both the CCRC and the Police Complaints Authority agree that her statements were improperly taken and should not have been used against her at trial or appeal.

Despite the CCRC referral the Court of Appeal dismissed Susan's appeal in December 2001. Unusually for a miscarriage of justice case politicians have not been reluctant to express concern about the case and widespread support from members of both the House of Commons and House of Lords has been achieved. The CCRC have been presented with more new evidence and continue to review the case. Susan was released on licence in April 2005.

Nick Tucker

Nick Tucker was convicted of the murder of his wife who died in July 1995 when the car she was travelling in, driven by Nick, crashed into a river in rural Suffolk. Nick Tucker was a Squadron Leader in the RAF with 25 years of unblemished service. He had recently had a brief affair with an interpreter while serving in Bosnia and the prosecution used this as a motive for murder.

The presence of petechial haemorrhages in Mrs Tuckers eyelids were interpreted as signs of strangulation, although there were no other signs of this. Furthermore such haemorrhages also occur in cases of drowning. The prosecution also claimed that the speed of impact was insufficient to render the occupants unconscious. (Nick was found in this condition while his wife was found in the river having left the car). Traces of Nick's blood from a head injury were also found on the passenger door. The prosecution case therefore was that he had staged the accident and feigned unconsciousness in order to murder his wife and that he had rendered her unconscious before the crash and then drowned her in the water. Speculation about motives and Nick's reaction on being rescued (which experts have since concluded was consistent behaviour following unconsciousness) were used to develop the case.

The first appeal was refused on the basis that there was no new evidence although the judges admitted that there was no direct evidence of murder.

Since then extensive tests and re-constructions have shown that the speed of the car was likely to be greater on impact than originally claimed and entirely consistent with the injuries sustained to both parties. The transfer of blood could have come from any number of people who attended the accident including the person who assisted Nick (who was bleeding from his head) and then went to the passenger side of the car. Furthermore the presence of deer in the areas was a common cause of accidents (Nick had described swerving to avoid deer) and there were faults with the car. Consultant neurologists have confirmed that all the evidence indicates that Nick was rendered unconscious and that his wife may have drowned trying to get around the car to assist him (the depth of the water had also been underestimated at the trial). All five pathologists who have investigated the evidence or reviewed the case have concluded that there was no evidence of murder and five forensic experts have been critical of way forensic evidence was handled. Channel Four's "Trial and Error" made a programme about the case in Nov 2000.

Despite all this and more evidence, much of which is new evidence, the CCRC refused in April 2003, after 4 years of deliberation, to refer the case to appeal. A further application with yet more new expert evidence has been presented to the CCRC. Nick was released on licence in December 2008 but still awaits a CCRC referral.

Sally Clark

Sally Clark and her husband Stephen were both solicitors working in the commercial field. In December 1996 their son Christopher died suddenly in his sleep, aged just 11 months. There was no suggestion of suspicious circumstances and the death was recorded, after post mortem by pathologist Dr Alan Williams, as natural causes with evidence of a lower respiratory tract infection.

In January 1998 tragedy struck again and their second son Harry died suddenly aged just 8 weeks. Neither of the two babies showed any sign of external injuries. Dr Williams undertaking the post mortem of Harry reported suspicion of retina and brain damage that might be due to shaking. This was later agreed among prosecution experts to be a misdiagnosis. However it had prompted Dr Williams to review the post mortem of Christopher, in so doing he found evidence of blood traces in the lungs and a slight cut to the inside of the lip (the defence experts explained this by reference to a previous nose bleed incident and to resuscitation attempts – resuscitation was also one of the explanations given for certain internal injuries to Harry). Dr Williams therefore suggested that both babies had been shaken to cause death.

Sally and her husband were arrested 4 weeks after Harry's death and Sally's honest responses to questioning were later to be used by the prosecution to create a picture of Sally as a career woman who was depressed and frustrated about having a family. This was in contradiction to health visitors and friends who described her as a caring and loving mother, enthusiastic about her family. Sally was charged with murder (Stephen was away when one of the babies died and thus could not be charged with the murders).

Days before the trial Professor. Green who had supported Dr Williams position came to agree with a defence expert that there was no clear evidence of shaking. At this stage it was expected that the trial would be stopped but instead the prosecution was allowed to change the argument and claim that both babies had been smothered. This argument was then based on evidence of hypoxia in the babies although defence experts maintained that this was normal in sudden infant deaths. There was similar debate about other internal injuries to the babies (see Chapter 8 of main thesis).

The medical evidence debate at trial was supported by Professor Meadow a paediatrician who had been involved in a number of similar cases and had developed the theory that multiple cot deaths were unlikely to be natural deaths. Professor Meadow told the court that the statistical likelihood of two such deaths occurring in one family was in the region of 73 million to 1. It was not until the second appeal in 2003 that the report of Professor Hill, a mathematician, was considered by a court. His analysis of such cases illustrated mathematically that infant deaths within a family are not totally independent events. Therefore it was totally misleading to simply square the figure for the incidence of one such death and arrive at a figure of 73 million to one as Meadow had done. The event of two deaths was clearly more common than Meadow had suggested and the probability was in the region of 1 in 130,000. Even this figure however masks the error of the “prosecutor’s fallacy” that was happening in this case – the idea that the chance of a rare event happening is the same as the chance that the defendant is innocence. Sally was convicted on a 10-2 majority verdict in Nov 1999.

Her first appeal in 2000 challenged the medical evidence and the statistical argument of Meadow with evidence from a statistician Dr Ian Evert. The Court of Appeal however upheld the conviction partly on the basis that the jury would not have been influenced by the statistics even though these were misleading.

By the time of the second appeal in 2003 the defence had amassed no less than 14 new reports from various medical experts in addition to Professor Hill’s report. The whole of the medical evidence was in question but the overwhelming finding was the chance discovery of a microbiology report on the death of Harry that Dr Williams had never disclosed to the prosecution. This reported showed had Harry had a staphylococcus infection at various sites throughout his body and that this, not smothering was the cause of death (the initial cause of death in Christopher had also been noted as infection).

Sally was cleared in 2003 but died prematurely in 2007 having never recovered from the trauma of her experience.

In June 2003 Dr Williams was found guilty of professional misconduct but not guilty of wilful intention to mislead – he was prohibited for 3 years from undertaking any Home Office pathology or coroners cases.

In 2005 Professor Meadow was struck off for serious professional misconduct but was later re-instated on appeal.

For a full account of the case see “Stolen Innocence” by John Batt (2004) London: Ebury Press

Sheila Bowler

Sheila Bowler was a 62 year old piano teacher whose husband had recently died when she was convicted of the murder of her husband's aunt Flo in 1993. Like Sue May (above) Sheila had for many years cared for and supported Flo until she had to move into a home. Sheila had collected Flo from the home to take her to her house for the weekend. Sheila drove around to undertake a couple of other tasks having picked up Flo, such that it was dark when on the way home her car came to a halt with a flat tyre. Flo was believed by all in the Residential home where she lived, and by Sheila to be capable of only a few steps unsupported. Sheila left Flo in the car and went to get help, calling eventually at the home of a couple she knew. It seems Sheila stopped for a conversation with the man she knew before raising the problem she was faced with – this would later be portrayed as suspicious. When they returned to the car Flo was no longer there.

The next day Flo was found drowned in the river, the circumstances suggested that she would have to have walked about 500 yards to have fallen in where she did. The case thus revolved around two unlikely scenarios: either Flo had walked the distance or Sheila, a woman of impeccable good character with a caring background had hatched a plot and killed Flo by pushing her into the river. Sheila's stoical personality and apparent lack of emotional expression added to the suspicion, along with a few other minor circumstantial factors such as a dispute about the degree of damage to the car tyre and the route taken by Sheila. This suspicion developed through police contact and the lack of other explanations and despite the lack of any eyewitness or scientific evidence to support the case against Sheila she was charged with murder. At trial the defence was that someone else must have committed the crime, meanwhile the prosecution played heavily on their interpretation of personality factors. The jury convicted on the basis that it must have been Sheila or someone else – not an accident.

After the trial evidence began to emerge anecdotally from the public, that people who were thought to be virtually unable to walk had been known to walk long distances when confused or frightened. Furthermore a geriatrician Professor Archie Young produced a report supporting this argument. At Sheila's first appeal in 1995 the Court declined to hear Professor Young's evidence on the basis that it was theoretical and the appeal was lost. Increasing media pressure and new accounts from people who knew Flo led the Home Secretary to refer the case back for a second appeal in 1996 (this was before the CCRC took over this responsibility in 1997). At the second appeal in 1997 the judges did agree to hear Prof Young's evidence along with further evidence including evidence from Flo's GP and others which suggested walking the distance was not inconceivable. The judges ordered a re-trial at which the accident scenario was fully explored, unlike at the first trial where this was not considered a possibility. The jury cleared Sheila at the re-trial in 1998.

