A Report by

JUSTICE

Miscarriages of Justice

Chairman of Committee

Sir George Waller

London
JUSTICE
1989

This Report has been prepared and published under the auspices of the JUSTICE Educational and Research Trust

ISBN 0 907247 11 3

Printed in Great Britain by E. & E. Plumridge Limited of Linton. Cambridge. England.

JUSTICE

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01-405 6018/9

JUSTICE

Extracts from the Constitution

PREAMBLE

Wheareas JUSTICE was formed through a common endeavour of lawyers representing the three main political parties to uphold the principles of justice and the right to a fair trial, it is hereby agreed and declared by us, the Founder Members of the Council, that we will faithfully pursue the objects set out in the Constitution of the Society without regard to consideration of party or creed or the political character of governments whose actions may be under review.

We further declare it to be our intention that a fair representation of the main political parties be maintained on the Council in perpetuity and we enjoin our successors and all members of the Society to accept and fulfil this aim.

OBJECTS

The objects of JUSTICE, as set out in the Constitution, are:

to uphold and strengthen the principles of the Rule of Law in the territories for which the British Parliament is directly or ultimately responsible; in particular to assist in the maintenance of the highest standards of the administration of justice and in the preservation of the fundamental liberties of the individual;

to assist the International Commission of Jurists as and when requested in giving help to peoples to whom the Rule of Law is denied and in giving advice and encouragement to those who are seeking to secure the fundamental liberties of the individual;

to keep under review all aspects of the Rule of Law and to publish such material as will be of assistance to lawyers in strengthening it;

to co-operate with any national or international body which pursues the aforementioned objects.

JUSTICE

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This report has been endorsed and approved
for publication by the Council of JUSTICE

It is dedicated to the memory of Tom Sargant OBE, JP, Secretary of JUSTICE for its first 25 years, who was passionately committed to remedying miscarriages of justice.

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LIST OF ABBREVIATIONS USED IN THE REPORT

RCCP	Royal Commission on Criminal Procedure in England and Wales 1979
PACE	Police and Criminal Evidence Act 1984
CJ(S)A 75	Criminal Justice (Scotland) Act 1975
CJ(S)A 80	Criminal Justice (Scotland) Act 1980

CHAPTER ONE

INTRODUCTION

1.1 Almost from its beginning in 1957, JUSTICE has received from all parts of the United Kingdom requests for help by, and on behalf of, prisoners alleging miscarriages of justice in their cases (i.e. they have been convicted after a trial by jury and they have been unable to mount a successful appeal). The voluntary nature of the society, and the lack of staff and resources, had prompted an initial policy of not investigating such claims. However, their volume and the common elements in many of them soon persuaded Tom Sargant, the society's secretary for its first 25 years, to investigate where he could and assist with appeals and petitions to the Secretary of State.

1.2 These cases sometimes provided the spur to setting up committees of investigation into the criminal justice system which resulted in reports urging reform e.g. Criminal Appeals (1964), Home Office Reviews of Criminal Convictions (1968), The Prosecution Process in England and Wales (1970), Evidence of Identity (1974), and Compensation for Wrongful Imprisonment (1982). Several reforms have taken place, often influenced by these JUSTICE reports. In recent years, the major ones in England and Wales have been the reform of police powers under the Police and Criminal Evidence Act 1984, and the institution of a national prosecution service under the Prosecution of Offences Act 1985.

1.3 These changes have not resulted in any reduction in the volume of allegations of miscarriage of justice made to the JUSTICE office. Over the past ten years, some 200–300 requests for help have been received each year. Even with a full-time legal case-worker since 1984, and the invaluable help of retired judges, lawyers and laymen, it has been necessary to limit investigations to cases where:

(i) lengthy terms of imprisonment of four years or more are being served;

(ii) no other legal help is available to the prisoner;

(iii) the allegation is of actual, rather than technical, innocence;

(iv) an investigation might achieve something, given the present operation of the appellate courts and the Home Office and Scottish Office; and

(v) a complaint about sentence involves an important point of principle; assistance is not given where the sole complaint is that the sentence is too long.

1.4 Such a policy therefore excludes all cases in summary courts (where over 90%

of all criminal cases are dealt with), as well as most cases involving a straight issue of disputed fact which depends on the credibility of the witness (e.g. a trial for rape where the sole issue is whether or not the complainant consented). In any one year, therefore, JUSTICE investigates about 50 cases in some depth. In about five of these the investigation leads to the preparation of grounds of appeal and/or petition to the Secretary of State. These five can take between two to three years to investigate from start to finish, although some can take five or more years. In addition to this work, much time is spent by JUSTICE staff in giving advice to prisoners, as well as assisting members of the legal profession, the media and the general public.

1.5 JUSTICE is the only organisation in the United Kingdom which regularly carries out such investigations. There are a number of reasons why this has come about:-

(a) Legal aid for appeals is very limited. Most prisoners have little or no money and continuing to investigate the correctness of a convicton is very time-consuming. Few lawyers can afford to devote unpaid time to continue to assist a client.

(b) Most prisoners are not well-educated and need help to present their arguments, whether to the Court of Appeal or to the Government Departments responsible for investigating petitions. Moreover, their own ability to carry out investigations is severely restricted by imprisonment.

(c) Few other organisations are as fortunate as JUSTICE in having access to the legal and forensic help which makes the investigation of cases possible.

1.6 The experience of investigating allegations of miscarriage of justice over 30 years has thus given JUSTICE an unrivalled experience in this field. This report is based on that experience, as well as that of the members of the Committee who each, in his or her own way, has seen the criminal justice system in operation over many years.

1.7 The three questions always asked of JUSTICE are

(i) how do such miscarriages of justice occur, given the extent of legal aid and rules of evidence and procedure designed to ensure that such things do not happen?

(ii) what sort of cases are they?

(iii) how many cases are there?

(i) **How do miscarriages of justice occur?**

There is a variety of possible causes. Each element is dealt with in greater

depth in the body of the report, but in summary they are:-

Pre-trial

(a) Poor work by some defence lawyers.

(b) Cases involving poor police investigation of the offence and/or police misconduct.

Trial

(c) Poor work by some defence counsel, often caused by the "late brief"; inadequate preparaton; bad tactical decisions and the failure to call witnesses.

(d) Underhand tactics by the prosecution.

(e) Poor summing-up by the judge but not sufficiently so to ground an appeal.

Appeal

(f) Bad work by defence lawyers usually leads to bad advice on appeal. Counsel is unwilling to admit mistakes to the Court of Appeal or the prisoner must appeal unaided.

(g) The majority of cases which come before the appellate courts are concerned with legal technicalities and not with the issue of the guilt or innocence of the appellant.

(h) A reluctance, over many years, to interfere where the accused has been legally represented at the trial, however badly.

Post-appeal

(i) The desire of the Secretary of State, as part of the Executive, not to be seen to be interfering with the work of the courts leads him deliberately to ignore most errors which arise under (a) to (g) above.

(j) Inadequate re-investigation, usually by the same police force that conducted the original inquiries into the case.

(ii) **What sort of cases?**

There have been five common threads through most of the allegations made over the years:-

(a) wrongful identification;

(b) false confession;

(c) perjury by a co-accused and/or other witnesses;

(d) police misconduct, usually in the allegation of a "verbal confesson" which, it is claimed, was never made, or the planting of incriminating evidence;

(e) bad trial tactics.

(iii) **How many cases?**

It is impossible to state with any accuracy the number of cases where justice has miscarried. There are three main reasons for this:-

(a) No organisations or individuals concern themselves regularly with the operation of summary courts (which, it will be recalled, have power to fine up to £2,000 and to imprison for up to six months and deal with the vast majority of criminal trials and which are, generally, constituted by laymen and not lawyers).

(b) The Court of Appeal (Criminal Division) in England and Wales did not permit general access to the transcripts of its judgments until 10 April 1989, and in Scotland the High Court of Justiciary sitting as a Court of Appeal in criminal cases does not transcribe all its judgments. It has not therefore been possible to monitor the general handling of appeals (only a small percentage of the judgments are published in the Law Reports and computerised data banks, and those mainly concern points of law and procedure).

(c) As mentioned in paragraph 1.3, JUSTICE itself is only able to investigate cases from a very small range. In 1986, some 9,380 of the 521,100 persons (1.8%) convicted of indictable offences were sentenced to four years or more imprisonment [1]. On average, only 1.3% of defendants received that sentence in the past eight years. One possible source of information is the number of free pardons recommended by the Home Secretary to the Queen in respect of wrongful convictions by persons tried on indictment. He does not make such a recommendation unless he is convinced of moral

1. Criminal Statistics for England and Wales 1986, table 5.12, Cmnd 233.

innocence. In the years 1980 - 1987, two free pardons were granted. In addition, three sentences of imprisonment were remitted "on grounds affecting the original conviction" (i.e. not on account of technical irregularities in the conviction or sentence, or as a reward for assistance to the authorities or on medical, compassionate or other grounds) [2]. The criminal statistics also show that in these years 37 cases involving some 49 persons were referred back to the Court of Appeal by the Home Secretary on the grounds that fresh evidence cast doubt on the safety of their convictions. The Court of Appeal allowed the appeal and quashed the convictions in 16 of these cases. Finally, from 1980 - 1987, the Home Secretary made ex-gratia payments of compensation to 60 persons who were wrongly imprisoned (an average of just over seven a year). The payments ranged from £180 to £121,000, and totalled more than £963,000 [3]. (These figures included persons whose convictions had been quashed after a reference back to the Court of Appeal and who had served a term of imprisonment.) Given the restrictive manner in which the Home Office operates, the average of seven persons a year considered by the Home Secretary to have been wrongly imprisoned must be the absolute minimum.

Of the 50 or so cases which JUSTICE looks at in some depth in any one year, it has strong doubts about the correctness of the conviction in about five cases a year where it considers that investigation might achieve something. There are at least another five cases where it has strong doubts about the jury's verdict but it does not consider that further investigation would be fruitful. On average, therefore, we doubt whether there are less than 15 cases of wrongful imprisonment a year after trial by jury. This figure allows for some overlap between the same cases being dealt with by JUSTICE, the Home Secretary and the Court of Appeal. The figure could be much higher [4].

1.8 No criminal justice system is, or can be, perfect. Nevertheless, the manner in

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2. Tables on the exercise of the prerogative of mercy, Vol.4 of the Supplementary Tables to the Criminal Statistics for England and Wales, 1980 - 1987, and Written Reply No. 145 (16.6.88) to Jerry Hayes MP.

3. See p.9 of the Sixth Report from the Home Affairs Committee session 1981-1982 HC 421 on "Miscarriages of Justice" for the years 1980 - 1981 and written reply no. 318 of 18th December 1987 to a question from Jerry Hayes MP for the years 1982 - 87. The corresponding figures for Scotland and N. Ireland are not known.

4. In a speech delivered to the International Bar Association on 26 September 1988, Lord McCluskey, a Senator of the College of Justice in Scotland who sits in the Outer House of the Court of Session, suggested that "vast numbers" of people were convicted of crimes they did not commit and that the machinery to remedy this injustice was inadequate.

which a society concerns itself with persons who may have been wrongly convicted and imprisoned must be one of the yardsticks by which civilisation is measured. Quite apart from damage to one's good standing in the community, wrongful conviction and imprisonment can (and frequently do) lead to the break-up of family, loss of reputation, home and job, as well as psychological harm. So seriously is the deprivation of liberty taken in Western Europe that violation of the right to liberty is the only violation of human rights which **must** be compensated under the European Convention on Human Rights[5]. Moreover, the imprisonment of an innocent person means that the real culprit is still at liberty, and this can undermine public confidence in the criminal justice system.

1.9 In this report we have come to the conclusion that in Great Britain there is insufficient protection against miscarriage of justice and we hope that the recommendations we make will go far to prevent such situations arising in future, and will increase the prospects of their being detected and frankly acknowledged when they do occur.

1.10 Only one member of the Committee is a Scottish Lawyer, and one other member has some experience of the Scottish criminal justice system. However, the Committee has examined Scottish procedure to see what lessons can usefully be learned there. In the course of doing so, some aspects of the Scottish system seemed to merit further examination and where it makes this suggestion, the Committee does so with due diffidence. We have not been able to consider the law and practice in N. Ireland, but we understand that they are not substantially different from those in England and Wales in respect of non-terrorist offences. Although some of the recommmendations we make might be applicable to magistrates courts, we have not studied them and so make no recommendation in regard to them.
Throughout the text we have illustrated our points largely by quoting real cases. But in order not to break up the narrative, we have set out the longer cases in an Appendix of cases at the end of the Report.

Acknowledgments

We would like to thank all those persons who have assisted us in this enquiry and particularly the following witnesses: Master Thompson and Roger Venne (Criminal Appeal Office); Inspector Barry Vincent (Paddington Green PS); Peter Hill, former producer BBC 'Rough Justice' programme; Tom Sargant, former Secretary of JUSTICE; Dr Gisli Gudjonsson and Dr James McKeith (Bethlehem Hospital).

5. Article 5 (5).

CHAPTER TWO

THE INVESTIGATION OF OFFENCES

2.1 In the United Kingdom, unlike some continental jurisdictions, the police are responsible for the investigation of offences, including the gathering of evidence, holding identification parades and the detention and interrogation of suspects. In Scotland police powers are regulated largely by the Criminal Justice (Scotland) Act 1980 (hereafter referred to as "CJ(S)A80"), and in England and Wales by the Police and Criminal Evidence Act 1984 (hereafter referred to as "PACE"). It is the police who seek to identify a suspect and who are responsible for charging him with the offence. Only at that stage is an independent legal prosecutor seized of the case. He may require the police to carry out further enquiries and may drop or amend any charges aganst the suspect.

2.2 The police operate under general guidelines issued as Codes of Practice under the above-mentioned legislation, as well as other guidance issued by the Home Office (in England and Wales) and the Crown Office (in Scotland). The general purpose of the legislation and the Codes is to provide the police with a fairly free hand for the purposes of investigation until they have a suspect. Then they have a limited time in which they may detain him without charge, and question him in the absence of his solicitor. In Scotland, this power is **very** limited, as they have only a maximum of six hours in which they can detain and interrogate a suspect without charge (s.2 CJ(S)A80). In England and Wales, in contrast, the police have up to 36 hours in which they may interrogate without charge before they must take the suspect before a magistrate (s.41 PACE). [1]

Failure to observe the Codes may result in the exclusion at the trial of any evidence obtained on the grounds that its admission would have an adverse effect on the fairness of the proceedings (s.78 PACE).

2.3 Unless the suspect has been caught in the act, the police must seek three possible sources of evidence:-

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1. Where the offences are connected with terrorism, the police throughout the UK may detain a suspect for 48 hours without charge and without judicial authorisation; after that period, the Secretary of State may authorise further detention for up to five days : Prevention of Terrorism (Temporary Provisions) Act 1989. The Act has to be renewed every 12 months by the Secretary of State and by Parliament every five years. This power was found to violate the European Convention on Human Rights in the case of *Brogan and Others v. the United Kingdom*, judgment of European Court of Human Rights of 29 November 1988.

(i) clues left at the scene of the crime (e.g. forensic science evidence),

(ii) identification of the suspect by any witnesses, and

(iii) information obtained from interrogation (particularly a confession), from others and from any searches, in order for a prosecution to be mounted.