For a full account of the case see "Anybody's Nightmare: The Sheila Bowler Story" by Angela and Tim Devlin, Norfolk: Taverner

Ian Thomas

The following account is taken from Ian Thomas's campaign booklet that explains the case. Ian was released on licence in 2003.

IAN THOMAS



VICTIM OF A MISCARRIAGE OF JUSTICE

- **CONVICTED** twice and sentenced to life imprisonment for a crime Ian Thomas did not commit.
- **NO** witnesses to any crime. **NO** confessions or admissions. **NO** forensic or any other expert evidence against IAN.
- **PLEA-BARGAINING**, bullying, detention under false pretences; just some of the tactics used by the police to secure a conviction.
- **NON-DISCLOSURE** of vitally important evidence by the police.
- **SUSPECTS** ignored by the police.
- **UNSUPPORTED** claims by the police and prosecution which have now been refuted by **FRESH EVIDENCE**.
- **BREACHES** of the **POLICE AND CRIMINAL EVIDENCE ACT**, and of the **EUROPEAN CONVENTION ON HUMAN RIGHTS**.
- **CONTRADICTORY** Appeal Court rulings and a refusal to accept sound legal argument have resulted in perverse judicial decisions.
- **ENGLISH LAW** - changes accepted because of IAN'S case.

Ian Thomas has been convicted and sentenced to life imprisonment for the murder of his partner Julie Christian. Convicted not once, but twice on tenuous and purely speculative circumstantial evidence.

Ian and Julie lived in 3 Teilo Street, Liverpool, England. Julie disappeared at some time during the afternoon of Sunday 11 November 1990, and her body was found amongst the remains of a fire in an alleyway between Teilo Street and Elwy Street on Wednesday 14 November 1990. The alleyway is just one metre wide.

When the police were called to where the body was found they began a catastrophic blunder of events in solving a serious crime. They failed to set up a scene of crime as per British Home Office Guidelines. After taking photographs and a video recording of the scene, the police arranged for Julie's body to be removed to the mortuary without an in-depth, on the scene investigation. The residue of the fire was then transported to the forensic laboratory for analysis.

The police claimed the crime took place in the communal home in Teilo Street, and that Julie had been killed no later than 12 noon on the Sunday. However, the forensic science officer has clearly stated that Ian, the house, and the contents of the house, were **not** connected to the crime in any way whatsoever. The police did not disclose this information at the earliest available opportunity by failing to provide the depositions and other material in good time - such action had been criticised by Liverpool's Stipendary Magistrate.

The time and cause of Julie's death was deemed as **unascertainable** by the prosecution Pathologist, so the police claims were totally unsupported.

The police involved Fire Officer Leitch of the Strathclyde Fire Brigade, Scotland, in the investigation in January 1991. The Home Office guidelines mentioned earlier, particularly in relation to the scene of a 'fatal fire', do not apply in Scotland. Note that Scotland has differing Laws to those which are applied in England and Wales.

Ian had left home at 2.00pm on the Sunday, and did not return home until the evening. Julie was alive and well when he left home that day.

Two schoolgirls, (who cannot be named for legal reasons), then saw Julie leaving home at approximately 3.30pm on the Sunday, they noticed a strange car in the street, and noted that Julie was followed by a strange man as she walked up the street. The police did not bother to find this man, or the car, claiming that Julie had been killed some 3½ hours earlier, and that Ian had removed her body from the house to the alleyway and set it on fire at 7.00pm Sunday night.

Note that people living either side of where the body was found put their household refuse in the alleyway on Sunday night, for collection by the refuse collectors on the Monday morning. They did not see or report any fire, nor a body.

On Monday morning 12 November 1990, the refuse collectors called to collect household refuse from the alleyway. They noticed a pile of rubbish that had been burned and literally got down on their hands and knees to try and remove it. They realised that it was still hot, so left it where it was for fear of setting their wagon alight. They did not report a 'live' fire, but crucially their actions **did not** reveal a body.

On Sunday 11 November 1990, a witness, (Teresa Whitby), saw two men acting in a suspicious manner near a place known locally as "Diggers", and gave the police a description of these men. On Tuesday 13 November 1990, another witness, (Tessa Harrison), found some property at this same location which turned out to belong to Julie. She later found other items at the back of "Diggers" that may have belonged to Julie, but the police were not interested in investigating this at all and she was ignored.

Instead, the police tried to claim that Ian was one of the two men and had 'dumped' Julie's property. However, the police have never officially claimed that Ian had a 'partner in crime', and at trial they accepted that neither of the descriptions of the two men seen at the site matched Ian at all. The police had never bothered to try and find these two men who, given the above, could clearly have been suspects.

At approximately 2.00am on Wednesday 14 November 1990, another witness, (Les Humphreys - who claims that he was warned by police not to attend the trial), heard two people dragging something past his rear door, along the alleyway leading to where Julie's body was found. This witness gave a statement to the police, but never gave evidence in Court at trial and the police never bothered to find the people the witness heard in the alleyway.

There were other witnesses who gave statements or telephoned the police reporting strange incidents involving men and women in the area during the relevant period of time. Again, the police never bothered to find any of these people, nor responded to any telephone reports, nor investigated reports of any of the events.

During the period 11 November to 14 November, Ian attended the police station to give a voluntary statement. On the 14 November the police, knowing Julie's body had been found at 3.00pm that day, should have suspended proceedings. They did not, and did not inform Ian of the finding of the body until approximately 10.26pm, some 7 hours later. They have since admitted holding him under false pretences in the hope of gaining a confession, but then arrested him anyway.

On Tuesday 13 November 1990, Ian had been examined by a duty police surgeon, Dr. Brian Baker. This was the day before the body was found, and some 36 hours before Ian's arrest. He agreed with Ian's claims that minor injuries to his face and hands arose by purely innocent means.

However, the police then called in another police surgeon, Dr. Ram Messing, who conducted an examination shortly after Ian's arrest. Dr. Messing decided that these minor injuries to Ian must have come from a fight with Julie and were inflicted in her "death struggle". There is no evidence to support these claims, and Messing's professional ability has been called into question in at least one other case.

During the period 15 to 17 November, Ian was interviewed by police officers Murphy, Forrest, Morrison and Bray. Ian had legal representation at that time and still maintained his innocence. The police have since admitted bullying Ian during these interviews but, off the record, they then offered Ian a manslaughter deal in exchange for a 'confession'. Ian categorically refused the deal on every occasion.

Note that shortly before the second trial, Prosecution counsel indicated that a manslaughter deal was still an option, but again Ian categorically refused.

Ian was eventually charged with murder on Saturday 17 November 1990 by Detective Chief Inspector Tony Bennett. At the Magistrates court, Liverpool Stipendiary Magistrate, Mr. Norman Wootton, stated that in his opinion the evidence was so weak that the police were **"scraping the bottom of the barrel"**.

Although remanded in custody, Ian was released on bail was in January 1991 by Justice Morland. Bail restrictions were not overtly stringent, with Ian being allowed to live amongst listed prosecution witnesses, no curfew, and relaxed 'signing on' conditions - all helping to illustrate that the case against Ian was very weak

At the first trial in February 1992, before Justice Waterhouse, the two schoolgirls who had seen Julie on the Sunday afternoon at a time when the Prosecution claimed death had already occurred were wrongly called as prosecution witnesses. One was allowed to refresh her memory from her statement and gave evidence which was perfect. The other was not allowed to refresh her memory and could not corroborate the first girls evidence. Without that corroboration from the second girl, both the Prosecution and the trial judge claimed that the first girl was simply mistaken about the sighting of Julie. They had no evidence on which to base that claim.

In January 1994 the defence were presented with police statements which had not been disclosed earlier. This concerned a witness, Vernon Blaseberry, who had made a statement in November 1990 to the police. He said that he saw Julie at approximately 5.00pm on the Sunday afternoon, some 5 hours after the police allege she was dead. This witness was suddenly 'remembered' just before the first appeal against the conviction. The Prosecution pulled out of that hearing, allowing the police time to effectively carry out a 'character assassination' on Blaseberry by finding people who would state that "*Vernon would not make a credible witness in a court of law*". Given the non-disclosure and time that had transpired, we will never know if what Blaseberry claimed three years earlier was correct. However, what is again clear is that the police failed to disclose the information at the earliest available opportunity.

Despite this complication with Blaseberry, in February 1994 the Court of Appeal quashed the conviction. This was based on the fact that the second schoolgirl had wrongly been prevented from refreshing her memory, effectively excluding vital corroborating evidence for the defence. A retrial was ordered in order to allow the evidence to be properly presented on behalf of the Defence.

Ian was released on bail pending the second trial which took place before Justice McCullough in October 1994. One schoolgirl again gave excellent evidence, but by this time the other schoolgirl could no longer remember the events of some 4 years earlier. The jury requested sight of the schoolgirls statements, but this request was refused by the judge. Again, crucial Defence evidence never went before the jury and Ian was once again convicted on the basis of spurious and speculative evidence.

During a second appeal hearing at the Court of Appeal in March 1996, the evidence of the schoolgirls was dismissed as 'hearsay' by Lord Justice Rose and the conviction was upheld; resulting in contradictory rulings that unjustly leave Ian still in jail.

As a result of this situation, a proposal was put to the Law Commission for a change to the Law. The Law Commission state in their report LAW COM. 245, "*As occurred in THOMAS (1994) Crim LR 745 where the eight year old witness who had provided exculpatory evidence in a statement to the police had no recollection of events at all by the time of the retrial, and the evidence which tended to show the defendant had not committed the murder with which he was charged never reached the jury.*"

This report and recommendation to change the law was accepted by the Government in December 1998, yet so far has never been enacted and has failed to provide any mechanism that would help Ian.

Perhaps surprisingly, in correspondence between Ian's family and themselves, the Crown Prosecution Service, (C.P.S.), finally admitted that:-

- There was no confession to any crime.
- There were no witnesses to any crime.
- There was no medical or psychiatric evidence.
- There was no pathological evidence.
- There was no forensic evidence to connect Ian, the house, contents of the house to the crime.

After dismissal of the second appeal, television production company 'Just Television' (4 Northington Street, London WC1N 2JG), researched Ian's case. This company is responsible for producing the renowned and respected programmes, "Trial & Error" and "Clear My Name". Their research highlighted the following;

In the original pathology report it is stated by the Prosecution pathologist that the time and cause of death is **unascertainable**. The police concocted a cause and time of death that they felt would suit their purposes in showing Ian to be guilty of the crime. However, Dr R. R. Berrett, a leading Forensic Scientist for 30 years, was employed by 'Just Television', to investigate the case. He conducted an experiment which, along with other fresh evidence, promoted a completely different scenario to that alleged by the prosecution. This also included evidence to suggest that the cause of death was through injury to Julie - resulting in bloodstaining on part of her clothing which was not mentioned in the original pathology or forensic report.

This has never been investigated by the Prosecution, and the Pathologist and Forensic Scientist have since admitted to not working together on the case. Dr. Berrett's evidence clearly refutes the unsupported claims by the police and shows how flawed their case was.

Dr. Berret's work was highlighted in the Channel 4 TV programme "Clear My Name" in 1998, which featured Ian's case. The TV researchers also found another witness, William Harris, a schoolboy in 1990, who had telephoned the police on Tuesday 13 November, saying there was a body on the 'South Street dump'. This area is a half mile away from where Ian and Julie lived. The police ignored William. His mother rang the police and the police visited the area on Wednesday 14 November with William's mother. The police failed to investigate this report and failed to secure the area as a scene of crime.

The significance of this is that it shows Julie's body could have lain at a different location and was then moved to where it was later found, therefore further proving the prosecution case to be at fault. The evidence of William Harris has been corroborated by another witness, Clinton Jones. Put into context, with the evidence of Dr. Berrett, this then also suggests that the noises heard by Les Humphreys could have been Julie's body being moved. *Remember*, the police never investigated this, but it has been accepted by the Criminal Cases Review Commission, (C.C.R.C.). In fact, although not their remit to do so, the C.C.R.C. themselves put forward an alternative scenario that did not include Ian as the guilty party. In doing so, they referred Ian's case back to the Court of Appeal for a **third** time.

That third appeal was eventually heard in March 2002, and was presented by an experienced and distinguished legal team, including Michael Mansfield, QC. The presentation of the case covered the points mentioned above; the two schoolgirls, fresh expert evidence, and the fresh evidence of William Harris.

The hearing took place over 3 days, and was presided over by Lord Justice Auld who himself was party too and a supporter of the changes proposed in the Law Com. 245 report. William Harris, his mother, and Clinton Jones were called to give evidence. The Prosecution conceded points relevant to the expert witnesses, and accepted that their timescale could well be completely wrong. The arguments surrounding the evidence of the two schoolgirls was aired again - taking up most of the Court's attention and later dominating the judgement documentation.

After reserving judgment for some 6 weeks, the Court of Appeal again dismissed Ian's appeal against conviction.

If anything, this has only served to compound the flaws that have occurred on previous occasions, and confused the issue even further in terms of the earlier contradictory Court of Appeal rulings. Effectively the Court has chosen to ignore the ruling of the first Court and has concurred with the findings of the second, failed appeal. This runs against the evidence that not only shows Ian to be innocent, but that he has also been treated unfairly. Conveniently, however, it leaves the judiciary free from having to criticise itself !

APPENDIX 4

Participant Information Sheets

Participant Information Sheet

I am writing to request your help and support with a research project into miscarriages of justice (taken to mean wrongful conviction) that I am currently undertaking at Cardiff University Criminology and Criminal Justice Department, under the supervision of Professor Mike Maguire and Dr Lesley Noaks. The project is funded by the Economic and Social Research Council (ESRC) and will hopefully be completed in Sept 2008 and lead to a PhD qualification. I very much hope that you will be interested in taking part in this project by agreeing to undertake a semi-structured interview.

Theme of the Research

In summary the research starts from the perspectives of people who have been (or are suspected of having been) wrongly convicted of serious crimes. These perspectives are derived largely from in-depth interviews. The study then seeks to balance and compare these views with those of other people who may be involved in some way, at some stage, with potential wrongful convictions. This might include police officers, expert witnesses, journalists and especially lawyers. (Arguably the influence of the legal system itself on this issue has been somewhat neglected in research compared to police investigation issues). However the study considers the whole process from investigation to trial and post-conviction procedures. In so doing it is hoped to gain a greater understanding of the issue by exploring areas such as the nature of legal traditions and systems, communication, perception and social interaction within these systems, professional training and cultures and how evidence is acquired, organised and evaluated. Interviews with people in relevant professions therefore form a vital component of the information gathering process for this project.

Time Considerations

I am very conscious of the pressure on the time of people in these professions and while interviews could be potentially lengthy I would be flexible and appreciative of any time, however limited, that can be afforded to undertake a semi-structured interview. (Around an hour is a probable average time for these interviews). The interview would be based on a set of pre-prepared questions but flexible according to participants' responses. Thus they might be taken in a different direction if other matters of interest arise. The interviews could be undertaken at a time and place convenient to the participant. Ideally I would like to record the interview but this is at the discretion of the participant. Reference to individual cases may be of value in some instances but general questions form the basis of the questionnaire and there is no necessity to discuss individual cases.

The following assurances are given if you decide to participate?

- Any help you agree to give would be on your terms and you would be under no pressure to give any information that you did not wish to disclose.
- Interviews would be held at a time and place that is convenient to you.
- You would not be named in the research unless you give express permission for this to happen.
- Any papers, tapes etc that you might provide would be securely stored and not released to any other party without your permission.
- While I may need to interpret your views in the context of the research as a whole I will make every effort to convey your views accurately and honestly.

- I will respect your right to withdraw permission to use any information given at any time during the research and/or withdraw from the project if for any reason you feel this is necessary.

My background

Most of my working career has been in various areas of health and social services rather than in anything associated with the law. In the early 1990s I joined the civil rights organisation "Liberty" who, at that time, were running a "Justice in Crisis" campaign. I have always been concerned about the issue of miscarriages of justice and on coming to live in Wales I became involved in the establishment of the South Wales Liberty Group. For over 10 years I have been an active campaigner with this group on miscarriages of justice generally and on a number of individual cases. My interest in the subject therefore is based on both practical experience and a deep concern about the injustices that can occur. From a research point of view however I would of course wish to consider all views on the subject in a fair and balanced way.

In order to make my voluntary work with the Liberty Group more effective I undertook a Masters (MSc) degree in Criminology and Criminal Justice completed in 2003. Following this, the opportunity arose to continue this work towards a PhD. I hope this work and whatever follows it, will in some way help towards a greater awareness of the problem of miscarriages of justice in the hope that the chances of preventing and rectifying such events can be increased. I have no illusions however about the difficulties that are faced when confronting this problem.

Where will the research be presented or published?

The final PhD theses may be available in University Libraries. Some of the information may be presented before this at academic conferences and possibly parts of the research may be published in academic journals.

If you could return the slip at the end of this letter in the enclosed stamped addressed envelope to indicate your decision either way that would be very helpful.