The relative importance of each of these three types of evidence is difficult to assess. However, a study was conducted for the Royal Commission on Criminal Procedure in England and Wales ("RCCP") [2] in 1974 of the work of detectives in the Thames Valley Police Area. This showed that a majority of offenders were caught in the act, or were still at the scene of the crime when the police arrived there, or were identified to the police by the victim or a witness. About 40% of offenders were detected by investigation, of whom 17% were detected because they were members of a small group of people who had an opportunity to commit the offence, or were found in possession of stolen property or trying to dispose of it, or were caught as the result of police observation or a trap. Eleven per cent were caught as a result of a stop/check or from a fingerprint search. Twelve per cent were implicated by an accomplice during interrogation. The study also showed that a quarter of offences discovered in the Thames Valley in 1974 were detected when the police were interviewing a suspect after his arrest for other offences. Thus interrogation played an important part both in the detection of offenders and of offences. These figures are broadly comparable with the findings of other researchers. The importance of confession evidence was confirmed by another study [3] for the RCCP of confessions in the Crown Court, which found that 13% of cases would have failed to reach a *prima facie* standard without confession evidence, and a further 4% would probably have resulted in acquittal. In about half of all the cases, statements alleged to have been made by the accused amounted to a full confession.

Forensic science evidence

2.4 Such evidence can sometimes be crucial. For example, in the case of *R. v. Mervyn Russell* (Court of Appeal 1983), the victim of a murder had been found with 22 hairs in her hand, all lying in the same direction and having roots. Four were brown, the rest grey. This suggested to the police liaison officer and the pathologist that they had come from the head of her assailant. However, this information about the colour and position of the hairs, and its implication, was not passed to the

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2. Research Study No.7. Report of the RCCP 1981 Cmnd 8092, paras. 2.9 - 2.17.

3. Research Study No.5 "Confessions in Crown Court Trials" by John Baldwin and Michael McConville.

prosecution or the defence, and so its significance was not appreciated. It was conceded at the trial that the hairs did not come from the head of the defendant, Russell; but the prosecution said they could have come from the victim scraping the floor as she lay dying. The information that the hairs most probably came from the head of the assailant was not discovered until several years later, whereupon the case was referred back to the Court of Appeal by the Home Secretary and the conviction was quashed.

2.5 In circumstances where there is no immediate suspect, the importance of pieces of evidence may not be appreciated at the time. Tests on evidence may destroy its original state and render it untestable by any other scientist. The avoidance of such difficulties is often a matter of adequate training in observation. However, greater police use of technology would, we think, assist in the detection of the real culprit. Examples that spring to mind are all police cars being equipped with small cameras and cassette recorders, and all police stations having adequate and mutually compatible computer facilities for intelligence purposes.

2.6 The problems faced by defendants in respect of scientific and other evidence, and particularly by potential defendants (i.e. where no suspect has yet been identified and therefore no defence lawyer is investigating the case), were examined by a JUSTICE Committee in its report "A Public Defender" (published in 1987). It concluded that the best solution was the establishment of an office of public defender to assist defendants and their lawyers. His functions would include

- facilitating the search for, and in certain circumstances undertaking the interviewing of, witnesses;
- assisting in the procurement of relevant information from the prosecution, banks, Government Departments etc.,
- collating and providing information, including the state of scientific research and the availability and quality of experts in the various parts of the country;
- providing a legal research department;
- enabling legal aid to be speedily obtained to cover the prompt instruction of experts and investigators;
- ensuring the early examination of exhibits on behalf of potential and perhaps unidentified defendants;
- ensuring the retention of possible defence exhibits where there is as yet no defendant;
- facilitating adequate access to forensic science laboratories.[4]

We draw attention to this proposal and consider it to be a very useful one for

4. Pp. 6 - 14, Part One: The Pre-Trial Position

dealing with these problems [5]

Identification

2.7 Identification, whether by sight or hearing, is evidence which can seem immensely convincing and compelling to a jury but can also, notoriously, be mistaken. Two celebrated examples of this were the cases of *Laslo Virag* (1969) and *Luke Dougherty* (1973) (details of which are set out in para 3.8 below). A more recent example is the case of *Ernest Barrie* (details of which are set out in Appendix One).

2.8 In Chapter Three we set out in detail our views on how identification evidence should be dealt with at the trial. We concern ourselves here with how it is investigated by the police.

2.9 The principal methods by which identification of suspects is tested are the formal identification parade, informal parades, e.g. in shopping areas or railway stations where the suspect mingles with the public, and confrontations, where the suspect is of highly individual appearance or refuses to co-operate. We were informed that where identification evidence is possible, formal parades are usually held in about 80 per cent of the cases, the remainder being informal parades and confrontations. However, witnesses were less likely to identify anyone at an informal parade and least likely to do so on a confrontation. Undoubtedly, many witnesses are nervous, particularly if they have been victims. This may affect the quality of the identification or lead to failure to identify.

2.10 Apart from what is brought about by the guidelines issued in Code of Practice D under PACE, there is no formal police training and no uniform police practice in respect of the conduct of identification parades. The police rely on volunteers to attend parades, but in some areas it is difficult to persuade members of ethnic minorities to co-operate. In London, an attendance allowance is now paid to volunteers to encourage participation, and we understand that this has greatly increased co-operation from all sections of the public. Local employers will sometimes volunteer members of their staff to stand on parades. Failure to organise an identification parade where the suspect has requested one, and it is practicable to hold one, may render any other form of identification inadmissible[6].

2.11 We were impressed by the evidence we received from the Police Inspector from Paddington Green Police Station who specialised in the conduct of identification parades. His expertise appeared to contribute greatly to the fair and efficient methods by which identification evidence is tested. It was clear, though, that lack of resources prevented the application of desirable safeguards in many cases, such as the photographing of all parades.

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5. Sir David Napley dissents from this view.
6. *R. v. Gaynor* 1988 Crim. L.R. 242.

2.12 Properly-run procedures are imporant because these may provide evidence of identification which is relied on by the prosecution at the trial. For example, in the case of *Smith v. H.M. Advocate* (1986) S.C.C.R. p.135, the case against the accused on charges of assault and robbery depended on the evidence of three eye-witnesses. One of these positively identified the appellant both at a parade and in court. The second witness accepted that she had omitted to qualify her identification by saying that he was at any rate similar to the culprit because she had been confused at the time of the parade (her child had just been involved in a road accident). The third witness testified that at the parade she had said that she **thought** the accused was the offender, but police evidence was that at the parade she had made an unqualified identification. Her evidence in court was that he was only very much like the culprit. On appeal, the High Court of Justiciary held that it was for the jury to determine whether police evidence as to witness identification **at a parade** was to be preferred to the failure of the same witness to make a positive and unqualified indentification **at the trial**.

2.13 We **recommend** the following improvements in identification procedures:-

(i) Major police stations should have a designated officer for the conduct of identification parades and confrontations, similar to the custody officer. He should be responsible for all aspects of the parades, and, as at present, he should play no part in the investigation of the offence. In smaller stations, officers should be given special training in the conduct of formal identification parades and group or street identifications.

(ii) It should become standard practice to video formal parades. This would enable the trial court to examine the circumstances in which an identification was made. It would also enable a nervous witness to watch the video later, in the presence of the suspect's solicitor, if he had some doubt about his identification, or lack of it.

(iii) Experiments should be conducted with videoing of informal parades, with the witness viewing the film later, in the presence of the defence solicitor, to see if an identification can be made. The witness should be excluded from the filming to avoid the possibility of identifying someone seen at the informal parade, rather than at the crime.

(iv) The building of Centres dedicated to identification should be given greater encouragement. These would enable witnesses to watch parades through a one-way mirror, and so would reduce mistakes caused either by the nervousness of the witness or of the suspect.

(v) Special procedures need to be developed, where speech is an important element in identification, to ensure that witnesses hear comparable accents and timbres.

Interrogation

2.14 The object of interrogation is to obtain information about the offence, e.g. where the proceeds of the crime are hidden, who the accomplices were and so forth; and to obtain a confession. The police are skilled at interrogation; as mentioned in para. 2.3 above, confessions form a major part of a large number of prosecutions. In recent years, there have been a number of significant developments concerning the interrogation of suspects.

2.15 (i) **Regulation**

Police are no longer able to detain suspects for unlimited time. PACE and CJ(S)A80 have imposed strict time limits and there are other regulations concerning rest and supervision. These regulations do not appear to apply to those who attend "voluntarily" in Scotland [7]. In England, they also do not apply to someone who attends "voluntarily", but if he exercises his right to leave under s.29 of PACE, he may be arrested and detained and the regulations then apply.

2.16 (ii) **The right to silence**

The right to silence means that a suspect cannot be compelled to give evidence at his trial and he does not have to answer questions put to him by the police. Although in theory no adverse inference can be drawn from the suspect's refusal to answer questions, in practice the jury often does [8]. The right is not absolute. Under the Companies Act 1985 and the Financial Services Act 1987, Inspectors have power to compel answers which may be used in evidence against the suspect in subsequent proceedings. Similarly, the Criminal Justice Act 1987 gave power to investigators to compel answers in cases involving serious fraud, but these answers can only be used to contradict an inconsistent statement. In recent years, there have also been moves to compel a suspect to reveal details of his defence. Thus, notice of an alibi must be given in advance [9] and in cases alleging serious fraud the judge may order the defence to give the court and prosecution a written statement giving the general nature of the defence and the principal matters in issue, with the sanction of judicial comment and the jury being able to draw adverse inference [10]. Finally, if a person suspected of a serious arrestable offence refuses to provide an

7. See "Detention or Voluntary Attendance?" Police use of detention under s.2 of CJ(S)A80 published by the Scottish Office 1986.
8. See "The Right to Silence" published by the Criminal Bar Association 1988.
9. S.11 Criminal Justice Act 1967.
10. Ss. 9 & 10 Criminal Justice Act 1987.

intimate sample without good reason, the court may draw an adverse inference and treat the refusal as corroboration [11].

The refusal to answer questions does not prevent the police from asking them, and the greatest safeguard against unfair or oppressive questioning is the right to consult a solicitor before answering, or have one present during the interrogation. Although the police many deny the suspect access to a solicitor under s.58 of PACE and s.3 of CJ(S)A80, the courts have imposed severe limitations on such denial. In the case of *R. v. Samuel* (1987) The Times 19 Dec, the Court of Appeal held that it was only in the most exceptional circumstances that a solicitor could be denied access to his client under s.58 of PACE. The police would have to have reasonable grounds for believing that a particular solicitor would be likely to commit a criminal offence. Alternatively, they would have to have grounds for believing that inadvertent or unwitting conduct on the part of the solicitor would hamper the investigation or alert accomplices or hinder the recovery of property. This would probably be the case only in respect of a sophisticated criminal known or suspected of being a member of a gang of criminals. Denial of access in any other circumstances would result in any confession obtained in the absence of the solicitor being excluded on the ground that it was obtained unfairly [12].

In Scotland a similar situation prevails but the right to silence has been fairly significantly modified by virtue of the judicial examination. This is an old Scottish procedure revived by the CJ(S)A80. When the accused is brought before the sheriff on petition on the next lawful day after arrest, the Procurator fiscal (i.e. the prosecutor) is entitled to require him to be judicially examined. This examination does not take place in all cases, but only where the fiscal deems it necessary and desirable.

The objects of reviving judicial examination were:

(a) to afford to an accused at the earliest possible stage in the judicial process an opportuntiy of stating his position as regards the charge against him;
b) to enable the procurator fiscal to ask an accused questions designed to prevent the subsequent fabrication of a false line of defence, for example, alibi; and
c) to protect the interests of an accused who has been interrogated by police officers and who has given answers or made statements to the police, so as to ensure as far as possible that any such answers or statements which are to be used as evidence at the accused's trial have been fairly obtained and are not distorted or out of context [13]. The fiscal asks the actual questions at the examination as he will know all the relevant facts of the case, but the whole procedure is in the control of the

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11. S.62 PACE.
12. This case was affirmed by the Court of Appeal in *R. v. Alladice* (1988) The Times 11 May.
13. Report of the Committee on Criminal Procedure in Scotland (Second Report), chaired by Lord Thomson. 1975 Cmnd. 6218. Chapter 8.

sheriff.

The examination is restricted to questions relevant to the objects outlined above. The defence is given a chance to question, but only where ambiguity has arisen. The accused may refuse to answer a question, but if he does his failure may be commented on by the prosecutor, the judge, or a co-accused if the accused (or a witness on his behalf) gives evidence of something which could have been stated in an answer to that question. The Thomson committee recommended that statements made to the police by a suspect should not be admissible unless they have been put to him at a judicial examination [14], but this recommendation was not accepted by Parliament, and such statements have been ruled admissible [15]. Despite the absence of this safeguard, the procedure appears to have worked well in Scotland to deal with the problem of the false confession and the false defence. An example of its operation is set out in Appendix Two.

2.17 (iii) Tape-recording of interviews

The tape-recording of police interviews was initially greeted with hostility by the police. But experiments have shown that challenges at trial to the accuracy of police accounts of interviews dropped dramatically when the interviews were tape-recorded, and pleas of guilty based on confessions contained in the recorded interviews also rose considerably. Field trials showed that the use of tape evidence led to the conviction rate in Wirral in contested cases in magistrates courts increasing from 61 to 76 per cent, and in the Crown Court from 54 to 76 per cent. The corresponding figures for Leicester were from 88 to 92 per cent in magistrates courts, and from 56 to 67 per cent in the Crown Court [16]. A study of the effects of PACE on custodial interviews [17] showed that the requirement of contemporaneous note-taking of interviews placed a severe burden on interrogators and has had a detrimental effect on police interrogation skills. According to the field trials, tape-recording substantially reduced these burdens. As a consequence, most police forces are now keen to introduce tape-recording, and the Government intends to introduce national tape-recording by 1991.