Contact Details

Please contact me at any time if you need more information or if you wish to discuss any aspects of the research before completing the Consent Form (see next page)

Full Contact details listed

If you wish to verify the content of this letter please contact Dr Lesley Noaks at the Dept of Criminology and Criminal Justice, Glamorgan Building, Cardiff University.
(Noaks@cardiff.ac.uk)

Thank you very much for your consideration of this request. I look forward to hearing from you and very much hope we will be able to work together on this project.

Dennis Eady
(Cardiff University)

CONSENT FORM

If you are willing to take part in the research please complete this section

If you have any questions that have not been answered by reading the Participant Information Sheet please contact me before completing this slip.

I _____ (NAME) confirm that: -

1. I have read and understood the information on the Participant Information Sheet and that any questions raised by me have been satisfactorily answered.
2. I understand that my participation is voluntary and that I am free to withdraw at any time without giving reasons.
3. I would be willing to take part in the PhD research project being undertaken by Dennis Eady of Cardiff University and understand the explanation and assurances I have been given about the project.

Signed _____

Date _____

Your Contact Details

Address

Tel No

email

I wish my comments to be kept anonymous (Please state yes or no and sign)

If you DO NOT wish to be involved please complete below: -

I _____ (NAME) do not wish to be involved in the research project.

Signed _____

Date _____

APPENDIX 5

Interview Schedules

Miscarriage of Justice victims interview schedule

Lawyers interview schedule

Police interview schedule

Journalists interview schedule

Expert witnesses interview schedule

MISCARRIAGE OF JUSTICE VICTIMS INTERVIEW QUESTIONS

Please do not be alarmed at the number of questions here. I have put down a wide range of questions for my own guidance. It is probably not as bad as it looks because: -

- I will try to be as well informed about your case as I can manage by the time of the interview. Therefore I may not need to ask every question. (I may need to clarify some details and issues specifically about the circumstances of your case if I'm unclear about these)
- If you took part in the previous research in 2003 you will already have given me much of the information so it may not be necessary to go over everything again.
- Some of the questions require short straight forward answers.
- In answering one question you may find you answer a number of others at the same time.
- You don't have to answer anything that you do not wish to answer.

The interview will be informal and shaped by your responses and views rather than rigidly dictated by the format below. I am particularly interested in getting an understanding of the way that you have experienced what has happened and how you have dealt with it, so it is obviously important that the interview gives you the opportunity to put over what you feel you need to say.

It would be very helpful for me to tape the interview if you are happy for this to happen.

SECTION 1: ARREST AND TRIAL

1. What was your reaction and what were your feelings on being arrested?
2. Why do you think the police focussed on you?
3. What happened to you when you were held in the police station?
4. How soon did you get access to a lawyer?
5. What was your experience of police questioning like?
6. Was your solicitor present at police interviews?
7. Were the interviews recorded on tape, by written notes or not at all.
8. Did the same law firm who represented you at the police station continue to represent you at the trial?
9. What was the main evidence against you and how was it flawed? Were any of the following used to convict you (Please give details of why this evidence was flawed):-
 - (a) Confessions by you or your co-accused.
 - (b) A prisoner claiming you had confessed while on remand.
 - (c) Unreliable eyewitness testimony.

- (d) Non disclosure of evidence.
- (e) Flawed or disputed forensic evidence or expert testimony.
- (f) Use of untrustworthy witnesses or informers
- (g) Police Malpractice
- (h) Poor legal defence.
- (i) Other evidence.

10. What do you feel about what happened at your trial?
11. How was the question of motive handled?
12. How did you feel witnesses were treated?
13. Were any witnesses: -
 - deliberately lying.
 - confused or mistaken.
 - mislead, misjudged.
 - unduly pressurised
14. Were there problems about how evidence was interpreted?
15. Can you describe the experience of being cross examined on the witness stand?
16. Did you feel the lawyers and judge acted competently and fairly? If not what did they do (or fail to do) that was unfair, incompetent or misleading?
17. Did the jury hear all the relevant evidence?
18. Who do you feel is responsible for what happened and why? (Police, lawyers, judge, witnesses, others?)
19. Did you have enough expert opinion/reports to support your case?
20. Did the police use 'collaborative testimony'? (Had they got together to give the same version of events at the trial?)

SECTION 2: TRYING TO CLEAR YOUR NAME

1. Can you describe your feelings and reactions on being convicted?
2. Did you seek leave to appeal to the single judge or the full court?
3. Were you granted a first appeal at that stage?
4. Did you keep the same lawyers for your first appeal?
5. How well did you feel they represented your interests at that time?
6. Were you kept informed of what was happening?

7. Did you change your lawyers? If so when, after the trial, after being refused leave to appeal or after a first unsuccessful appeal? Or did your lawyers say they could do no more for you?
8. When and how did you start to try and clear your name?
9. How difficult was it to find lawyers who were willing to fight your case?
10. How did you find them?
11. Do you feel they did a good job for you?
12. Did you contact the media. If so how did you contact them?
13. Have the media helped you? If so how?
14. Did you make contact with any other people or organisations in the hope that they might help? If yes which people or organisations did you contact?
15. Were any of these people or organisations able to help you in any way. If so in what ways?
16. How (if at all) did your family or friends help?
17. What do you feel have been the significant breakthroughs (if any)?
18. Did you apply to the Criminal Cases Review Commission (CCRC)?
19. Did you have a lawyer to submit your case to the CCRC?
20. Did the CCRC talk directly to you about aspects of the case either by letter or in person?
21. What was the outcome of your application to the CCRC?
22. How long did they take to come to a decision?
23. What did you think of the work done on your case by the CCRC?
24. What were your main grounds of appeal?
25. What was the outcome?
26. What did you think about the approach of the judges and the reasons given for the decision?
27. Can you describe the experience of going through an appeal?
28. What did you make of the proceedings?
29. Did you understand and follow everything?
30. How long after the appeal ended did you get a decision?
31. What were your feelings before, during and after the appeal?
32. Is there any thing else you can say about your struggle to clear your name

SECTION 3: PERSONAL EFFECTS OF WRONGFUL CONVICTION

1. What for you are the worse things about prison life generally?
2. What are the worse things about being wrongly imprisoned?
3. How has it effected: -
 - (a) You as a person (Your beliefs, views, personality, values etc)?
 - (b) Your health (physical, mental or emotional)?
 - (c) Your family and/or friends?
4. Have you had any help to deal with the personal side of things? What, if anything, can help?
5. Is there anything or anyone who helps you cope with the personal trauma?
6. Is there anything else you would like to say about the personal effects of your experience.

SECTION 4: THE CRIMINAL JUSTICE SYSTEM IN GENERAL

1. How does your view of the criminal justice system differ now compared to before these events happened?
2. Were you surprised by the way the courts operate and the rules of evidence?
3. Do you think the public have a reasonably accurate idea of how the system operates?
4. Were there any barriers that prevented you communicating your views to other people involved (lawyers, police etc)
5. Did you feel in control of your defence at the various stages (arrest, trial, appeal) of the legal process?
6. How do you feel about the job that the police and lawyers do and the way they do it?
7. How do you think that the police and lawyers interpreted your reactions to what was happening at various stages?
8. What would you most like to see changed about the criminal justice system?
9. Is there anything else you would like to comment on in relation to the criminal justice system?

Lawyers Interview Schedule

1. How would you define a miscarriage of justice?
2. What is your view about the level of incidence of wrongful convictions?
3. What do you think are the main causes of wrongful convictions?
4. How adequate do you think the appeal system is for correcting miscarriages of justice?
5. "Winning often entails tactics that distort or suppress the truth, for example, concealing relevant witnesses, withholding information that would help the other side, preparing witnesses to affect their testimony at trial (coaching), and engaging in abusive cross-examination"
Langbein J. H. (2003: 1) "The Origins of the Adversary Criminal Trial "

"The barrister is like a stage manager or director...He decides which things to highlight, the level of lighting on the actors and witnesses, which actors to spotlight, which aspects to play down, almost what words to put into their mouths....You are directing the performance"
Morison and Leith (1992: 142) "The Barristers World and the Nature of Law"

What is your reaction to these statements? Are they accurate in your experience and what are the implications of such adversarial aspects?

6. Is adversarialism in its current form the best way to establish truth in your view?
7. What is your view of the practice of barristers who both prosecute and defend?
8. How significant do you think assessment of demeanour (of witnesses and suspects) is during investigations and court procedures?
9. To what extent do you accept the notion of "case construction" (That the police build cases by ignoring or downplaying evidence that doesn't fit their case and embellishing in many ways the case for the prosecution) and how far does this continue at trial and appeal?
10. Have you come across occasions where you think evidence or exhibits may have been 'lost', 'buried' or 'hidden' during or after an investigation in order to assist or sustain a prosecution case?
11. How much significance would you attach to witness statements that change over time as the investigation, trial or appeal progresses?
12. Is there always sufficient caution exercised when drawing conclusions from scientific evidence?
13. Have you come across cases where the absence of scientific evidence is a significant enough factor in the circumstances of the case to give you concerns about the safety of a prosecution or conviction.
14. Are judges' warnings about things like eyewitness testimony or cell confessions an adequate method of safeguarding against jury misconceptions?

15. Are defendants adequately protected against inadequate defence performance or preparation, or against the use of the “wrong tactics”?
16. Do current trial procedures safeguard adequately against errors or distortions in the investigation process?
17. Have the traditions (hierarchy, self regulation, rules of procedure etc) helped or hindered the criminal trial as a way of ascertaining the truth
18. Do you believe that the prosecution has to prove its case or that in reality the defence has to show positive evidence of innocence?
19. Have you come across instances where the prosecution have called witnesses who ought really to be called by the defence (or vice versa)? If so why do you think this was done? Can the defence call prosecution listed witnesses if the prosecution decide not to call them?
20. Would you like to see reforms to the jury system?
21. Is legal protection in police custody adequate in your view?
22. Can you comment on legal training and culture? How does this prepare people for the job (beyond legal knowledge) or influence the way they do it and/or the beliefs they hold?
23. Does legal training focus enough, in your view, on the issue of miscarriages of justice?
24. To what extent do you accept the guilt or innocence of your clients before during or after the trial or appeal? How, if at all, do such views affect you, do you ever become emotionally involved?
25. Defendants sometimes express concern about the close relationships and conviviality apparent between prosecution and defence lawyers. Are their dangers in the “collegiality” of the legal profession?
26. Do you think judges should be more or less inclined to stop cases which appear to be evidentially weak?
27. Do you think the CPS pursue some cases too rigorously in the appeal courts and are they encourage/obliged to do this by the Court of Appeal?
28. What do you think has been, or is likely to be, the effect of measures in the Criminal Justice Act 2003 such as greater use of bad character evidence and hearsay, more defence disclosure, double jeopardy and limiting appeal grounds to those in CCRC Statement of Reasons, in terms of just results in the courts?
29. Do you as a lawyer feel able to challenge decisions or practices that seem unfair or unjust?
30. Any other points you would like to make?

Police Interview Schedule

1. How would you define a miscarriage of justice?
2. What is your general view about the level of incidence of miscarriages of justice?
3. What do you think are the main causes of miscarriages of justice?
4. Is there any truth in the idea that in some cases the police select evidence that supports a suspect's guilt and ignore evidence or leads that suggest alternative scenarios?
5. Are there any problems involved in taking accurate statements from witnesses and suspects?
6. Why do you think that some witnesses change their statements over time?
7. Does the pressure to get a conviction (From the public, media or internally) have an influence on a major crime investigation?
8. How much scope is there for individuals to question the direction, decisions or actions within a major inquiry?
9. To what extent do you think detective work is about following hunches or interpreting individuals' reactions or demeanour?
10. What kinds of considerations do you take into account when conducting interviews with suspects?
11. Do you feel that the protections for suspects in police custody are adequate, inadequate or excessive?
12. How might you evaluate the quality of a witness or a piece of evidence?
13. How might an inquiry be effected by complexity and information overload in major inquiries?
14. How much weight might you attach to the absence of scientific evidence linking the suspect to a crime scene?
15. Is there always sufficient caution exercised in drawing conclusions from scientific evidence?
16. How, where and for how long are evidence/exhibits kept in a major case and how secure is this material from getting lost or contaminated?
17. How do you feel issues about public interest assessment and PII certificates can impact on possible miscarriages of justice?

18. What are the benefits and risks of the informant system?
19. Are there aspects of the trial process that you feel can have a distorting effect on reaching the truth?
20. What do you feel about the adversarial nature of the legal process?
21. How do you feel about performance targets for the CPS (See Annual Report) in terms of their possible effect on getting just results?
22. Similarly how do you feel about new arrangements for charging and closer working between police and CPS?
23. How do you feel measures in the CJ Act 2003 such as use of hearsay evidence, previous convictions and double jeopardy will impact on possible miscarriages of justice?
24. How adequate do you think the systems for review of possible miscarriages of justice are (CRCC and Court of Appeal)?
25. Do you think there are occasions where the police and prosecution should acknowledge that there has been a wrongful conviction rather than try to sustain the conviction?
26. Do you think that certain types of cases are more prone to M of J than others?
27. Does investigation training focus specifically on miscarriages of justice in any way at any stage?
28. Do you think there is a problem for many defendants in understanding and/or coping with the system and the rules of procedure and language used?
29. Do you ever feel emotional involvement with a case and if so how do you deal with this?
30. Have you ever been concerned that a conviction may have been wrongful?
31. What would you most like to see changed in the criminal justice system?
32. Any other comments you wish to make on the issue of miscarriages of justice?

Journalists Questionnaire

1. How would you define a miscarriage of justice?
2. What in your experience seem to be the main causes of miscarriages of justice?
3. Do you have a view about the general level of incidence of wrongful convictions? Is it your impression that they are increasing, reducing or changing in nature?
4. Do you have any comments on how the trial system works?
5. What factors might motivate you or convince you to write on or investigate potential miscarriages of justice?
6. Do you have any comments on your impression of police and legal cultures? How does this compare with 'journalistic cultures'?
7. How would you describe the general approach in the wider media towards criminal justice issues and miscarriages of justice?
8. What are your views about post conviction procedures (CCRC, Court of Appeal etc)
9. What are the main obstacles to journalistic enquiry in this area?
10. What have been the most revealing or surprising things that you have discovered when working in this area?
11. Have you come across occasions where you think evidence or exhibits have been 'lost', 'buried' or 'hidden' during or after an investigation in order to assist or sustain a prosecution case?
12. Do you have any comments on the value or risks involved with scientific evidence
13. How can you verify or evaluate the information you are getting.
14. Any other comments you wish to make?

Expert Witness Questionnaire

1. How would you define a miscarriage of justice?
2. What is your experience and how do you see your role in legal proceedings?
3. Do you think miscarriages of justice are a major problem in the UK?
4. What in your opinion or experience are the most common causes?
5. How satisfactory is the legal process for getting across specialist information?
6. What is your experience of cross-examination as a way of imparting or testing information?
7. What kind of insights has your expert testimony/report etc provided?
8. Has your work been given adequate attention or regard by the police, lawyers and courts.
9. Do you have a personal commitment to preventing miscarriages of justice or do you see your role as providing information only?
10. Are there any inbuilt or constructed biases in the way expert testimony is recruited, constructed or utilised?
11. Have you come across instances where important expert testimony has not been used or commissioned?
12. What are the main obstacles to effective use of expert testimony in the legal system?
13. Is there scope for greater agreement between experts rather than prosecution/defence using opposing expert opinion?
14. What is your view of 'legal culture' and how does this differ from scientific culture?
15. Do you have any views about how the legal system (investigation, trial and appeals) could be changed or improved?
16. Do you think juries (or lawyers) generally understand the information given by experts?
17. Any other comments you wish to make about the legal system and miscarriages of justice?

APPENDIX 6

**Letter from Crown Prosecution Service declining to
participate in the study**

Emma Wethey
Senior Research Project Manager
Policy Directorate Research Team
50 Ludgate Hill
London EC4M 7EX

Tel: 020 7796 8789

Dennis Eady
2 Taff cottages
Station Terrace
Llanharry
Pontyclun
CF72 9DF

25 June 2007

Dear Mr Eady

RE: Miscarriages of justice research request

We have now reviewed your request to conduct interviews with CPS prosecutors on the topic of miscarriages of justice. I regret to say that we will be unable to offer assistance on this particular occasion.

The CPS is keen to support research and we are currently involved in numerous external projects, but regrettably, due to resource restrictions, we are unable to support all of the requests we receive. We must ensure that any project we do support will usefully inform our business objectives and enhance CPS performance.

We are not confident that your research proposal and questions as currently framed will address the reasons for miscarriages of justice which we would be most interested in. We are also uncertain of the relationship between the interview questions and the project objectives.

Miscarriages of justice are of huge concern for the CPS and one of the main drivers for its formation. All prosecutors follow the Code for Crown Prosecutors which may be useful for you to consult as a guide to the decision-making process (http://www.cps.gov.uk/victims_witnesses/code.html). I have also enclosed a transcript of a recent speech presented by Sir Ken Macdonald QC (DPP) on miscarriages of justice which explores many of the issues you are covering.