2.18 These recent developments, while going a long way towards reducing the chances of false confessions, are unlikely to eliminate them altogether. There are two main reasons for this. First, confessions can take a variety of forms. It emerged from the study of the field trials that there were far fewer challenges to the voluntariness of an interview or of what was alleged to have been said, but an

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14. Para 8.11.
15. *H.M. Advocate v. Cafferty* (1984) S.C.C.R. 444.
16. "The Tape-Recording of Police Interviews with Suspects: a second interim report." Home Office 1988.
17. By Irving and McKenzie, published by the Police Foundation in 1987.

increasing number of challenges about the interpretation of particular words in the interview. Second, once they have obtained a confession, the police tend not to look any further for a suspect, and sometimes they do not try to verify the contents of a confession. The 1987 Police Foundation study showed that very few suspects who made admissions were reinterviewed. One of the criteria employed by the prosecution in deciding whether to prosecute where the case depends on a confession is to look out for any grounds which might cast doubt on its reliability. This practice was endorsed by the RCCP, which stated that "... when the evidence against the accused is his own confession, all concerned with a prosecution, the police, the prosecuting agency and the court should, as a matter of practice, seek every means of checking the validity of that confession." [18]

2.19 The variety of confessions

Dr. Gisli Gudjonsson (a psychologist and former Icelandic police inspector) and Dr. James McKeith (a psychiatrist) of the Bethlehem Hospital, London, have made a study of some 70 cases involving confessions. According to them, there are three distinct groups of people who tended to give false confessions:-

(i) **the "voluntary" group,** who confess to notorious crimes because they want publicity or have fantasies about committing crime;

(ii) **the "guilt" group,** who want to be punished for a crime because they have general feelings of guilt about some aspect of their lives;

(iii) **the "coerced" group,** who are essentially suggestible in personality or in a situation which they find intolerable. Examples of the "coerced" group include:-

(a) the person who could not remember what happened because of drink or drugs and agreed that things must have happened as suggested;

(b) the person whose self-esteem was tied to his work and who, when his professionalism was put under intense scrutiny over a considerable time, agreed that he must have done as alleged;

(c) the person who suffered from an embarrassing illness (Krohn's disease which causes diarrhoea under stress), who was allowed only limited access to a toilet and who confessed in order to overcome the shame of soiling the cell and her clothing;

(d) the educationally sub-normal person who was in awe of figures in authority and agreed that he had done as alleged when intensely questioned by a uniformed officer;

(e) the person suffering emotional shock because of the death of a loved one, a child, who felt some responsibility for the death because she was not present to protect the victim, and then confessed to the murder after intense questioning which included allegations that she was a bad parent;

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18. Para 4.74.

(f) the person who is desperate to obtain bail or to avoid a loved one being arrested and detained for questioning.

2.20 According to Drs. Gudjonsson and McKeith the police are skilled at detecting the false confessions of people in the "voluntary" and "guilt" groups, but not of those in the "coerced" group. Partly this is due to a lack of awareness training of these types, partly to the failure of the police to check out the confessions for internal consistency with the known facts.

2.21 Changes made to English law in PACE were designed to reduce the risk of false confessions leading to wrongful conviction. Section 76 of PACE gives the Court power to exclude unreliable confessions, as well as those obtained by oppression. Section 77 requires the judge to warn the jury about the danger of convicting on the confession of a mentally handicapped person made in the absence of an independent person. In addition, the Code of Practice on the questioning of suspects provides detailed safeguards to avoid unfairness.

2.22 A series of trials took place during 1986 following a riot on the Broadwater Farm housing estate in Tottenham, North London, in October 1985, in the course of which a police constable was brutally murdered. Although neither PACE nor the Codes of Practice were then operative, the Metropolitan Police were operating a "trial run" of the sections of PACE governing the detention and treatment of persons by the police between July and December 1985. The Act and the Codes became law on 1st January 1986. Many of the defendants were under 18 years of age, and some disturbing allegations were made at some of the trials.

A report on the trials was prepared by Amnesty International [19]. We summarise some of the cases set out in the Amnesty report in Appendix One to show how necessary are the safeguards set out in the Act and Codes.

2.23 In the trials arising out of the Broadwater Farm riot, the prosecution based their case on confessions in respect of 41 defendants; only 19 were convicted. According to the Amnesty Report, many of the defendants made similar allegations about breaches of the PACE safeguards leading to false confessions. Since PACE and the guidelines came into force in January 1986, a number of cases have been reported in the Criminal Law Review where the issue before the court

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19. "United Kingdom: Alleged Forced Admissions during Incommunicado Detention", AI London, February 1988.

was disputed confession evidence [20]. These cases suggest that the court is likely to exclude an interview where there has been bad faith on the part of the police.

Confessions will also be excluded where there has been "oppression" [21]. A confession may also be excluded in other circumstances where the court considers it to be unreliable or to have been obtained unfairly.

2.24 It would appear therefore that PACE is beginning to bring about the changes which were hoped for in police practice, and it may be that fewer doubtful confessions will be admitted. These safeguards will not, however, necessarily deal with the kind of suggestible person who is interviewed in a perfectly fair manner and who confesses willingly but wrongly, or the emotionally upset person who is told, in a perfectly straightforward manner, that once he has made a statement he can go, and so confesses to get out of an unpleasant situation. We believe that greater safeguards will not only prevent repetition of the circumstances described above in relation to the Broadwater Farm cases, but will also protect the police against allegations of improper or negligent behaviour. We **recommend** therefore that

(a) adequate resources should be made available to the police to enable all interviews with suspects to be tape-recorded; interviews in respect of serious offences should be videoed;

(b) police training should included awareness of the psychological factors

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20. (i) Access to solicitor unreasonably refused: confession inadmissible: *R. v. Paul Deacon* 1987 Crim.L.R. 404.

(ii) Interview conducted in breach of codes of conduct - bad faith irrelevant -breach of statutory rights - interview excluded: *R. v. Foster* 1987 Crim. L.R. 821.

(iii) Confession - accumulated acts of unlawfulness - excluded as "oppressive" under s.76 PACE: *R. v. Davison* 1988 Crim. L.R. 442.

(iv) Failure to inform the suspect that a duty solicitor was available when her own was unavailable did not amount to agreement to be interviewed without a solicitor. Interview inadmissible: *R. v. Vernon* 1988 Crim. L.R. 445.

(v) Drug addict unfit to be interviewed for 8 hours after arrest. Following several hours of "general chat" with interviewing officers, suspect confesses. Breach of codes requiring rest periods. Cannot get round PACE safeguards by calling interviews "general chat". Confession inadmissible: *R. v. Trussler* 1988 Crim. L.R. 446.

(vi) Suspect's solicitor unavailable. Not told of duty solicitor. Agreed to be interviewed without solicitor because "cold and unhappy". CA held no unfairness: admissions rightly admitted: *R. v. Hughes* 1988 Crim. L.R. 519.

21. Which must be given its ordinary dictionary meaning and not just the words mentioned in s.76 (8) of PACE, i.e. torture, inhuman or degrading treatment, and the use or threat of violence: *R. v. Fulling* CA 1987 Crim.L.R. 492.

giving rise to false confessions and how interviewing techniques can recognise and overcome these;

(c) the police and prosecution should be under a professional duty to check out a confession for consistency with the known facts;

(d) consideration should be given to introducing into England and Wales the Scottish procedure of the Judicial Examination.

2.25 The role of the prosecution

At the pre-trial stage, the prosecution role is primarily to advise on evidence and to establish whether there is sufficient evidence upon which to base a prosecution. The advent of the Crown Prosecution Service in England and Wales should lead to the dropping of many weak cases at the pre-trial stage, as it is supposed to do under the Procurator fiscal in Scotland. However, it has long been acknowledged in Scotland that, for the most part, Procurator fiscals do not speak to the police officer who reports the offence before marking a case as fit for prosecution, and they rely solely on the police report in making decisions concerned with prosecution [22]. It is unlikely that the situation will be different in England and Wales, where pressure from the volume of work is much greater.

2.26 However, one important pre-trial duty of the prosecution is to disclose information in its possession to the defence. The investigative resources available to the police and prosecution are vastly superior to those available to the defence, who do not become concerned with a case until retained by a suspect. At that stage in the proceedings, most of the police investigation has been completed. A great deal of information will have been obtained, much of which may appear to be irrelevant. In England and Wales, the prosecution is under a duty to disclose such information to the defence in accordance with guidelines issued by the Attorney-General. In Scotland, witness statements (known as precognitions) are confidential to the Crown. Although the defence have power to ask the Court to order a witness to give a precognition on oath, the courts have said that, on practical grounds, this can only be used with caution, where it is feared that the witness might depart from his precognition at trial. [23] Defence solicitors have no right to take statements privately from the Crown witnesses, but the Crown will usually make available to the defence the information contained in their precognitions.

2.27 A failure to disclose can sometimes result in a miscarriage of justice. An example of this was the case of *Paul Ngan* (Court of Appeal 1984). In February 1983, Paul Ngan was convicted of wounding with intent and of causing an affray. He was sentenced to four years imprisonment on each count, to run concurrently. The case arose from a serious fight at a Chinese celebration which broke out between a group of Singapore Chinese and a group of Hong Kong Chinese. During the

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22. "Criminal Procedure in Scotland: Cases and Materials" by Gane and Stoddart (1983) p.32.

23. S.9 CJ (S)A80 as interpreted in *Low v. MacNeill* 1981 S.C.C.R. 243.

fighting a Mr. Wong sustained severe knife wounds. It was this wounding of which Ngan was convicted. One of the Singapore Chinese, Chee Vui Chong, got away and fled abroad; the others were arrested.

The identification evidence was rather confused, but did generally point towards Ngan. The forensic science evidence established beyond doubt that pieces of metal found in Wong's right forearm belonged neither to Ngan's knife nor to any of the others examined by the police. Chong's was the only knife not examined. After the trial it was learned that Chong had been arrested in Malaysia. He had confessed to the wounding, and after extradition had pleaded guilty to having inflicted the wounds for which Ngan had been convicted.

At an appeal out of time, the prosecution accepted both that Chong's evidence was valid, and that (upon close analysis) the other identification evidence implicating Ngan was unsafe. The court therefore quashed the four-year sentence for wounding and halved the sentence for affray to two years, enabling Ngan to be released from custody immediately. After the appeal it came to light that Chong had made his confession five months before Ngan's trial to the English police sent to Malaysia to interview him. The confession had not been made available to Ngan's lawyers -presumably because the police had not communicated it to the prosecuting lawyers.

2.28 Observance of the guidelines ought to prevent this kind of case arising. We **recommend** therefore that it should be a breach of professional duty for the police or breach of professional conduct for the prosecution to fail to observe the guidelines on disclosure issued by the Attorney-General in England and Wales and that there should be similar professional obligations about disclosure in Scotland.

Pre-trial defence work

2.29 Legal assistance for defendants in the United Kingdom is provided by solicitors and barristers in private practice, usually funded by the public purse through legal aid. The legal aid schemes provide for the exclusion from legal aid work of solicitors and barristers, either temporarily or for a specified period, for *inter alia* breach of professional standards (i.e. incompetence). Such exclusion is extremely rare. In the five years from 1983 - 1987 in England and Wales, one solicitor (for a limited period) and no barristers were barred under this provision in the regulations. There are a large number of practitioners who specialise in criminal work but there is nothing to prevent any qualified lawyer who meets the professional rules about the organisation of his practice from offering himself for criminal work. There is little or no monitoring of the competence of defence lawyers, but the experience of JUSTICE is that standards vary greatly.

2.30 Legally-aided work is considerably less well paid than private work.

Solicitors, in particular, have to meet high overheads by taking on very large volumes of work, sometimes more than their staff can competently handle. A major case may tie up a clerk for months. Legal aid will rarely reimburse the true cost of such work. In addition, separate authorisation has often to be obtained for specialist work, such as forensic science examinations, tracing witnesses, and long-distance travel, otherwise there is a real risk that these items of the bill will not be allowed. Sometimes the legal aid authorities will not give prior authorisation and the solicitor must take the risk that, on general taxation of his costs at the end of the case, these items will be disallowed. As a consequence, some solicitors will send all the papers to counsel to read rather than go through them themselves at no profit.

2.31 Although this situation does not affect the majority of ordinary cases which begin and end in the summary courts, it does sometimes lead to the higher risk of a miscarriage of justice in major cases. Examples of cases which JUSTICE has seen in recent years where information was not obtained, apparently for fear of not recovering the cost on taxation, include:-

(a) The failure to obtain expert opinions about psychosexual characteristics, accents and voice identification where this was a crucial identifying feature in a rape case. [24]

(b) The failure to obtain details of other supporting alibi witnesses on the grounds that five were sufficient, and in any event the prosecution case was weak. The Court of Appeal would not have allowed the large number of other witnesses to be called because they were known about at the trial, and there was no reasonable excuse for not calling them. [25]

(c) The failure to obtain independent forensic science evidence about the length of time a body could have lain in the open, and whether the defendant was capable of carrying a body of the size of the victim, as alleged by the prosecution. [26]

The late brief

2.32 The organisation of the legal profession means that a barrister does not usually begin to give serious consideration to a case until after he has received the brief from the solicitor. The brief is a set of instructions to counsel setting out the case against the defendant, and any explanation given by the defendant. Counsel is usually asked to advise on evidence to be obtained for the trial, and other tactical

24. The Case of *John McGranaghan* - see Appendix One.
25. The case of *Luke Dougherty:* see paras 2.9 and 2.48 - 2.56 of the Devlin Report, HC 338, reproduced in Appendix One.
26. The case of *William Funnell* - see Appendix One.

matters. Sometimes, the legal aid authorities will permit expenditure only if counsel advises that a particular piece of evidence must be obtained. Pre-trial work of this nature is not well paid, and the effort put into it is not fully rewarded unless the same counsel is briefed to represent the defendant at the trial. Trial work is much more generously, and realistically, remunerated; the incentive is therefore to keep pre-trial work to a minimum. It is this which has caused the failure of experiments to institute effective pre-trial reviews in criminal cases; for example, the experiments which followed the Report of Lord Justice Watkins' Working Party on the Criminal Trial (1982), which was intended to bring about agreed evidence, lists of witnesses, charges to be dropped/proceeded with, and pleas acceptable to the Crown before trial.

2.33 Barristers' chambers, like firms of solicitors, try to attract as much work as possible, but it is rarely possible to predict the exact length of a trial. For example, Mr. Smith may be briefed in respect of several criminal matters and it may be that, if some end in a plea of guilty, or the jury is not out too long considering its verdict, he may be able to conduct them all. More frequently, however, his clerk knows that he cannot possibly be available for them all, but the clerk is unwilling to return the brief to the solicitor, preferring to keep the work, and hence the fee, in chambers. He therefore waits until shortly before the trial, and then telephones the solicitor on Friday to say that Mr. Smith's trial has overrun somewhere and so he cannot be available on Monday for the trial in London. However, he has a good chap in chambers, Mr. Jones, who will read the papers over the weekend and appear in court on Monday. The solicitor has no choice but to agree. A set of papers received by counsel in this way is called a late brief. Sometimes this telephone call takes place on the evening before the trial. The defendant may well have had long discussions with Mr. Smith and be confident in his ability, so he is often quite disappointed to find a complete stranger before him in court.

2.34 In most run-of-the-mill cases, counsel has been able to master the details of a late brief, but from time to time it is clear that he has not. We are aware of one murder case in recent years resulting in a sentence of life imprisonment where leading counsel, having taken over the case late, had failed to defend in the manner the accused was entitled to expect; the Court of Appeal subsequently quashed the conviction [27]. In another case, which depended on careful and searching cross-examination, it appears that leading counsel did not ask the relevant questions because he had not read all the papers. [28]

2.35 In 1979, the Royal Commission on Legal Services [29] recommended, in paras. 22.63 and 22.64, that both branches of the legal profession in England and Wales should institute professional standards to cure inadequacies in the preparation

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27. The case of *Anthony Burke* - see Appendix One.
28. Because this information was imparted in confidence, it is not possible to name the case.
29. Cmnd 7648.

and handling of briefs. Both the Law Society and the Bar impose a duty to act competently on their members, with power to remit fees and impose penalties for serious breach. We are aware of a number of cases where complaints of inadequate preparation of the defence has been made which seem to have been justified. Such complaints are almost invariably rejected. We **recommend** that the legal profession should make greater efforts to monitor the competence of its members and that failure to provide a competent service, both before and at the trial, should be treated more seriously by the respective disciplinary bodies than it appears to have been hitherto.

2.36 It is, of course, of little comfort to a convicted prisoner to know that his former lawyers will not in future be allowed to conduct cases because of their failings in his own. The importance of defence failings lies only in respect of their impact on the trial and any subsequent appeal, and we deal more fully with this problem below.

2.37 In the report on "The Public Defender" mentioned above, it was also suggested that this office be available to conduct difficult cases, with the litigant being able to choose between it and private representation. We make no comment on this, other than to commend it for discussion.

CHAPTER THREE

THE TRIAL

3.1 The object of the trial is to determine whether the accused person is guilty as charged. It is **not** to establish the truth of the incident. Thus, for example, it is strictly irrelevant in a trial against Smith that Jones had confessed to the crime, had been charged with the offence and was even committed to stand trial for it. None of the information about Jones' confession can be put before the magistrates or the jury or taken into account by them when deciding whether Smith was guilty. The adversarial system of justice means that the tribunal of fact must reach its decision on the basis of the evidence put before it by the prosecution and, if they call any, the defence. In a jury trial, this evidence is usually carefully filleted to ensure that unnecessary and irrelevant evidence is not put before the jury. This includes any previous convictions of the accused.

3.2 Such a system depends, for its effectiveness, on everything being ready for the trial, and everything relevant emerging at the trial and being properly explored there. The role of the judge in a jury trial is to act as a kind of referee to ensure that the rules are observed by both sides, to sum up the evidence to the jury, and to explain to them their duties, the burden of proof and so forth. It is not his job to ask the questions that hang in the air, or to try to ferret out information which counsel on either side may prefer, for their own reasons, to keep hidden.

3.3 When this system works well, it is probably unrivalled at getting at the truth. When it works badly, the risk of wrongful conviction is probably greater than under the alternative inquisitorial system which operates in most of Continental Europe. In this chapter we shall consider those hazards of the accusatorial trial which have given rise to miscarriages of justice in the past.

Sufficiency of Evidence

3.4 In England and Wales, provided that evidence satisfies the technical rules relating to its admissibility, there is no legal requirement relating to the amount of evidence required to convict, apart from five areas where the law requires corroboration. These areas [1] are

(i) perjury;

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1. Corroboration of the unsworn evidence of children was abolished by the Criminal Justice Act 1988.

(ii) personation at a parliamentary or municipal election;

(iii) offences of defiling women or girls by fraud or administering drugs or procuring them for prostitution;

(iv) treason by encompassing the death of the sovereign or her heirs.

In addition, there are three categories where the judge must warn the jury of the danger of convicting on the uncorroborated evidence of witnesses who are

(a) accomplices;

(b) complainants in sexual offences;

(c) children who have given sworn evidence.

3.5 The reason for these latter categories is that such witnesses have, from time to time, been shown to be more unreliable than other witnesses. In all other cases one single piece of evidence - one witness, a confession, an identification, a piece of scientific evidence - will suffice for conviction, provided the jury believes it and is satisfied beyond reasonable doubt that the guilt of the accused is established by that one piece. This situation puts a great premium on the impression that witnesses give from the witness box. Sir Frederick Lawton, a very experienced retired judge of the Court of Appeal, said in connection with re-trials that "it may be pertinent to remember that witnesses, like young race horses, learn a lot from their first time out. Justice may not be done if there is a re-run". [2] This observation is equally true of persons who appear regularly before the courts as witnesses, namely forensic science experts and police officers. They become skilled at presenting their evidence and at standing up impressively to cross-examination.

3.6 The same might be said of experienced criminals who appear regularly before the courts - except that if they challenge the character of any prosecution witnesses, they risk having their previous convictions disclosed to the jury, and so they are often advised not to give evidence. Witnesses who are nervous and/or overawed by the formalities of the courtroom - and this is particularly true of first-time witnesses - can either make a good impression of being very honest or a bad one of being very unsure of themselves, and so not credible.

3.7 In Chapter Two, we considered how certain types of evidence can lead to miscarriages of justice in the context of pre-trial matters; we consider them here in the context of the trial.

Identification Evidence

3.8 Identification evidence has long been recognised as liable to give rise to miscarriage of justice. One of the most celebrated cases was that of *Luke Dougherty*.

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2. Letter to *The Times* newspaper dated 11 January 1988.

He was convicted in February 1973 of the theft of some curtains from British Home Stores and sentenced to 18 months imprisonment. The evidence against him consisted of two identifications by the shop assistants, who had previously identified him from police photographs. No identification parade was held. Dougherty's defence was that he had been on a coach trip to Whitley Bay that day with some 49 people, he being one of the only two men on the trip. Five alibi witnesses from the party were due to be called, but only two turned up at the trial. They were not believed. He appealed, but counsel advised against seeking to call further witnesses and relied on criticism of the judge's decision to permit a dock identification. The appeal was dismissed. With JUSTICE's help, further statements were taken from the other persons on the coach, and a petition was sent to the Home Secretary. He referred the case back to the Court of Appeal, which quashed the conviction on 14 March 1974. Shortly afterwards, the Devlin committee of Inquiry into evidence of identification in criminal cases was set up.

3.9 The principal recommendation of the Committee was:-

> "8.4 We do however wish to ensure that in ordinary cases prosecutions are not brought on eye-witness evidence only and that, if brought, they will fail. We think that they ought to fail, since in our opinion it is only in exceptional circumstances that identification evidence is by itself sufficiently reliable to exclude a reasonable doubt about guilt. We recommend that the trial judge should be required by statute
> (a) to direct the jury that it is not safe to convict upon eye-witness evidence unless the circumstances of the identification are exceptional or the eye-witness evidence is supported by substantial evidence of another sort; and
> (b) to indicate to the jury the circumstances, if any, which they might regard as exceptional and the evidence, if any, which they might regard as supporting the identification; and
> (c) if he is unable to indicate either such circumstances or such evidence, to direct the jury to return a verdict of not guilty." (p.149)

Such a statute would be based on the assumptions (i) that in the ordinary cases of eye-witness identification there is a risk of mistake too great for the identification to be acted upon in a criminal case (where reasonable certainty is the standard of proof) unless it is supported by other evidence, (ii) that there are exceptional cases where the circumstances of the identification are such that one can be reasonably certain, without other supporting evidence, that the identification is not mistaken [3], (iii) that a trial judge should be able to recognise these exceptional cases, and (iv)

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3. Examples of "exceptional circumstances" in the report (paras 4.61 - 4.65) were credible evidence of familiarity; admission of being present at the scene but denial of the crime (distinguishing "ordinary observation" from "visual identification"); failure by the accused to counter the prosecution case with his own version of events.

that it is better that they should be excluded from the requirement of other supporting evidence.

3.10 The Devlin Report was published in April 1976 [4]. In July 1976 the Court of Appeal gave its judgment in the *Turnbull* case [1977] QB 224, delivered by Lord Widgery CJ. In the guidelines laid down in that judgment the Court adopted the substance of the Devlin Recommendation (without of course giving it the statutory effect which the Committee had recommended):-

> "In setting out these guidelines for trial judges, which involve only changes of practice, not law, we have tried to follow the recommendations set out in the Report which Lord Devlin's Committee made to the Secretary of State for the Home Department in April 1976. We have not followed that Report in using the phrase "exceptional circumstances" to describe situations in which the risk of mistaken identification is reduced. In our judgment the use of such a phrase is likely to result in the build up of case law as to what circumstances can properly be described as exceptions and what cannot. Case law of this kind is likely to be a fetter on the administration of justice when so much depends upon the quality of the evidence in each case. Quality is what matters in the end. In many cases the exceptional circumstances to which the Report refers will provide evidence of good quality but they may not: the converse is also true".

At the beginning of his statement of the *Turnbull* guidelines Lord Widgery said this:-

> "In our judgment when the quality [of the evidence] is good as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution. Were the Courts to adjudge otherwise, affronts to justice would frequently occur." [5]

3.11 Because we have been denied access to the transcripts of the judgments of the Court of Appeal, it has not been possible to conduct any research into the way in which that Court has dealt with appeals against convictions based mainly, or solely, on identification evidence. The reported cases suggest that the *Turnbull* guidelines only apply to "fleeting glimpse" cases, and do not cover cases where what is alleged is recognition, or the identification is alleged to have taken place over some time. [6] The experience of JUSTICE in investigating convictions based

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4. HC 338.
5. This judgment was cogently criticised by Lord Devlin in his book "The Judge" 1979 OUP pp. 188 - 193.
6. *R. v. Curry* and *R. v. Keeble* 1983 Crim. L.R. 737.

mainly, or solely, on identification since the *Turnbull* case is that some judges do not first look to see whether the case is one where the quality of the identifying evidence is poor, and therefore is to be excluded. Moreover, the risk of wrongful identification can be as great where the identification is claimed to be recognition or is made in bad conditions. The *Turnbull* guidelines have not, in our view, proved as effective as the Court of Appeal hoped in preventing miscarriages of justice, despite the occasional re-iteration of the *Turnbull* rule (e.g. *R. v. Weeder* (1980) 71 Cr.App. R. 228). We set out in Appendix One two cases decided since *Turnbull.* The first is *Mycock,* where JUSTICE considered that there was a wrongful conviction and where, after referral back by the Home Secretary, the Court of Appeal quashed the conviction. The second is the case of *McGranaghan,* where (although the Court of Appeal upheld the conviction) JUSTICE considers it highly probable that there was a wrongful conviction.

3.12 We take the view that the safeguards against wrongful conviction recommended by Devlin have been substantially weakened over the years, and that the Court of Appeal - for the reasons given in Chapter Three below, and as was illustrated in the cases of *Mycock* and *McGranaghan* - cannot be relied upon to identify miscarriages of justice that occur at the trial involving poor identification evidence. Although the Devlin recommendations will not guarantee that wrongful convictions do not happen, we consider that they would substantially reduce the risks without causing serious affronts to justice, as feared by Lord Widgery. In Scotland, where the requirement of corroboration has always existed, no such fears have been realised. Moreover, the introduction of other reforms, such as pre-trial judicial examination, would greatly reduce the chances of the obviously guilty going free. We accept that difficulties may arise out of the use of the term "exceptional circumstances" by Lord Devlin's Committee. We consider that these can be overcome by excluding from the requirement of corroboration cases in which the identification was made where the circumstances are such that, in the view of the court, the identification evidence is likely to be reliable. With that modification, we *recommend* therefore that the proposals of the Devlin Committee should be given statutory force.

Confession Evidence

3.13 We demonstrated in Chapter Two how people can come to make false confessions. Two of the most celebrated examples of miscarriage of justice this century have involved false confessions: the case of *Timothy Evans,* hanged in 1950 after confessing to the murder of his child and pardoned after his death, and the *Confait* case, where three young men were convicted in 1972, on the basis of their confessing to the murder of Maxwell Confait, their convictions subsequently being quashed.

3.14 JUSTICE has itself assisted in a number of cases where the evidence consisted mainly, or solely, of a confesson, and where serious doubts were raised

about the correctness of the conviction. One such case was that of *Roy Binns*. Binns was found guilty in July 1976 of setting fire to a Portacabin outside Scarborough Hospital and sentenced to 18 months imprisonment. He and a friend, Wheatley, had been questioned at length and both made admissions. Binns, who had a history of psychiatric disorder, claimed that his confession had been pressured out of him, but Wheatley pleaded guilty and was the chief prosecution witness against him. The existence of an unidentified fingerprint found at the scene was not disclosed to the jury. As a result of inquiries into another offence, the police later discovered that the fingerprint belonged to a local criminal called Alexandre, who admitted that he had been responsible for the hospital fire, unknown to Binns and Wheatley. The police thereupon reinvestigated the case against Binns and Wheatley, who admitted that he had lied at Binns' trial. A report was sent to the Director of Public Prosecutions in December 1976, and to the Home Office in March 1977. Nothing happened until May 1977, when Binns' solicitors were told that Alexandre would not be prosecuted for the offence. With JUSTICE's assistance, an application for leave to appeal out of time was made to the Court of Appeal, which gave leave and quashed the conviction almost immediately.

3.15 Other examples of cases involving more than one confession to a single crime are described in para 3.42 below dealing with hearsay evidence.

3.16 It is, of course, for the jury to determine whether a confession is genuine and proves the guilt of the defendant. Most suspects confess to committing crimes because they are guilty and it may be assumed that it is only upon reflection while on remand, or after consulting fellow prisoners, or even sometimes their lawyers, that they decide they have nothing to lose by challenging the genuineness of their confession with allegations that it was forced or enticed or tricked out of them, or was made up. We have no doubt, from our collective experience, that many such allegations are false, but also that some are true. Our recommendations in respect of pre-trial matters will, we hope, go some way to eliminating both false allegations and false confessions. However, many prosecutions will still rely on confessions, so how should these be dealt with at the trial?

3.17 It is not clear from the authorities whether the kind of psychological test for determining suggestibility developed by Dr. Gudjonnson (mentioned in para. 2.19 above) is fully admissible in evidence. This is an objective test which seeks to measure on a psychometric instrument the capacity of the individual to be influenced by suggestive questions and instructions, and his likelihood of accepting post-event information and incorporating it into his own memory. The test is administered in two parts. The first part consists of a tape-recorded story of a mugging which the subjects are required to listen to and subsequently report all that they remember about the story. Each correct 'idea' in the story earns one point, the maximum possible score being 40. Both 'immediate' and 'delayed' memory can be recalled.

The second part of the scale monitors interrogative suggestibility. The subjects are

asked 20 specific questions about the content of the story, from which their suggestibility scores are derived. The higher the score, the more suggestible the individual. Fifteen of the questions contain certain suggestive cues. An answer that indicates that the subject has followed a cue is labelled a 'Yield' score. The highest possible score is 15. When a "suggestible" individual displays other emotional or mental characteristics, which can be ascertained by a psychiatrist, it is possible to say whether a confession made by a suggestible person, with his particular mental state in the particular circumstances surrounding the offence, is more or less likely to be reliable. [7]

3.18 Such evidence is new to trials in this country, but we think that it is admissible as falling within the dictum of the Court of Appeal in the case of *R. v. Turner* [1975] QB 834, at p. 841:-

> "...the opinion of scientific men upon proven facts may be given by men of science within their own science. An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary..."

The findings would be based entirely upon clinical examination and testing. The tests applied have been worked out and checked by scientific methods outside the knowledge and competence of judges and juries and they purport to show what judges and juries would have no means of judging for themselves, namely whether a particular person is more suggestible than the average person because of his particular psychological make-up. Moreover, a psychologist or psychiatrist could in the context of the case give expert evidence of a general nature of the effects of pressures not within the ordinary experience of judges and juries, such as prolonged custody, persistent interrogation and feelings of guilt or failure in relation to the case. In *Turner*, the psychiatrist was purporting to assess the likely reaction of a man, shown to have no sort of peculiarity of personality or psychology, to emotional pressures such as love and disloyalty and taunting by a loved one, which are within ordinary human experience. If there is doubt about our views on the admissibility of the Gudjonnson test, we *recommend* that expert evidence of suggestibility, and other psychological and psychiatric traits, which will enable the court better to assess the reliability of a confession, should be admissible in evidence.