I hope these materials are useful for your research and wish you all the best with your PhD.

Regards

Emma Wethey
Senior Research Project Manager

APPENDIX 7

Case study based on trial observation – ‘Mr Q’

The Trials of Mr Q: Observational reflections on the trial process

This section is included here for two reasons: -

- Firstly to illustrate the value and experience of an observational approach in the research process. To enhance this some first person descriptions are included.
- Secondly to show some of the problems and uncertainties that can arise in the trial process.

The observation was enhanced through close contact with Mr Q's wife and consequently some inclusion in discussions with Mr Q's legal team during the trial. The parallel reason for being present at the trial was to give support to Mrs Q and indirectly to Mr Q during this traumatic time. The second and third trials were observed directly, information on the first trial was obtained from Mr and Mrs Q and from references made at later trials

The First Trial

In July 2000 Mr Q was convicted of indecent assault on two teenage girls. The offences allegedly occurred around activities run by the St John's Ambulance cadets with which Mr and Mrs Q were assisting. Mr Q was found not guilty of similar allegations in relation to a third girl who made claims about computer pictures which were demonstrably untrue. According to Mrs Q the circumstances of the events were implausible and the girls involved were vulnerable individuals from dysfunctional families – she was not called to give evidence to this effect. In fact it was claimed by the complainant that one of the allegations for which Mr Q was convicted took place in front of Mrs Q and a number of St John's cadets who would, according to Mrs Q, have denied that it took place. None of these people were called to give evidence. According to Mr Q his lawyers maintained that it was unnecessary to call them as he would be cleared anyway. Mr Q maintains that his instructions to call them were ignored.

Previous to these accusations Mr Q had appeared in the local newspaper as someone who had highlighted the dangers to children of easily obtained adult pornography on the internet.. Around six months after this the police took proactive action to check his computer for child pornography, although the reasons for this suspicion at that stage are unclear. No child pornography was found on Mr Q's computer but some suspicion may have been aroused by this police action: Mr and Mrs Q remain unsure whether this action might have been provoked by an allegation or might have in itself prompted allegations. They have made reference to a certain police officer who seemed determined to find charges against Mr Q.

During the trial Mr Q was supported and given a lift back and forth by two brothers (hereafter referred to as X and Y) with whom he and his wife had become friends over a period of time.

The Fire

Mr Q was convicted of the above offences on 7th August 2000 but was given bail pending sentence. He was sentenced to 15 months imprisonment on 8th Sept 2000. During the time on bail a fire occurred at the Q's home and most of the house was burnt out. Due to the conviction of Mr Q the house had been subject to a number of threats and acts of vandalism, including a break-in, and the walls had been dubbed with obscene slogans aimed at Mr Q.

Consequently Mr Q had been spending most nights away from the house in his caravanette with their foster daughter Ann (the name has been changed) while Mrs Q was often working nights as a hospital nurse.

This was a period of time when vigilantism against alleged paedophiles was heightened following publicity and exposure of certain people by the News of the World newspaper. In one case a judge had given a reduced sentence as a result of the act of arson against the convicted person. The judge at Mr Q's first trial apparently said he had taken the fire into account.

On his release from prison in 2001 Mr Q was to discover that he was to face further charges. Initially he and the two brothers X and Y were charged with deliberately starting the fire which destroyed the Q's home. Soon after this another complainant came forward with historical abuse accusations relating to a period between 1987 and 1989, when as a teenager she had been close to the Q family. These accusations included not only claims of indecent assault but also accusations of rape when the complainant was around 11-13 years old.

Faced with these charges Mr Q fled to Ireland with his foster daughter Ann where he remained until found in 2006 and extradited in 2007. Mr Q's explanation at the trials that followed was along the lines that having been wrongly convicted once, he panicked and fled. The judge at both the second and third trials (the same judge presided over both) made a number of critical comments about this action which seemed to reflect the alternative view that this action was an attempt to evade responsibility for his actions, thus implying an indication of guilt.

In the autumn of 2007 Mr Q pleaded guilty to absconding and was given a prison sentence of 6 months. Thus he remained in custody as a convicted person and then on remand pending the second and third trials.

The Second Trial – Arson

The two brothers X and Y had pleaded guilty in 2001 to setting fire to the Q's home and were sentenced to 4 years and two and a half years respectively - their case was heard in the absence of Mr Q who had absconded. In mitigation they claimed that Mr Q had asked them to do this and was thus largely responsible for the instigation of the plan. They were to be the main prosecution witnesses at Mr Q's trial for arson.

In January 2008 the Arson trial began: -

I arrive at the Crown Court on the first day and pass through security; they direct me to Court 1 upstairs. I enter what looks like a Doctors waiting room, except that unlike doctors' waiting rooms, it's deserted and gives the impression that nothing much is going to happen today. Then I see Mrs Q through the window of a side room; she's in consultation with a woman, who judging by the outfit must be her husband's barrister. I hang around the waiting room, and then I look in the court room which is empty but for a couple of court officials. I read the notices and note that note taking is not allowed, no explanation why? Eventually Mrs Q emerges and introduces me to the barrister. Mrs Q cannot enter the court because she is later to be a witness.

Eventually the court gets started, Mr Q is escorted in and the court rises for the judge. It is a modern court room, not as intimidating as the old, traditional style. In fact the atmosphere seems quite matter of fact and slightly unreal. It is still hard to accept the seriousness of what's happening in this polite, sedate and misleadingly re-assuring atmosphere. Legal arguments are beginning. There are four or five people sitting in front of me all taking notes, they are all journalists it transpires as I suspect, but I decide to take some notes, maybe there will be no objection. After about 10 minutes a woman comes over, I think she's a court usher but in fact she's from the CPS. She tells me I can't take notes without the judge's permission. "How do I ask his permission?" I ask. "You can't take notes you know that" she says. She's right I do know that but how does she know I know that? I say "OK no problem" and stop the note taking. Over the next week or so I pass this person frequently but like the prosecution barrister and the police officers in the case, she never shows any recognition or eye contact let alone a 'hello'. She has quickly worked out that I have some link with the defence side - this is adversarialism and an invisible wall has been erected.

At the first break Mr Q's barrister informs me that the prosecution are concerned about my note taking in case I use it to 'coach' Mrs Q who is to be a witness later in the case. I give assurances that this will not happen but it occurs to me that in any court case where people know the witnesses they can quite easily sit in the public area and pass on information to the witnesses with or without taking notes.

It is obvious now that, apart from the journalists, who do not stay long, I am the only observer in the small public area, apart from when occasional supporters of prosecution witnesses sit in for short periods. It feels awkward and conspicuous but I

assure myself that I have a right to be there and I'm not a criminal or a voyeur.....

Initially the defence argued for more time to go through statements and interview transcripts with Mr Q who had been unable to have enough meetings with his London-based solicitor, (who much to the Q's consternation did not attend either trial). This was in part due to Mr Q being moved 4 times between prisons in the time leading up to the trial. The case was adjourned at the lunch break for this to happen in the afternoon. Following the prosecution's outline of their case, the first witness, one of the brothers was called: -

X is a very reluctant witness, he confirms his name but cannot recall his age - he has to look to the public area where his family can mouth the answer to help him out. He does not want to be there or answer any questions and keeps referring to his statement made at the time of his own conviction for arson. The prosecution barrister points out that this will not do, to give evidence he must say it. It is clear that he can't remember what was in the statement and cannot read well enough to refer to it. He resents having to drag all this up again after 'rehabilitating himself'. Eventually the court is adjourned so that the statement can be re-read to him. He returns a little more confident and seeming a little more resigned to making accusations against Mr Q.

In essence X's evidence in chief was that there had been a conversation about two weeks before the fire when the idea of burning down the house was brought up and he had then finally agreed to do it with Mr Q on the telephone the day before the fire. He recruited his brother Y to drive him to and from the house about half an hour beforehand and then broke into the house and lit the fire using a petrol diesel mixture which he knew to be in the workshop area at the back of the property. X said he lit the fire because he regarded Mr Q as a paedophile and wanted him out of the village. This did not accord with the prosecutions argument that Mr Q was motivated by insurance claims or the prospect of a reduced sentence for the indecent assault convictions or with X and Y's later admissions that they continued to visit Mr Q on a friendly basis after the fire. It also posed a curious rationale: If the fire was started as a vengeful act, why was it started at the request of the very person against whom the vengeful act was directed?