3.19 Expert evidence of this kind will certainly assist the court to reach the correct verdict. However, it is by no means conclusive of the question of the truth of the confession; the "suggestible" person could still be confessing truthfully. It will not

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7. See "Challenging your client's confession" Solicitors Journal Vol. 131 No. 23, 5 June 1987, and "Interrogative Suggestibility: comparison between 'False confessors' and 'Deniers' in Criminal Trials" Med. Sci. Law (1984) Vol. 24. No. 1.

help resolve the issue of false verbal confessions, or those falsely alleged to have been made to other prisoners. Nor does it help to clarify other, subtler pressures, such as the suggestion that if he did not do it, his wife or child must have done, and that they will be brought in for questioning unless he confesses. Then there is the inducement that bail will not be opposed in return for a confession, or will be opposed if the suspect refuses to confess.

3.20 In England and Wales the solution to these problems is supposed to be found in sections 76 and 78 of PACE, which give the court power to exclude (by s.76) a confession obtained by oppression or which is considered to be unreliable and (by s.78) any evidence whose admission "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." There is some evidence that these sections are having an impact on trials. We quote two examples:-

(i) *R. v. Harvey* 1988 Crim. L.R. 241.
The defendant was of low normal intelligence suffering from a psychopathic disorder aggravated by alcohol abuse. She and her lesbian lover were present when a man was murdered. Both women had blood on their clothes on arrest, when the lover confessed. The next day the defendant confessed and later the lover withdrew her confession. She became a witness for the prosecution but died before the trial. Two psychiatrists gave evidence at the trial that the defendant might have confessed, on hearing her lover's confession, in a child-like attempt to try to take the blame. They argued that before anything the defendant said could be relied upon, independent corroboration should be sought. The judge excluded the confession as being unreliable and the jury was directed to acquit.

(ii) *R. v. Mason* 1987 Crim. L.R. 757.
The appellant was convicted of the arson of a motor car. He had denied being involved immediately after the fire but when arrested some days later he was told by the police, untruthfully, that his fingerprint had been found on a piece of the bottle used in starting the fire. This lie was subsequently repeated by the police to his solicitor. He then told the police he had asked a friend to set fire to the car and had provided bottles of petrol and thinners. He argued on appeal that the judge should have acceded to his request to exclude the confession because it was unfairly obtained. The Court of Appeal held that it was not for them to discipline the police for misbehaviour in respect of the admitted deceit but although the judge had considered this in respect of the appellant he had not done so in respect of the solicitor, and he would have excluded the confession if he had done so. There being no other evidence, the conviction was quashed.

3.21 However, many other cases proceed solely on the basis of the defendant's confession and it is clear from the judgment in *Mason* that if the police had deceived only the appellent, his conviction would have been upheld. In that case, the confession may well have been genuine. In others, such as the Broadwater Farm riot cases mentioned in paragraph 2.22 above, the confessions may well have been

false. The danger of false confessions has led some to call for the introduction of a requirement of corroboration for confession evidence, either generally or in the special circumstances of children or the mentally handicapped or where the confession was not tape-recorded or repeated in the presence of an independent person. [8]

3.22 In order to see what effect a requirement of corroboration would have, we examined the situation in Scotland. There, police investigation is in theory under the supervision of the Procurator fiscals. In practice, however, the Procurator fiscal does not attend police interrogations, and protection for persons interrogated is largely secured by the rule of Scots law that evidence unfairly obtained will be excluded at the trial, coupled with the fact that Scots law requires sufficiency of evidence by way of corroboration and no one can theoretically be convicted solely on the evidence of an uncorroborated confession, or indeed on any single piece of evidence, such as one identification.

3.23 According to Scottish commentators, the difference between the Scottish and English law of evidence on the question of sufficiency of evidence is more apparent than real. [9] There are various ways in which the requirement can be met – a second eye-witness, circumstantial evidence, evidence of the truth of an incriminating aspect of a statement by the accused, and so forth. The degree of corroboration would not appear to be high in some cases. For example, in the case of *Proctor v. Tudhope* (1985) S.C.C.R. 139, eye-witness identification by one person was held to be sufficiently supported by evidence from the same witness and a police officer that the accused had run off when pointed out by the witness to the officer a few hours later. It had not been proved to the Sheriff's satisfaction that the accused had heard the witness shout "That's the one that broke into my house". On appeal, the High Court upheld the conviction, saying that "not very much was required in the way of corroboration". There was no admission of guilt in this case; the identification was heavily relied on and the reaction could have resulted from some other offence not charged or even general distrust of the police.

3.24 Where there is an admission of guilt, the degree of corroboration required is even less than in other cases. According to George More, then President of the Society of Procurators of Midlothian:–

> "The evidential rules relating to corroboration have been relaxed to the point where a conviction can now virtually follow upon the evidence of one credible witness. So-called "self-corroborating" confessions are now sufficient for conviction no matter how little detail of the crime is present and even if such

8. See, for example the arguments of Sir Henry Fisher in his "Report of Inquiry into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6" HC90, 1977, paras 2.26 – 2.29.

9. "A Treatise on the Law of Evidence of Scotland" Dickson p. 986.

detail is already well known to the police." [10]

3.25 A further article in the same Journal in 1986 [11] explained why this situation had come about and was acceptable. It concluded

> "... While there may occasionally be a marginal case in which it is arguable that there was indeed no sufficiency, as for example occurred in *Proctor v. Tudhope* 1985 S.C.C.R. 39, where the only corroboration of the householder's identification was the accused's running away when pointed out to the police by the householder; and indeed while there is also an occasional case in which there is clearly no corroboration but the High Court ignores that fact on the grounds of public policy (see *Yates v. H.M. Advocate* 1977 SLT (Notes) 42 which was followed by Lord Cameron in *H.M. Advocate v. Paxton* 1985 SLT 96) [12]; still Mr. More's criticism in respect of the principles of minimal corroboration (in cases where there is an admission) and of self-corroborating confessions are improper in view of the fact that in each of these cases the judge of fact is able to start from the very strong position that there is an unequivocal admission of guilt. If a sheriff believes the evidence of a clear admission of guilt, no reasonable man would require much to corroborate that admission."

3.26 Perhaps the limits of that relaxation were achieved in the case of *Hartley v. H.M. Advocate* 1979 SLT 26, where a youth of 17, described as suffering from, "disordered personality", confessed to murder after he had been held in custody for 12 hours overnight, without sleep, and without parental or legal advice. His confession was held to be admissible. In refusing his application for leave to appeal, the High Court approved the dictum of Lord Justice-Clerk Wheatley in *Balloch v. H.M. Advocate* 1977 SLT (Notes) 29:-

> "The law on this subject has been canvassed in many cases... suffice to say, a judge who has heard the evidence regarding the manner in which a challenged statement was made will normally only be justified in withholding the evidence from the jury if he is satisfied on the undisputed relevant evidence that no reasonable jury could hold that the statement had been voluntarily made and had not been extracted by unfair or improper means".

Later cases suggest that it is for the accused to show unfairness, and that unfairness cannot be inferred merely from the circumstances in which the questioning took place or the statements were made. There must be evidence that these factors

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10. "An open letter to the Lord Advocate", Journal of the Law Society of Scotland 1985 Vol. 30 p.429.
11. "Corroboration and Confessions" p.118.
12. These cases established that, in a case of rape, evidence of the woman's condition after the event is capable of affording corroboration of her evidence that she had been raped.

influenced the accused or had some effect on him. [13]

3.27 The Scottish experience suggests that corroboration is not necessarily the foolproof safeguard that its proponents suggest. Our collective experience suggests to us that information given early in an investigation is often reliable information and that what is needed is a rule of evidence which will provide adequate safegurds against false confessions, whether invented by dishonest investigating officers, induced by pressure upon the accused of one sort or another, or resulting from misunderstanding or faulty recollection after a conversation not recorded immediately. We *recommend* therefore that no confession (including "any statement wholly or partly adverse to the person who made it" - s.82 (1) of PACE) should be admissible unless:

(i) it is made in the presence of a solicitor; or

(ii) it is tape-recorded; or

(iii) it is put to the accused before an examining magistrate (if our recommendation on the introduction of judicial examination is accepted); or

(iv) the truthfulness of the facts contained in the alleged confession is corroborated by independent evidence of other witnesses.

3.28 We recognise that this may put a burden on solicitors. A suspect who has second thoughts and who subsequently seeks to challenge his confession may well dismiss his solicitor, who might then be placed in the unhappy position of being called to give evidence by the prosecution that a confession was made in his presence. It may also be argued against this proposal that solicitors would always advise their clients to say nothing. Where they do so at present, it is usually because they have not had an opportunity to consult their clients and do not know what the case is all about. They therefore advise their clients to say nothing until they have had an opportuntiy to discuss the case. Once this is done, most solicitors urge their clients to tell the police what they know. This may, of course, change, and we consider the question of the right to silence below.

3.29 Some members of the Committee considered that, despite the limited nature of the protection afforded by corroboration, it ought particularly to be a requirement where the suspect is a child or young person or is mentally handicapped, because the presence of the independent person would not necessarily act as a safeguard against falseness. If mental handicap is not obvious to the police, it is unlikely to be more so to a solicitor or magistrate or by the interview being tape-recorded. Moreover, if children tell lies they may feel they have to repeat them in order to avoid worse trouble when another figure of authority appears. However, a majority take the view that our recommendations,

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13. E.g. *Boyne v. H.M. Advocate* 1980 SLT 56 - boy aged 16 questioned over several hours late at night, confessed to being art and part (i.e. a particeps criminis) of murder, conviction upheld.

together with the protection afforded by, for example, sections 76 and 78 of PACE, provide adequate safeguards for these types of suspect in England and Wales.

Majority Verdicts in Scotland

3.30 In Scotland, the Thomson Committee recommended a reduction in the number of jurors from 15 to 12, and retention of the simple majority of one, considering that "it", i.e. a weighted majority of 10–2, "would be inappropriate because of the presence in our system of the not proven verdict and the requirement of corroboration". [14] The serious weakening of the safeguard of corroboration in Scotland, particularly in confession cases, causes us to question the continuing validity of the Thomson Committee's reasons. Moreover, as the standard of proof in criminal cases in Scotland is the same as in England i.e. beyond reasonable doubt, it seems anomalous that in one part of the United Kingdom the doubts of more than two people should be regarded as sufficiently serious to prevent the discharge of that burden, whereas in another part the doubts of seven people are not. We think that the position in Scotland should be reconsidered.

Hearsay evidence

3.31 The rules relating to hearsay evidence in the United Kingdom have become immensely technical, but their origin lies in the exclusion of evidence which, however logical or persuasive, is inadmissible because its maker cannot be examined in court. Thus, for example, if Smith sees Jones commit a crime and tells what he saw to PC Brown within moments of the event, but is later killed in a motor accident before Jones' trial, PC Brown will not be allowed to give evidence of what Smith told him if that evidence is introduced for the purpose of showing the truth of what Smith said to PC Brown. In Continental European jurisdictions no such rules apply – they are regarded as so many hindrances to the ascertainment of the truth.

3.32 There have been suggestions in the past for reform of the hearsay rule. In their 11th Report on Criminal Evidence (General), the Criminal Law Revision Committee made a number of recommendations regarding hearsay evidence, one of which was:–

> "236. The scheme which we propose, stated shortly, is as follows:–
>
> (i) to make admissible any out-of-court statement if
>
> (a) the maker is called as a witness, or
> (b) he cannot be called because he is dead or for one of the reasons

14. Para 51.11.

mentioned later in this paragraph...

> The cases where an out-of-court statement is to be admissible on account of the impossibility of calling the maker as a witness are (a) where he is unavailable because he is dead, unfit to attend as a witness, abroad, impossible to identify or impossible to find, and (b) where he is available but is either not compellable as a witness and refuses to give evidence, or is compellable but refuses (in court) to be sworn."

This recommendation was made subject to a restriction in these terms:-

> "(iv) A statement said to have been made, after the accused had been charged, by a person who is compellable as a witness but refuses to be sworn or by a person said to be abroad, impossible to identify or find or to have refused to give evidence, will not be admissible at all (and there will be a similar restriction in the case of the supplier of information contained in a record)." [15]

The reason for this restriction, which the Committee recognised might be thought drastic, was to discourage the concoction of false evidence. The Criminal Justice Act 1988 gives limited effect to these recommendations by admitting in evidence a statement made by a person *in a document* who (i) is dead or (ii) is unfit to attend the trial as a witness or (iii) is outside the UK and whose attendance cannot reasonably practically be secured or (iv) cannot reasonably be expected to recollect the matters in the statement or (v) cannot be found. The rule against oral hearsay has not been amended.

3.33 A fairly recent case in the Court of Appeal must be considered - *R v. Wallace and Short* (1978) 67 Cr.A.R. 291. The appellants were convicted of being in possession of explosives found by the police in the boot of a car which they had been driving. Their defence had been that the explosives were planted in the boot by two other men, Hannah and Hannay. They were asking the Court of Appeal to set aside the verdicts because of statements obtained since the trial, "the gist of which", according to the judgment of Roskill L.J.,

> "is that two persons - one named Hannah and the other named Hannay - have confessed to having planted the explosives in the car in which the prosecution alleged they were found and were there to the knowledge of the appellants".

It appears from the judgment of the Court of Appeal that Hannah and Hannay had been questioned by the police about these statements, had denied having made them, and had refused to assist the police in their inquiries. It was conceded for the appellants that the statements were inadmissible as evidence and no application was made that they should be received as fresh evidence under s.23 (2) of the Criminal Appeal Act 1968, which expressly provides that such evidence shall be

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15. 1972 Cmnd 4991.

received only if it appears to the Court that it "would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of an appeal".

> "It is accepted", the judgment states, "that this information is inadmissible in evidence, and counsel for the appellants expressly accepted that, if they had sought to put into the witness box any one of the witnesses whose statements had been so carefully taken and objection had been taken on behalf of the Crown -as Mr. Cassel said would be the case - this Court would have been bound to have excluded that evidence as inadmissible".

It was argued for the appellants that the Court, under s.2(1) of the Act, had a power, independent of s.23, to take cognisance of the statements and the duty, if on doing so they felt a doubt about the verdicts, to set these aside. The argument was rejected.

> "The Court pointed out to counsel that, if this argument were well-founded, it had the rather strange result that appellants coming before this Court with a bundle of inadmissible documents were in a stronger position than those relying upon section 23... But there is nothing - absolutely nothing - in the statute to suggest that the Court is free to quash a conviction on the basis of information wholly inadmissible in evidence." (pp. 295-6).

3.34 The Court then went on to consider two earlier cases where the Court of Appeal appeared to have acted on the basis of inadmissible hearsay evidence.

> "It is said that this Court has previously acted upon inadmissible evidence for the purpose of quashing convictions. Two cases were relied on, in particular a recent unreported decision of the Court in *Hails' case*, May 6, 1976, and in *Cooper's case* [1969] 1QB 267. [16]
>
> "So far as *Hails case* is concerned, it was a case of a youth who had been convicted of murder of a child, that youth having a mental age of about 10. Subsequently to the trial a man whom I will not name, and who had apparently been a witness at the trial, made a confession of guilt. This Court, being apprised of the fact that the confession had been made, quashed that conviction. The case was relied on as authority for the proposition that this Court has power to act on inadmissible evidence.
>
> "With respect, it is no authority for any such proposition. There is nothing in the judgment of the court which Ormrod L.J. delivered to suggest that any objection had been taken to evidence being given of the fact that this confession had been made. If there had been any question of the admissibility of that evidence, the learned Lord Justice must have dealt with that question in his judgment. The whole of that case, in our view, proceeded on the footing not that the Court was dealing with a conviction to be quashed

16. The 'lurking doubt' case.

on inadmissible evidence, but with a conviction which it thought was unsafe and unsatisfactory because the doubts which must have already existed as to the weight which could properly be attached to a confession by a youth of intellectual immaturity were reinforced when it was known that somebody else, whether truthfully or not, had confessed. That case is far removed from the present."

3.35 It is clear from Roskill L.J.'s summary, that the Court in *Hail's case* had acted on the witness's confession of guilt made after the trial in reaching its conclusion that the verdict was unsatisfactory. It had used the fact of that confession for the purpose of reinforcing a doubt about the appellant's guilt. That was to use the statement for a purpose inconsistent with the hearsay rules, and none the less inconsistent with them because the prosecution may have been willing that the Court should do so or because the Court may not have come to a firm conclusion about the truth of the hearsay statement.

3.36 Before quoting the passage in Roskill L.J.'s judgment dealing with *Cooper's case*, we set out the facts of the case which show, very clearly we think, that the doubt felt by Widgery L.J. about the verdict against Cooper was based on hearsay evidence, given at the trial, of an admission of guilt made by a man called Burke.

3.37 The charge against Cooper was of assaulting a woman called Miss McFarlane and causing her actual bodily harm. Her evidence had been that she and a woman friend had been molested by a group of three men late at night in Earl's Court Road, London, and that one of the men had struck her in the face. Some weeks later she had purported to identify Cooper at a parade as the man who had struck her. Cooper gave evidence. He admitted that he had been with two other men, Burke and Fahy, in Earl's Court Road earlier that night, but said that he had left them so that he might visit a girl friend. The visit had been a short one and he had returned to Earl's Court Road to look for his friends. When he found them the incident in which Miss McFarlane had been struck had just come to an end. He thought that Burke had been the assailant. Fahy gave evidence supporting Cooper's story, but as he had already told the police that it was Cooper who had struck the girl his evidence (according to Widgery L.J.'s reading of the transcript) was gravely descredited. The important witness on Cooper's behalf was a man called Davis. He had not been present in Earl's Court Road on the night in question, but on the day after the identification parade had visited Cooper, who was then in prison. Burke had also come to the prison to see Cooper, and he and Davis had shared the same visit. Cooper, he said, had asked Burke what he (Burke) was going to do about it, and Burke had replied that it would all come right in the end. Davis said that he had left the prison with Burke and had questioned him about the incident as they walked away. Burke had told him that it was he who had struck the girl. "I asked him", Davis said, "what he was going to do about it. He was evasive. I persisted and I asked him if he was going to let an innocent man suffer for this when he had done it. Burke said there was nothing he could do about it because

he had a very bad record and would get four years." This evidence, proving that it was Burke not Cooper who had committed the offence, was clearly hearsay. No objection seems to have been taken to it at the trial. No reference to its hearsay character seems to have been made in the Court of Appeal. It was recapitulated in detail by Widgery L.J. in his judgment. It seems certain that it was this evidence of Davis's (and the fact that a photograph of Burke showed a strong resemblance to Cooper) which created the "lurking doubt" in the Lord Justice's mind.

3.38 This is how Roskill L.J. dealt with the appellant's argument that the Court in *Cooper's case* had acted on inadmissible evidence:

> "So far as *Cooper* is concerned, Viscount Dilhorne pointed out in *Stafford and Luvaglio v. DPP*, and as we pointed out in argument, *Cooper* is not a case of this Court acting on fresh *or indeed inadmissible evidence*. What the Lord Chief Justice (Widgery L.J. as he then was) said was that the Court was left with a lurking doubt on the evidence, *all admissible*, which had been given at the trial." (our italics)

3.39 No doubt Lord Dilhorne had said in *Stafford's case* that the Court of Appeal in that case had been dealing with fresh evidence and that this had not been so in *Cooper's case*. But nothing was said by Lord Dilhorne about the evidence in *Cooper's case* being "admissible" or "inadmissible". No doubt he assumed, as Widgery L.J. may also have done, that the evidence in *Cooper's case* **was** admissible. Nobody at that time had pointed out that it was not. The description of the evidence as being "all admissible" is that of Roskill L.J. and not of Lord Dilhorne or of Widgery L.J.

3.40 If the hearsay rules were, as we think, disregarded in these two cases, it was surely to the good. They were both cases in which a miscarriage of justice might have resulted if the evidence in question had been excluded. In *Cooper's case*, the circumstances in which Burke was said by Davis to have made the admission strongly suggest that Davis was telling the truth. If he had been lying, he would have surely put the admission into Burke's mouth when the two of them were together with Cooper in his cell. The reason given by Burke for his refusal to come clean, namely that he had a record and might expect a heavy sentence, would also be a reason for Fahy having lied to the police when he said it was Cooper and not Burke who had assaulted the girl. The hearsay evidence was necessary for the right decision of both appeals.
Roskill L.J. ends this part of his judgment with these words:-

> "It is unnecessary in this judgment to go any further than is necessary for the decision of these particular appeals. We are not saying that there may not be a case in which this Court, in its pursuit of justice and its constant efforts to see that there shall be, so far as humanly possible, no miscarriage of justice, may stretch points in favour of appellants and take into account evidence which perhaps on a strict view of the laws of evidence it ought not to take into account."

3.41 We think that it is a powerful argument against a strict exclusionary rule that miscarriages of justice can be avoided only if the appellant is lucky enough to find a court prepared to decide his case otherwise than according to law.

3.42 In two recent cases, *Blastland* (1986) and *Gayle* (1987) the hearsay rule has operated to deprive the defendant of the opportunity to put before the jury evidence that someone else may have been responsible for the offence with which he was charged, and that the fact that the other person's confession was obtained in the same circumstances as his own, and was judged unreliable, was a good ground for the jury to doubt the reliability of the defendant's own confession. These cases are set out in Appendix One.

3.43 We consider that these cases and the uncertainties with which courts may or may not operate the hearsay rule, are strong arguments in favour of reform. In his book "The Proof of Guilt" Professor Glanville Williams stated:-

> "The books on evidence do not distinguish between the rules of hearsay as applied to the evidence for the Crown and as applied to the evidence for the defence... Most people would say, however, that there should be a great difference between the position of the defence and that of the prosecution. A miscarrige of justice should not be risked by shutting out any evidence for the defence, even though it may be hearsay. Accordingly, Crown counsel frequently take no objection to defence evidence even when they might technically be able to do so... It would be much better if the hearsay rule were not applied at all against the defence." [17]

3.44 We recognise, however, that any reform of hearsay which operated solely in favour of the accused might lead to the undesirable situation where, in effect, the defendant could introduce hearsay evidence which was favourable to him but keep out that which was unfavourable. He could also seek to introduce statements that supported his views from witnesses who were unwilling to submit themselves to cross-examination. We do not favour the proposal of the Criminal Law Revision Committee (noted above) because the restriction upon it they propose would deprive it of much of its value. We *recommend* therefore that the court should have power to receive hearsay evidence at the request of the accused and should do so if if considers it reasonable in the interests of justice in the circumstances of the particular case. The effect of this recommendation would be that only the defence would be able to apply for hearsay evidence to be introduced, but that the ultimate decision would rest with the court, which would be unlikely to grant the request if, for example, the maker of a hearsay statement was available for cross-examination.

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17. 2nd Edition 1958 pp. 178 - 179. Prof. Glanville Williams was a member of the Criminal Law Revision Committee when it published its 11th Report and did not then dissent from its proposals on hearsay.

Court witnesses

3.45 From time to time, there may be a witness who can throw considerable light on what happended in respect of the crime, but whom neither the prosecution nor the defence wish to call. The prosecution, because the evidence may not relate directly to the case they are mounting against the defendant; the defence, because if they call the witness, and he is found to be uncooperative, they cannot cross-examine him. An example of this might be a fight in which someone is killed. Smith and Jones are jointly accused of murder and each is blaming the other for the death. Brown was present at the scene throughout the incident, but he was evasive in interviews with the police because he had not tried to stop the fracas and did not wish to risk being charged with anything himself. He had been interviewed by the defence solicitors but did not wish at that stage to favour Smith or Jones, both of whom were mates of his. Neither of the two defence counsel know whether he will say that Smith or Jones struck the fatal blows, so neither call him to give evidence. In such a case, the judge will direct the jury not to speculate on why Brown was not called. Both Smith and Jones are convicted of the murder and sentenced to life imprisonment. Brown reads about the trial and sees that Smith has lied in putting the blame on Jones, so he contacts Jones' solicitors and says that Smith was the guilty party. But as Brown was available to be called at the trial, his evidence would not be "fresh" for the purposes of an appeal and so it would not be admitted in the Court of Appeal.

3.46 The courts do have an inherent power to call a witness, but judges are extremely reluctant to exercise it, as this puts them at risk of descending into the arena of the trial and putting in jeopardy their status as referees.

3.47 We think that this is a reasonable judicial fear, but that it would be set at rest if the power were exercised at the request of either counsel or because of a question from the jury, and the judge agreed. Such a witness would be formally examined by the judge to establish his name, address and occupation and any non-controversial matters if the judge thought this appropriate. He would then be open to cross-examination by prosecuting and defence counsel, and the judge would be able to protect the witness from any unfairness, as he does with other witnesses. We *recommend* accordingly.

The right to silence

3.48 As noted in para. 2.16 above, the right to silence is the right to refuse to answer questions when in police custody, and to stay out of the witness box at the trial. The trial court is not entitled to draw any inference of guilt from the exercise of this right; nor is the Court of Appeal. Some lawyers who practise in the Court of Appeal believe that the Court draws an adverse inference from the failure of an appellant to give evidence at his trial. Certainly, the Court frequently expresses

surprise at the failure of the defendant to give evidence when the circumstances suggest that an explanation from him is called for. It is perhaps not surprising if this fact colours its views of his claim to innocence. Some members of the Committee consider that if our recommendations to improve safeguards for the accused are implemented, it may be necessary to reconsider the scope or even retention of this right. [18] Other members of the Committee consider that judicial examination is a preferable solution which would work equally well in England and Wales. When it considered reviving judicial examination, the Thomson Committee rejected the proposal to make the accused in Scotland a compellable witness on the ground that this would provide him with an opportunity to tailor his evidence to meet the prosecution case which he had just heard. In its view, the best opportunity for obtaining the truth from an accused was immediatley after he had been charged when he did not know the evidence against him. Judicial examination would not violate the ancient principles against self-incrimination and the presumption of innocence. As judicial examination operates in Scotland (described in para. 2.16 (ii) above), the accused can only be questioned about the nature and particulars of any defence which an account he has given discloses (e.g. alibi, or consent etc.) or about any confession he is alleged to have made. He can consult his solicitor before answering, and is not obliged to answer or give any explanation; nor can he be directly asked if he committed the offence. His refusal to answer or provide an explanation can only be commented on at the trial in so far as he, or any witness called on his behalf, states in evidence something which he could have said in answer to that question. The burden of proof remains throughout on the prosecution. Those who have investigated alleged miscarriges of justice where the defendant claims innocence believe that such a defendant is severely disadvantaged both at the trial and on appeal by not giving an explanation, whether or not on the advice of his lawyers. Judicial examination would certainly remove that disadvantage for the person who is wrongly accused, or who alleges a false confession has been ascribed to him.

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18. During 1988 the Home Office established a Working Group on the Right to Silence which published a consultation paper in September.

CHAPTER FOUR

THE APPEAL

4.1 In England and Wales, appeal against conviction at a summary trial lies to the Crown Court. The appeal is by way of rehearing. In the years 1976–86, an average of 6,200 persons appealed each year to the Crown Court against conviction, and an average of 27% succeeded in having their convictions quashed.[1] In Scotland, appeal against the sheriff lies to the High Court, and is regulated by sections 442–454 of the Criminal Procedure (Scotland) Act 1975. Appeal lies on matters of fact and law. Such matters raised on appeal must have been raised at the trial (if the appellant was represented). The sole ground of appeal is that a miscarriage of justice occurred, but there is no rehearing. We have not examined the operation of the appellate system in respect of summary trials and so we make no comment upon it.

4.2 Appeal against conviction after trial on indictment in England and Wales lies to the Court of Appeal (Criminal Division). The leave of the Court is required for all appeals other than those involving points of law alone, or where the trial judge has granted a certificate that an appeal should be heard, or where the Home Secretary refers the case to the Court of Appeal. In 1986, there were 9,347 appellants of whom only 49 did not require leave.[2] The majority of these 49 were appeals on a point of law. This follows the pattern of earlier years.

4.3 The procedure for leave is that a Single High Court Judge (usually but not always from the Queen's Bench Division) reads the grounds of appeal and such of the trial papers as are put before him. Sometimes he also has a transcript of the trial judge's summing-up. It is exceedingly rare to have a hearing in respect of leave. If leave is refused, the appellant can renew his application for leave to a full court of three judges, one of whom is always a Lord Justice of Appeal (in appeals against sentence the court usually consists of two judges, one of whom is a Lord Justice). If the application is granted, the appeal against conviction is always heard before three judges. The test to be applied in deciding where leave should be granted is "whether the Court feels the need to hear the prosecution on the merits of the matter" – *R. v. Mealey and Sheridan* [1975] Crim.L.R. 1581.

4.4 Legal aid granted for a trial includes counsel's advice on appeal. If he advises against appeal, then legal aid ceases and an appellant must continue by himself or

1. Table 6.7 Criminal Statistics for England and Wales 1986.
2. Table S.4.14a, Criminal Statistics for England and Wales. Vol. 4, Supplementary Tables.

with whatever help he can get from an organisation such as JUSTICE. If counsel advises in favour of an appeal, legal aid will automatically continue to cover drafting the grounds. If the Single Judge refuses leave to appeal, legal aid ceases altogether. For representation before the Full Court on a renewed application for leave, the appellant must pay privately. In practice, few appellants are represented on renewed applications. If leave is granted, whether by a Single Judge or the Full Court, legal aid is almost always granted for counsel, but rarely for solicitors unless it is necessary for them to obtain and prepare fresh evidence. If an application for leave to appeal is refused, that is effectively the end of the appellate process.

4.5 An appeal lies to the House of Lords at the instance of the defendant or the prosecutor from any judgment of the Court of Appeal deciding an appeal (but not an application for leave to appeal). Two conditions must be satisfied before such an appeal may be brought: (i) the Court of Appeal must certify that a point of law of general public importance is involved in the decision, and (ii) either the Court of Appeal or the House of Lords must consider that the point is one which ought to be considered by the House of Lords and has given leave to bring the appeal. The number of appeals to the House of Lords is small; in 1986 there were only nine such appeals. In practice, therefore, the Court of Appeal is the final appellate court. Thereafter a case can only be considered by the Court of Appeal if it is referred back by the Secretary of State. We deal with this in the next chapter.