X still has to be cross-examined by the defence but the trial is adjourned at lunch time for the defence to go through the papers with Mr Q. It will be a feature of both trials that the defence case is ill prepared and has to be put together by Mr Q and his barrister as the trials proceed; this is disconcerting to say the least to Mr and Mrs Q and requires regular pleas from the defence to the judge for more time to prepare, each time this occurs the judge struggles with the need for a fair trial and the need to progress the case. The jury is dismissed for now but the judge is concerned that the brothers will not turn up tomorrow and calls them into court to explain that they must

be there. Perhaps the jury should see just how reluctant they are to give evidence. Y virtually refuses to come back initially such that the judge has to explain that they will be arrested and potentially imprisoned if they don't come. This seems like a new variation on the witness protection scheme.

The next day X is cross-examined by the defence, he seems more confident today and contrary to how it is normally meant to be, seems to be more comfortable when the defence barrister is trying to undermine his testimony than when the prosecution barrister was trying to help him. He copes after a fashion with the contradictions put to him about his evidence but cannot really logically explain them. He explains why he would burn down Mrs Q house when, despite her husband, he still liked and respected her. He wanted to get Mrs Q out of the house away from the danger of vigilante attacks; his brother will later give the same reason. X admits initially lying to the police up until the time of his trial in the hope of getting away with it by saying he did not light the fire. (His girlfriend at the time had gone to the police saying he smelt of petrol on the night of the fire). His brother will maintain the same line on this.

Y is the second witness; he broadly accords with X but admits that the discussions about burning the house some weeks before the fire appeared to be joke statements rather than literal statements. In fact he maintained that he only decided to do it immediately before the fire on X's request and even when he drove X to the house did not really think X would do it.

Y also maintained that he phoned Mr Q on his mobile phone just before the fire started because a light was on in the house. Mr Q then phoned his wife at work to check that she was not in and returned Y's call to tell him to "go ahead". These calls did take place but Mr Q's version was that the brothers were keeping an eye on the house as friends, given the attacks that had occurred, and the calls were made simply to check everything was OK; his wife was at work and their daughter had presumably left the light on when he and she left earlier that evening. The prosecution suggested the timing of the call and the call to his wife at work suggested Mr Q knew what was about to happen. The alternative explanation, put later by Mr Q in his evidence, was that given the level of attacks on the property such checks were reasonable precautions and in no way indicated his involvement in a plot.

A number of statements were read out giving limited support to the prosecution case and the prosecution barrister went through Mr Q's original police interview transcripts, reading Mr Q's part while a police officer in the case read his own part from the witness box. The judge became frustrated by this exercise which seemed to be of little evidential value thus causing the prosecution barrister to cut this short and close his case.

The defence case began with Mr Q taking the stand: -

Mr Q's Barrister starts by tracing Mr Q's life and his meeting and relationship with his wife and their adoption of Ann their adopted daughter who has some learning disabilities. I wonder why this is relevant, it is not evidence but it seems like an attempt not just to put things in context but to humanise the defendant in the eyes of the jury and help them to appreciate that the life of a family is at stake here. Similarly time is spent helping Mr Q to explain about all the work he has done himself to build up and improve the house and how he would never want it destroyed, least of all by himself.

Mr Q is clearly a more articulate witness than X or Y, he explains that yes some items were removed from the house the day before the fire which might appear suspicious but other items were removed to friends and relatives before this because of the threats and the break-in that had occurred. He also points out that valuable tools, a computer, videos etc were not removed and were lost in the fire. He explains that absconding was an act of stupidity induced by the overwhelming pressure of the accusations. He explains why he was away from the house at the time of the fire because of the vigilantism and thus the consequent watching of the house by the brothers and the phone calls before the fire checking everything was OK.

Cross-examination by the prosecution Barrister begins this afternoon, the third day of the trial and continues into the next morning. All of the issues are re-visited in detail stressing the suspicious interpretation of the events. Mr Q deals, impressively it seems to me, with most of these matters, including pointing out that insurance was a requirement of the mortgage when the accusation of an insurance scam is suggested. Mr Q becomes emotional on questioning about the house and the idea that he would burn it down after so much personal work and pride in it. As the questioning continues he begins to become angry and frustrated although not to an extreme level but the Barrister plays on this and keeps pushing and pushing on issues like the phone calls. As a frustrated Mr Q tells him in response, he keeps asking the same question in different ways. This Barrister is not a particularly aggressive character, up till now he has been reasonable and fair, but in this phase he is persistent like a dog with a bone. It becomes very uncomfortable to watch, I wish he'd let it rest, he's made the point. Clearly Mr Q is not going to make an admission; all that can be achieved is to make him show anger.

Mrs Q is the only other defence witness: The personal history is run again along with most of the same issues on which she remains consistent with Mr Q's evidence which she has not, as a witness, been allowed to hear. In cross-examination she too becomes emotional when confronted with the destruction of her house and the implication that she might have been moving things out of the house knowing that a fire might be started. This is never made as an accusation but it is an obvious inference. Some years ago now I went with Mrs Q to help her retrieve belongings from the burnt out house, as she is speaking I recall a picture of her desperately trying to salvage items from the charred mess of her home, trying to salvage the remnants of a contented family life.

At one point the prosecution Barrister suggests that she and Mr Q had argued before the fire because she would not move out of the house. Mrs Q denies this and I feel at this point the Barrister has overstepped the mark. There has been no evidence presented to suggest this, it is pure speculation.

After the ordeal I reassure Mrs Q that she did well – she fears she may have let her husband down but this is not the case, they have both explained the circumstances as well as they reasonably could.

Mr Q is found guilty and sentence is postponed until after the rape trial that is to follow in a few weeks. I have associations with the family, I am not an entirely neutral observer, but if I were I can't see how anyone could be sure either way from the evidence presented. The circumstances of this trial inevitably meant that Mr Q's previous conviction would be exposed – was it this that tipped the scales with the jury? In the rape trial to follow this could be even more of an issue and given the provisions of the 2003 Criminal Justice Act the revelation of relevant previous convictions is a virtual certainty. Things do not look good for Mr and Mrs Q who are both in their 60s, or for their daughter Ann who is especially devoted to her father.

The Third Trial – Rape and Indecent Assault

The third trial began in a state of confusion, the prosecution having introduced a number of new counts including incriminating statements and accusations which had only been passed to the defence one week before the trial. The defence expected, and argued for, a postponement of the trial to prepare a response to the new counts, trace witnesses, await a psychologist report on Ann's ability to give evidence and to request the medical and social service reports of the complainant be made available.

The Judge and prosecution clearly do not want to postpone the trial. The Judge points out that medical and social service files are likely to be subject to Public Interest Immunity (PII) and thus not open to public scrutiny. The Judge adjourns the Court to consider the request to postpone the trial. He emerges after about an hour with what might be viewed as a master class in trial management: Firstly he declares that the new accusations are inadmissible being highly prejudicial and of little evidential value, adding little to the already serious accusations. Secondly he, somewhat presumptuously, dismisses the issue relating to Ann by declaring that she obviously should not be called and that "we don't need a psychologist to tell us that". Thirdly he decides he will view the social service files to see if anything relevant is in them and asks the prosecuting Barrister to view the medical files and disclose anything relevant to the defence. The Court is adjourned while the files are collected and viewed. There are more hours of waiting around while this is done. Mr Q's Barrister, who normally works in London, is incredulous that the trial may go ahead under these circumstances, how for example can they assess Ann's level of suggestibility without psychometric

testing? On the surface Ann's expressive skills are good but they mask serious limitations in understanding.

When the court resumed, still without the jury at this stage, two factors emerged that might assist Mr Q. Firstly the Social Service records reveal that after the period when the rapes and assaults allegedly took place the complainant requested to go back and live with the Q's rather than stay in care or go home. Secondly unused material has emerged revealing that the complainant made a rape accusation against another man in 1992 who was found not guilty. However while this issue can be put to the jury, records of the 1992 trial cannot be traced; therefore details and cross-examination of the complainant on this matter will be very limited. Furthermore the Judge points out that Section 41 of the Youth Justice and Criminal Evidence Act 1998 prevents questioning about an accuser's past sexual conduct.

Mr Q faces 4 counts of rape, 4 counts of indecent assault and one count of gross indecency regarding some indecent photographs. This last count was dropped after the prosecution case had been completed hence the jury had heard arguments about it even though they did not have to rule on it – the Q's felt that this was prejudicial. Given that the offences allegedly occurred over the period from October 1987- Oct 1989 when the complainant was 11- 13 years old the number of counts was somewhat artificial and the focus was primarily, where the rape is concerned, on two occasions. The first allegedly occurring in a village hall shortly before a children's' disco, the circumstances of this were, if not implausible, certainly extremely risky from the alleged assailants point of view, as other people could have arrived at the hall or been told by the victim almost immediately after the event. The other incident(s) allegedly occurred in the Q's house sometimes in the presence of Ann, who it was alleged also had sex with Mr Q after he had raped the complainant. Thus the implication, (though not the charge) was not only of rape of a child but also of sexual acts with Mr Q's foster daughter, a person with learning disabilities then in her early twenties. Potentially Ann is a crucial defence witness as privately she denies that this happened, potentially she could give evidence that the complainants story is untrue. However it is eventually concluded that, she may not cope with cross-examination, the Barrister advises after much debate and consternation that there is too great a risk especially in the absence of a psychologists report, that she may be led into saying something "catastrophic" in the witness box.