4.6 The figures for the years 1981–1986 relating to appeals against conviction show that in only a relatively small proportion of cases are applications for leave granted.[3]

	Applications for leave to appeal (A = Abandoned; R = Refused; G = Granted Conviction includes appeals against both conviction and sentence)				**Appeals** (D = Dismissed; Q = Conviction Quashed; Rt = Retrial ordered; Includes appeals without leave)		
	Conviction	**A**	**R**	**G**	**D**	**Q**	**Rt**
1981	1386	177	846	363	228	132	3
1982	1320	129	973	355	242	113	–
1983	1399	157	1047	365	231	131	3
1984	1666	157	1179	562	376	181	5
1985	1350	126	948	489	321	167	1
1986	1846	194	1373	510	348	160	2

4.8 It is clear from the number of cases referred back by the Home Secretary that not all cases of miscarriage of justice are put right in the Court of Appeal. Many of those who practise regularly in the Court of Appeal consider that these figures by no means reflect the true extent of wrongful convictions that fail to be corrected on

3. Extracted from Vol. 4 Supplementary Tables to Criminal Statistics for England and Wales 1981 – 1986.

appeal. It is necessary therefore to look at the jurisdiction of the Court and its practice to find out why this should be.

Jurisdiction

4.9 The Court of Appeal when dealing with criminal matters is a creature of statute and has no inherent powers. In order to understand its present jurisdiction and practice, it is necessary to consider briefly its history.

4.10 The Court of Criminal Appeal was established by the Criminal Appeal Act 1907. This was largely because of public disquiet at the case of *Adolf Beck*. At his first trial in 1896, ten women identified Beck as the man who defrauded them. He was convicted and served a sentence of seven years penal servitude. At a second trial of Beck in 1904 for other similar offences, five women swore that he was the man who had defrauded them and he was again convicted. It was subsequently proved that all 15 witnesses had been mistaken. The powers of the Court were set out in section 4(1) of the Act:

> "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal".

4.11 The way in which the Court exercised its jurisdiction was summarised at paras. 138–143 of the Interdepartmental Committee on the Court of Criminal Appeal (the Donovan Committee) which reported in 1965.[4] The Donovan Committee had been set up partly in response to a report by JUSTICE published in 1964 on "Criminal Appeals" which was critical of the operation of the Court. The Donovan report stated:–

> "138. From the outset the Court has acted upon the view that its functions are circumscribed in appeals which raise issues of fact. Thus in the first case which came before the Court (*R. v. Williamson*, "The Times", 16th May 1908) the Lord Chief Justice (Lord Alverstone) in giving judgement said:–
>
> > "It must be understood that we are not here to re-try the case where there was evidence proper to be left to the jury upon which they could come to the conclusion at which they have arrived. The Appellant must bring himself within the words of section 4(1). Here there was evidence on both sides, and it is impossible to say that the verdict is one at which the jury could not properly have arrived."

4. Cmnd 2755.

"139. Commenting in a leading article upon the first sitting of the Court, "The Times" said:-

> "It will be the duty of the Judges in the first few months of the life of the Act to make it evident that they mean not to interfere with the findings of juries unless they are obviously unfounded."

The Court has continued to act upon this general principle. It was expressed by Lord Chief Justice Goddard in 1949 in the following words:-

> "Where there is evidence on which a jury can act, and there has been a proper direction to the jury, this Court cannot substitute itself for the jury and retry the case. That is not our function. If we took any other attitude it would strike at the very root of trial by jury." (*R. v. McGrath* [1949] 2 All E.R. at p.497).

"140. The view that the Court cannot re-try cases is clearly correct. What has been questioned in this context, however, is whether the Court is, or should be, debarred from interfering with a jury's verdict because there was some evidence to support it, and because it cannot therefore be described as unreasonable.

"141. Purely as a matter of construction of the language of section 4(1) we cannot say that the interpretation adopted by the Court is open to serious doubt. If there was credible evidence both ways, and the jury accepted the evidence pointing towards guilt, it is difficult to say that the verdict was "unreasonable" or could not "be supported having regard to the evidence" or that "there was a miscarriage of justice". If there be some defect in the situation which requires to be remedied, the defect lies in the statutory language rather than its judicial interpretation.

"142. A large body of informed opinion takes the view that such a defect does exist. It can be illustrated by taking the case of disputed identity, it having long been generally recognised that "evidence as to identity based on personal impressions, however, *bona fide*, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts an unsafe basis for the verdict of a jury" (Report dated 14th November 1904 of the Committee of Inquiry into the case of Mr. *Adolf Beck*, Cd. 2315).

"143. Where a crime has been committed, and the proof that a particular person committed it rests solely upon his identification by a witness or witnesses for the prosecution, then if the jury accepts that evidence, and rejects the evidence of an alibi tendered by the defendant, the latter would have little hope of successfully appealing against his conviction in face of the construction of section 4(1) of the Act adopted by the Court. Yet the verdict could be wrong, and the defendant innocent."

4.12 As a result of the Donovan Committee's report, Parliament reconstituted the Court as the Criminal Division of the Court of Appeal and extended the grounds

on which the Court of Appeal could allow an appeal. These are now contained in section 2(1) of the Criminal Appeal Act 1968, which reads:-

"2(1) Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think

(a) that the conviction should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or
(b) that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or
(c) that there was a material irregularity in the course of the trial,

and in any other case shall dismiss the appeal:
Provided that the court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred.

"(2) In the case of an appeal against conviction the court shall, if they allow the appeal, quash the conviction.

"(3) An order of the Court of Appeal quashing a conviction shall, except when under section 7 below the appellant is ordered to be retried, operate as a direction to the court of trial to enter, instead of the record of conviction, a judgment and verdict of acquittal."

4.13 It is useful to consider the reasons why the Donovan Report recommended that the Court be given the new power to set aside a conviction on the grounds that it is unsafe and unsatisfactory. It set out a number of cases where the Court appeared to be operating inconsistently with its own pronouncement. It went on:-

"148. In these cases (which are examples only) the Court has acted as a jury and come to the conclusion that on the totality of the evidence, some of which was one way and some the other, it would be unsafe to allow a verdict of guilty to stand.

"149. There are some who would argue that this is within the words of section 4 which require the Court to allow an appeal if they think that the verdict of the jury should be set aside on the ground that it is "unreasonable or cannot be supported having regard to the evidence". This, however, would conflict with some of the Court's own pronouncements as to the extent of its powers. We think the better view is that in order to do justice (which includes the avoidance of possible injustice) the Court has assumed a power the existence of which is doubtful. We think tht any doubt upon the matter should be resolved and that the Court, as proposed by M. F.E. Smith (as he then was) in 1907, should be given an express power to allow an appeal where, upon consideration of the whole of the evidence, it comes to the conclusion that the verdict is unsafe or unsatisfactory.

"150. If this recommendation be accepted two adverse results may follow: (1) there may be an increase in the number of appeals or applications for leave to appeal because undeserving appellants may see new hope in the new provision; and (2) some appellants who are guilty may escape on appeal. The first possible consequence is probably of little moment. It is common for appellants today to urge that the verdict against them was unreasonable and contrary to the weight of the evidence, which is not very different from urging that it was "unsafe or unsatisfactory". We doubt therefore if the number of additional appellants would be large. As to the second consequence, we think reliance can safely be placed upon the experience and acumen of Her Majesty's judges to reduce this risk to a minimum. The advantage to be gained from the provision we suggest, however, is that the safeguards for an innocent person, wrongly identified and wrongly convicted, are sensibly increased. We think the country would probably be prepared to pay what we believe would be a small price for this reform. It might operate in other cases besides those of disputed identity, e.g. some cases of alleged rape where there is substantial evidence of consent which the jury reject in favour of the woman's denial."

4.14 The Court of Appeal (Criminal Division) considered the scope of this new power shortly afterwards in the case of *R. v. Cooper*, the details of which have been set out in para 3.37 above. Widgery L.J. (as he then was) said:-

"The important thing about this case is that all the material to which I have referred was put before the jury. No one criticises the summing-up, and, indeed, Mr. Frisby for the appellant has gone to some lengths to indicate that the summing-up was entirely fair and that everything which could possibly have been said in order to alert the jury to the difficulties of the case was clearly said by the presiding judge. It is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this Court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this Court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966 - provisions which are now to be found in section 2 of the Criminal Appeal Act 1968 - it was almost unheard of for this Court to interfere in such a case.

However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the gound that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been

done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it."

The effect of this judgment is that the test is no longer a purely objective one: could a reasonable jury have had no doubts that the accused was guilty, so that they could properly convict him? The test is subjective: if the Court of Appeal themselves feel a doubt about his guilt, they must set aside the jury's verdict.

4.15 How has the Court of Appeal exercised this new power? The fact that the judgments of the Court of Appeal (Criminal Division) were not open to inspection prevented a thorough analysis of the cases. However, one researcher, Dr. Michael Knight of Queen's University, Belfast, was exceptionally allowed access to the Court judgments for the purposes of producing a supplement to his book "Criminal Appeals" [5] (which covered the years 1907 -1968) to examine the work of the Court of Appeal (Criminal Division) in the years 1968 - 1973. This supplement was published in 1975. His conclusion in respect of appeals based on grounds that a verdict is against the weight of the evidence is set out on p. 63 of Chapter 5:-

"Has *Cooper* made a difference to the Court's approach to this problem? As cases of convictions allegedly unsupported by the evidence are rarely reported (they do not usually contain points of substantive or adjectival criminal law) one is relying on a small range of cases - the few cases reported in the Criminal Appeal Reports, the Criminal Law Review and other series of criminal reports, newspaper reports and a representative sample of 1973 unreported cases which the writer studied in the Library of the Registry of the Court. But the answer to the above questions is, disappointingly, no. The picture 1969 - 1973 is surprisingly like that for the period October 1966 - February 1968 analysed in depth in the principal work (i.e. his book "Criminal Appeals"). "

4.16 JUSTICE has itself been assisting with appeals against conviction since 1960, and its experience is also that the new power has made little difference to the way in which the court decides appeals. In giving evidence before us, the then Registrar of the Court of Appeal (Criminal Division), Master Thompson, said that the "lurking doubt" principle was not implicit in the term "unsafe and unsatisfactory". The Court had to have regard to the language of the statute, which did not speak of "lurking doubt" or "thinness of evidence". He said that some of the senior judges did not regard Lord Widgery's interpretation as authoritative.

4.17 The experience of JUSTICE in supporting applications for leave to appeal is that the common attitude of the Court of Appeal is that where all the discrepancies and weaknesses of the prosecution evidence have been canvassed before the jury, and the judge has summed up fairly and correctly, then it must not interfere with the jury's verdict, as this would amount to a re-trial of the merits of the case, which is

5. Published by Stevens & Sons in 1970.

not its function. Time and again JUSTICE has read counsel's advice on appeal to the effect that, where the summing-up has been impeccable and there are no mistakes of law, the Court of Appeal will not substitute its own opinion for that of the jury, however much it may disagree with it, and therefore there are no arguable grounds of appeal. It is, of course, impossible to say in how many, or how few, cases where such advice is given there is a miscarriage of justice.

4.18 Most applications for leave made without legal support are turned down and many are abandoned. One reason for the abandonment may obviously be because the appellant is guilty and gives up an appeal which is hopeless. Another reason is the power in the Court to punish the appellant for making a hopeless appeal by effectively making him serve a longer sentence. The exact mechanism is to order that a certain period of imprisonment between conviction and appeal shall not count towards the sentence. A further reason is the widespread belief that continued protestations of innocence jeopardise the chance of early release on parole.

4.19 We have been able to find only six reported cases since *Cooper's case* when the Court has quashed a conviction on the grounds that there is a lurking doubt because the conviction is against the weight of the evidence, and where nothing has arisen since the trial to throw any other doubt upon it. [6] There may be other, unreported cases, although Master Thompson, when giving evidence to us, doubted this. A recent example is *Pope's case.* Pope was convicted in January 1986 of assault on a Mr. Efthimion occasioning him actual bodily harm and sentenced to six months imprisonment, suspended for two years. He was alleged to have thrown a slab of concrete at Efthimion's head in the street at night as part of a revenge attack by a youth, Isaac, who had a grievance against Efthimion. It was alleged that Pope referred to Isaac as his brother during the attack. Five months after the incident, Efthimion recognised Pope as the man who threw the concrete slab. Pope was arrested and denied the charge and any association with Isaac. Efthimion had failed to pick out either Isaac or one of his two brothers at a parade (despite evidence that he had seen Isaac on several occasions). Isaac's other brother was never interviewed. Despite an impeccable summing-up and *Turnbull* warning, the Court of Appeal quashed the conviction as unsafe because they considered that Efthimion may have been mistaken in his identification.

4.20 None of the Committee can recall an appeal being allowed in the circumstances envisaged by the Donovan Report, at para. 150, i.e. "some cases of alleged rape where there is substantial evidence of consent which the jury rejected in favour of the woman's denial." It is also our experience that the Court is extremely reluctant to quash a conviction where there is evidence of a confession

6. *R. v. Pattinson and Laws* (1973) 58 Cr. App. Rep. 417; *R. v. Thome and Others* (1977) 66 Crim. App. rep. 6; *R. v. Lamb* (1980) 71 Cr. App. Rep. 198; *R. v. Thompson* (1981) 74 Cr. App. Rep. 315; *R. v. Pope* (1987) 85 Cr. App. Rep. 201; *R. v. O'Leary* 1988 Crim. L. R. 827. One unreported case is *Anthony Burke*; see Appendix One.

by the appellant, or where it has been alleged that police misconduct played a part in obtaining the conviction.

4.21 We have come to the conclusion that the restrictive manner in which the Court of Appeal interprets its powers appears at times to be ineffective in curing miscarriages of justice on appeal. We can suggest several possible reasons for this. First, Court of Appeal judges, like trial judges, juries and practitioners, are not always fully aware or mindful of the sorts of circumstances which can and sometimes do lead to miscarriages of justice. Second, there is a natural reluctance to accept that a jury of 12 men and women, properly directed and with all the relevant evidence before them, could have made a wrong decision. Third, the appellate judges are rightly inhibited by the knowledge, possessed by all who have experience of criminal trials, that cases commonly look very different to those who have seen the witnesses and heard their evidence as opposed to those who have only read about them or talked to some of the participants afterwards. Fourth, those who investigate miscarriages of justice have the time to analyse all the evidence, interview witnesses, consult the lawyers and relevant experts, and conduct further investigations. None of these are available to the appellate judges, who have limited time to work through a vast number of appeals, the majority of which concern technicalities of law and procedure and comparatively few of which contain any merit as regards actual innocence.

4.22 We are sure that it should be an important function of the Court of Appeal to rectify miscarriages of justice. It would appear that Parliament intended in 1968 to impose on the Court a duty to form its own opinion about the correctness of a conviction, notwithstanding the fact that no criticism can be made of the conduct of the trial. We have come to the conclusion that the present legislation does not sufficiently spell out the duty of the court when deciding an appeal on the basis that the conviction is a miscarriage of justice. We *recommend* therefore that the material part of section 2(1) of the Criminal Appeal Act 1968 should be re-drafted in the following terms:-

"2(1) Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if -

(a) (i) they are themselves doubtful upon the evidence whether the appellant is guilty of the offence of which he has been convicted; or they think that
(ii) the verdict of the jury is on any other ground unsafe or unsatisfactory; or

(b) (i) the judgment of the court of trial should be set aside on the ground of a wrong decision on any question of law; or
(ii) that there was a material irregularity in the course of the trial, and in any other case shall dismiss the appeal."