The next day there was a further delay, the defence is still arguing the need to postpone the trial to find witnesses or get a report on Ann. Moreover there are papers that Mr Q has not yet seen because he felt unable to have them in prison because he felt his cell mate could not be trusted with them. The Judge conceded to allow another afternoons delay for the Barrister to go through the papers with Mr Q. Following this another legal discussion took place in which it was decided that under the provisions of the 2003 Criminal Justice Act Mr Q's previous convictions for indecent assault would be made known to the jury. Details will not be given and the arson trial will not be mentioned. The absconding will be revealed to the jury to explain the delay in dealing

with these matters since the accusations were made in 2001. The defence conceded this situation without any real opposition given the law. Ironically had Mr Q not absconded and been tried in 2001 his previous convictions might not have been revealed to the jury. Now he faced a substantial hurdle before the evidence had even been presented.

Eventually the trial began with the prosecution outlining its case, describing their version of how the complainant met the Q's and became initially close to them and then describing the incidents. All these matters were then explored with the complainant: -

.....I feel some tension in the court as the first witness, the complainant, is called but on the surface she seems in control. In fact her demeanour is consistent, bland even, serious but unphased and not openly emotional. She answers questions about the very sordid accusations as the prosecution barrister leads her through the evidence and insists that exact details are given – 'sexual intercourse' won't do, the act must be precisely described like some perverse sex education lesson. How does she feel describing these alleged events in this incongruous, polite and formal atmosphere? How does Mr Q feel sitting silent in the dock listening to these obscene accusations being made about him. Once again I attempt the futile exercise of trying to read the faces of the jury, all I can say is that they are listening intently: Can they reasonable conceive that anyone might tell lies of this magnitude, if not then the details are irrelevant. Like me, none of them are taking notes.....

The defence cross-examined the complainant raising the issues of the previous accusation, the wish to return to live with the Q's even after the alleged events (the complainant claimed she had an assurance it would never happen again) and the fact that she said nothing about the incidents until approached by the police over a decade later as they made inquiries in the context of the previous case against Mr Q.

The rest of the prosecution case consisted of evidence from the complainant's mother who described her difficulties as a child and absence from school and how she had befriended the Qs and also testimony from a police officer which consisted of reading Mr Q's initial statement and denials at the time of arrest.

At the end of the prosecution case one of the jurors sent a note to the judge saying that she recalled the previous case and publicity about Mr Q in the local papers and thought she might have worked in the same hospital as Mrs Q. Mrs Q was asked to come into the court and the juror confirmed that she knew her at least by sight. The defence argued that the jury should be discharged as the juror admitted discussing the previous case in the jury room and thus there was a strong possibility of prejudicial things having been said. There was always the argument that this case should have been tried in another area due to the substantial newspaper coverage of the case in 2000. The judge discharged the juror but was not prepared to stop the trial and the case continued with 11 jurors.

Mr Q was the first, and it eventually transpired, the only witness in his defence: -

... Mr Q has a back injury, he staggers in to the witness box and manages to sit down on the high swivel chair that is available, although from his constant discomfort obviously orthopedically unsuitable. As with the first trial Mr Q seems to answer questions from both barristers confidently including stressing that Ann would never tolerate such actions, he becomes emotional at one point when trying to deal with accusations that concern his daughter and again is angered by the prosecution Barrister's apparent pressing for an admission of guilt. His accounts of the alleged incidents are entirely different and he strongly denies any truth in the accusations....

.....It is eventually decided that Mrs Q will not give evidence for the defence. She could say that she heard nothing about the events apparently going on in her home; she could describe how her daughter would surely have told her. She could say it is inconceivable that this could be hidden from her or others in the house. However Mr Q's barrister has found another statement which the prosecution could use to rebut such testimony. Someone is claiming in a statement that Mrs Q indicated some knowledge at the time. Mrs Q is astonished by this statement and appears speechless and distressed with shock and frustration. Every element of the defence case seems to have "potentially catastrophic" consequences. The Barristers message to Mrs Q is that where evidence is concerned every action has a consequence and every 'tactic' involves guesswork about how it will be taken by the prosecution, the judge and the jury – even to the point of influencing the eventual sentence if Mr Q is convicted, especially if he puts Ann through the ordeal of giving evidence. There is no crystal ball to reveal what the effects might be. As each potential defence witness is analysed out of contention the case is getting shorter. This will please the judge who has clearly been keen to progress the trial expeditiously. It does not please Mr Q (now himself the only defence witness) or Mrs Q both of whom have been presented with terrible dilemmas about whether Mrs Q should give evidence and whether it is ethical or advisable that their daughter who has learning difficulties should give evidence – whether she would be led into making unintended 'catastrophic' statements under cross-examination. Whatever the rights and wrongs of the situation, the idea that the jury hears all the evidence in the adversarial system is clearly false.

The prosecution Barrister summed up his case: -

He summarises the testimony that has been heard, generally fairly, but I detect a few subtle digs – the complainant was genuine" she didn't claim disability or distress" – was this a subtle suggestion that Mr Q was feigning his back injury to get sympathy or that his distress in the witness box was an act? He points out that at one point Mr Q had refuted a detail in the complainant's argument by saying "Ann always made sure

the bedroom door was closed”, changing the context subtly the Barrister suggests this was to hide what was going on. He poses the question to the jury “Did he slip up there”?

The defence Barrister then closed for the defence.

She describes Mr Q as “a man of bad character”, this is legally true in terms of his previous convictions but seems to be unhelpful terminology (in the first trial she had occasionally used the term paedophile) but this apart she puts forward a good argument, stressing the areas of doubt, the previous accusations by the complainant, the wish to return to live with the Q’s and the period of over ten years before making any complaint to anyone.

The Judge then summed up the case: -

There is one point where I notice eye contact with a particular juror which seems to be indicating disapproval or disbelief in the defendant – perhaps I am reading too much into this. I note that he refers to the complainant by her first name; this somehow gives a sympathetic tone towards her. To what extent I wonder do juries read or miss-read judges?

...once again purely on the basis of the evidence I cannot be sure either way, the circumstances of the rapes seem to me to be unlikely and highly likely to have been discovered by others at the time. I wonder if the jury might compromise any doubts and convict on the indecent assault charges but not the rapes, but then again what will be the effect of the previous convictions or even the issues discussed about previous adverse publicity in the papers that the juror who knew Mrs Q had discussed to some degree at least with the other jurors.

... The next day I cannot attend the Court - mid-morning I check my phone for messages. Mrs Q’s distraught message is short and to the point, it’s all she can get out – “Guilty on all counts”.

The jury decided in less than an hour and Mr Q was sentenced to 12 years imprisonment (8 for this trial and 4 for the previous one). He will be over 70 by the time he is eligible to be considered for release.

What has this observation revealed: -

- The conflicts of practical trial management verses giving time to thoroughly prepare a defence case.
- The pressure on lawyers not to extend the trial by calling witnesses who might be deemed not relevant enough.
- The influence of the judge on these and other matters, not least on what information can and cannot be revealed to the jury
- The effects of late disclosure by the prosecution, prison moves and cell sharing, distance from lawyers and inadequate defence preparation leading to the defence running the case day to day and in this case unsuccessfully seeking adjournment.
- Consequent delays which in these two trials resulted in an average of less than 3 hours actual court time per day.
- The problem of defending uncorroborated and especially historical accusations of sexual abuse. (Section 33 of the Criminal Justice and Public Order Act 1994 repealed the provision of the Sexual Offences Act of 1956 which prevented conviction purely on the basis of one uncorroborated witness)
- The potential effect of revealing previous conviction to a jury. In particular if the first conviction happened to be based on false accusations every preceding accusation will be coloured by that.
- The extent of the tactical game that is played in deciding which witnesses can or should be used. In particular how using one witness can open up the use of other witnesses by the other side and how decisions on each witness involve second guessing the potential effect on the judge as well as the jury.
- How this, along with decisions by judges, can mean that the jury here a heavily edited version of the evidence.
- The problems of tracing witnesses, especially in historical cases.
- The problems of evidence available from persons with learning disabilities who cannot cope with the trial process.
- The effect on families on both sides of criminal trials.
- The uncertainties of various kinds and how these afflict the search for 'proof beyond reasonable doubt