The proviso, permitting the Court to dismiss an appeal if it considers that no miscarriage of justice has actually occurred, should remain but be limited to an

appeal brought under (b)(i) or (ii). These are the grounds on which technical legal points are based and it is right that the Court should have power to prevent someone obviously guilty on the facts escaping proper punishment because of some legal error.

Practice

(i) Errors by lawyers

4.23 The Court of Appeal has long taken the view that counsel's conduct of the defence at the trial which turned out to be mistaken or unwise does not afford a valid ground of appeal. This was recently affirmed in the case of *R. v. Gantam* 1988 Crim. L.R. p.109. In a case decided a month later, *R. v. Swain* 1988 Crim. L.R. p.109, a differently constituted Court of Appeal applied *Gantam*'s case in dismissing an appeal against conviction where it was contended, inter alia, that the appellant's counsel had damaged his defence case while cross-examining a prosecution witness. However, the Court said that if it had had a lurking doubt that the appellant might have suffered some injustice as a result of flagrantly incompetent advocacy, it would quash a conviction. We are not aware of any conviction quashed (in recent years) on the ground of incompetent advocacy at the trial. The usual attitude of the Court was expressed by Potter J. in the case of *R. v. Iroegbu* on 29th July 1988 [7], when the Court dismissed an appeal based, inter alia, on counsel's failure to apply to have admissions excluded under PACE. He said "The criminal trial is based on the adversarial system and reliance is placed upon counsel to do what is right in the interests of his client."

4.24 The invalidity of counsel's mistakes as a ground of appeal is not confined to mistaken advocacy. It includes tactical decisions not to call witnesses, or to put evidence before a jury. It it exceedingly difficult, in our experience, to persuade the Court of Appeal to admit such evidence for the purposes of an appeal. An example of this was the case of *Martin Foran*, which JUSTICE took to appeal, and which is set out in Appendix One. Another example is the earlier-mentioned case of *Anthony Burke*, also in Appendix One.

4.25 The reasons for this attitude were set out by the Court of Appeal in the case of *R. v. Shields and Patrick* 1977 Crim. L.R. p.281 when, in dismissing an appeal, the Court said:-

> "...there was an increasing tendency to treat the trial by jury as a preliminary skirmish rather than a trial, to be less energetic in locating defence witnesses, to refrain from calling witnesses who were available but whose evidence might in some respects be thought dangerous to the defence and then, after the trial, to claim that the verdict was unsafe because those witnesses had not

7. Ref. No. 5972/E1/87.

been called. The appropriate time to call witnesses was at the trial. It was for the jury, not the Court of Appeal, to evaluate evidence. The terms of section 23 of the Criminal Appeal Act (which empowers the Court to receive fresh evidence) could not be too often emphasised. It would seldom if ever be a reasonable explanation for not calling a witness that the risk of calling him was at the time considered too great and counsel advised that he should not be called."

4.26 We recognise the difficulties faced by the Court of Appeal in such circumstances. However, the mistakes of counsel are rarely the fault of the defendant and we think it is wrong that an appellant should be penalised for conduct on the part of his lawyers which may have been due to inexperience, negligence, incompetence or tactics which, though seeming reasonable at the time, have subsequently been realised to lead to injustice. By the nature of such allegations, an appellant is unlikely to have the support of his lawyers when his appeal is based on such grounds, and so he will be doubly disadvantaged. There is adequate power in the professional bodies to penalise solicitors and counsel for bad work. If the Court of Appeal were to refer lawyers to their disciplinary bodies for this offence, it would have a general salutary effect and should prevent professional abuse of the appellate process, so overcoming the objections mentioned in the case of *Shields and Patrick*. We believe that if the Court's powers are amended in accordance with our recommendation, it should quash a conviction where the conduct of counsel leaves it with a doubt about the defendant's guilt. However, we accept that it may well be that the Court of Appeal will not regard itself as the proper forum for the rectification of a possible miscarriage of justice which is founded on errors by defence lawyers and that this may be better resolved by a re-trial. We hope that the Court will exercise its general power to order a re-trial (conferred by the Criminal Justice Act 1988) in such circumstances.

(ii) **Fresh evidence**

4.27 The power of the Court of Appeal to hear fresh evidence is contained in section 23 of the Criminal Appeal Act 1968. There must be a reasonable explanation for not having adduced the evidence at the trial, and this includes the part played by the defendant in preparing the defence (e.g. as regards an alibi). The fresh evidence must be credible, which the Court has interpreted to mean well capable of belief in the context of the issue under consideration. [8]

4.28 Before its powers were reformed in 1966, the Court of Appeal considered fresh evidence in terms of what its effect would likely have been on the jury, and if the jury might have come to a different conclusion, the conviction was quashed. This is the attitude currently taken by the High Court in Scotland. However, the new powers of the Court of Appeal were examined by the House of Lords in *Stafford*

8. *R. v. Beresford* (1971) 56 Cr. App. R. 143.

v. D.P.P. (1974) AC 878, where it was decided that the proper test was now what the Court of Appeal itself thought of the new evidence. Lord Cross stated (at p.907)

> "It was argued most strenuously by the counsel for the appellants that the Court of Appeal ought to have asked itself expressly whether if the fresh evidence had been given at the trial together with the original evidence the jury might have had a reasonable doubt as to the guilt of the accused and that its failure to ask itself the question vitiated its judgment. I do not agree. Section 2(1)(a) of the Criminal Appeal Act 1968 simply directs the court to allow an appeal against conviction if it thinks that under all the circumstances of the case the verdict is unsafe or unsatisfactory. In a fresh evidence case it is natural for the court to put itself in the position of the jury which convicted on the original evidence and to ask itself whether the addition of the fresh evidence might have induced a reasonable doubt in its mind. But that is only another way of asking whether it might have induced a reasonable doubt in the minds of the members of the court if they had constituted the jury. It is, of course, true that two equally reasonable men may differ as to whether there is a reasonable doubt as to the guilt of the accused. But if I feel sure that he is guilty and you feel a doubt on the point I must regard your doubt on that point as unreasonable however reasonable a person I consider you in general to be. Conversely, if I regard your doubt as reasonable I cannot feel sure that the accused is guilty. I do not think that the Court of Appeal when, in the cases to which we were referred, it asked itself whether the jury might have felt a reasonable doubt in the light of the fresh evidence, was intending the formula to cover a doubt which the court would think unreasonable though the jury might wrongly think it reasonable."

4.29 How then does the Court approach the conviction when the appeal is based on fresh evidence? In *Stafford and Luvaglio*, Viscount Dilhorne said (at p. 892):-

> "The Court has to decide whether the verdict was unsafe and unsatisfactory and no different question has to be decided when the Court allows fresh evidence to be called. Where such evidence is called, the task of the Court of Appeal may be extremely difficult. They have not heard the evidence the jury have heard. They can only judge of that from the shorthand note. They know, however, that the jury by their verdict have accepted some part, it may not be all, of the evidence for the prosecution, and at least sufficient of it to satisfy them of the accused's guilt. They know, too, that the jury must have rejected the defence put forward."

The distinguished Law Lord, Lord Devlin, criticised this approach in his book "The Judge" [9] on the grounds that it meant that the accused now had a mixed trial by judges and jury:

> "They (i.e. the judges) did not hear the old witnesses and there are no specific

9. 1979 OUP pp. 158–9.

findings about them to be found in the general verdict. So the judges have to decide upon their reliability on the record, fortified by conjectures from the verdict; to reach their verdict, the judges would say, the jury must have believed this or that. In assessing the reliability of the new witnesses... the judges are on their own."

Before *Stafford*, it was considered sufficient to persuade the Court of Appeal that a miscarriage of justice had occurred if it could be demonstrated that reliable and cogent evidence existed which had reasonably not been before the jury at the trial so that their verdict was reached on only part of the evidence and must, *ipso facto*, be unsatisfactory. Because the jury does not give reasons for their verdict, no one knows whether their view of the credibility of witness A would have been shaken if they had heard the contradictory evidence of fresh witness B. When the Court of Appeal, though, considers the reliability of witness B, it sometimes appears that the judges' views are coloured by the jury's finding as to the credibility of witness A, and they do not have a completely open mind as between A and B. However, the appeal is not by way of a re-hearing, and the Court does not re-examine all the witnesses. Its function, according to Lord Devlin,

"is to stand back and to look at the case immobilised on paper. Before the jury the case is unwound as on a recording cylinder; before the judges it is spread out. The jury sees the whole performance, but cannot, except in memory, move from one incident to another; the judges can freeze the significant points, study and correlate them. It is the examination of the case on paper that gives the appellant judges the detachment which is the essential quality of a court of review." [10]

The detached quality of this kind of review can be jeopardised when the Court itself takes on the function of the jury in fresh evidence cases, instead of ordering a re-trial. Perhaps the most extreme example of this process in recent years was the case of *R. v. Cooper and McMahon*, set out in Appendix One.

4.30 As the Court of Appeal has now been given a general power of re-trial, no doubt it will use it more frequently when the question of fresh evidence arises. This will not be appropriate, however, when the case is very old and there is no realistic prospect of surviving witnesses being able to recall events. In such circumstances the Court will not be bound by the factual findings of the jury, whose view of the evidence might well have been different if it had heard the fresh evidence. The Court will then weigh up the whole of the evidence and, if they have any doubts about the appellant's guilt (in accordance with the new test we propose in para 4.22 above), they will quash the conviction.

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10. Op. cit. p. 170.

Technology

4.31 A particular difficulty in relation to appeals is the cost of transcribing evidence given at the trial, and the summing-up. The Criminal Appeal Office might not order a summing-up unless an application is renewed to the Full Court, and prisoners may buy a copy of this at a cost which is prohibitive, given the limited earnings they are permitted in prison. Transcripts of evidence are rarely ordered. Yet a transcript might make it easier for the Court of Appeal to determine whether it considers the verdict to be safe and satisfactory, regardless of whether it applies the "lurking doubt" test. Moreover, if a tape-recording itself was available for inspection, this would assist in considering whether there were unfair nuances of speech in the summing-up. Most courts can easily be wired up to tape proceedings, and it appears that it is only outmoded restrictive practices that prevent the use of technology greatly to decrease the costs, and therefore the availability, of a record of the proceedings. We *recommend* that the use of technology to produce a cheap and reliable taped record of trial proceedings be introduced as soon as possible.

Criminal Appeals in Scotland

4.32 The final court of appeal in Scotland in criminal matters is the High Court of Justiciary. There is no appeal to the House of Lords. The powers of the Court are contained in s.228 of the Criminal Procedure (Scotland) Act 1975 ("CP(S)A 75"), a section inserted into that Act by the Criminal Justice (Scotland) Act 1980, which made major reforms in the Scottish appeals system. There is now only one ground of appeal on both conviction and sentence, which reads as follows:-

> "(2) By an appeal under subsection (1) of this section, a person may bring under review of the High Court any alleged miscarriage of justice in the proceedings in which he was convicted, including any alleged miscarriage of justice on the basis of the existence and significance of additional evidence which was not heard at the trial and which was not available and could not reasonably have been made available at the trial."

Before 1980, the High Court was under an obligation to allow an appeal if the appellant established that there was a miscarriage of justice unless the Crown could prove it was not substantial. Since 1980, the High Court has a new discretion whether to allow an appeal and the onus is on the appellant both to establish that there was a miscarriage of justice and that this is of sufficient gravity to justify quashing the conviction. [11] The 1980 reform also gave the High Court a general power to order a retrial [12]. Even if the appellant was responsible for the miscarriage

11. Ss. 228 and 254 CP (S)A 75, as interpreted in *McCuaig v. H.M. Advocate* 1982 SLT 383.
12. S. 255 CP(S)A 75.

of justice by falsely pleading guilty, the High Court may still quash the conviction. [13]

4.33 The following have been held to amount to a "miscarriage of justice":-

(a) a misdirection by the judge of sufficient materiality to cast doubt on the guilty verdict; [14]

(b) the introduction of previous convictions, provided this created substantial prejudice; [15]

(c) oppressive conduct on the part of the trial judge (e.g. excessive interventions or bias against the accused). [16]

(d) the unreasonableness of the verdict. [17] This ground, however, has been very restrictively interpreted to mean that the verdict is so flagrantly wrong that no reasonable jury discharging their duty honestly under proper direction would have given that verdict. The High Court has stated on numerous occasions that it cannot retry or review a case as this would undermine the function of the jury.

4.34 The High Court has always had power to hear fresh evidence on appeal, but this was always very restrictively interpreted. In *Gallacher v. H.M.Advocate* 1951 J.C.38, the appellant had been convicted of murder and sentenced to death, accused of being one of a group of men who had kicked to death the deceased. He was identified as part of the group by three men; two other witnesses had said he was not part of the group. On appeal, he applied to the Court to call three new witnesses to corroborate his version of events. Lord Justice-Clerk Thomson gave what became the authoritative judgment:-

> "The condition for the exercise of this discretionary power (i.e. to admit fresh evidence) is that the Court must 'think it necessary or expedient in the interest of justice.'...
>
> "We cannot order a retrial by another jury. Further, it has been said by the Courts of Appeal, both in Scotland and in England, that we must not retry the case ourselves. That is to say, we must not consider afresh the whole case on

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13. E.g. *Boyle v. H.M. Advocate* 1976 J.C. 32. Boyle pleaded guilty to assault and robbery after making a full admission, and was sentenced to nine years imprisonment. He was an army deserter and wished to avoid being returned to military custody. In fact he had nothing to do with the offence, as the Crown accepted would have been apparent if it had been properly investigated.
14. E.g. *McTavish v. H.M. Advocate* 1975 SLT (Notes) 27.
15. E.g. *Cordiner v. H.M. Advocate* 1978 J.C. 64.
16. E.g. *Tallis v. H.M. Advocate* 1927 J.C. 92 is the leading case, still relied on.
17. *Webb and Others v. H.M. Advocate* 1927 J.C. 92 is the leading case, still relied on.

the basis of the printed word and the new evidence. That would be substituting ourselves for a jury with none of the advantages of seeing and hearing the great bulk of the evidence which the jury possessed, substituting our assessment of the credibility of the witnesses whom the jury saw and heard for the assessment made by the jury.

"If we are not to 'retry' the case in that sense, our function is to attempt to assess the value of the verdict in the light of the new evidence and to decide whether a verdict of guilty cannot now be supported or, it may be, to determine whether the result of its admission is to demonstrate that there has been a miscarriage of justice. This appears to involve weighing by some standard the possible verdicts to which a jury might come in the hypothetical circumstances of their having had the new evidence before them along with the old.

"Counsel for the appellant argued that the standard for us was 'Are we satisfied that no reasonable jury, properly directed and having heard the new evidence, would or could have come to any other conclusion than that to which they did come and that no miscarriage of justice had actually occurred?'...

"This does not seem to us to be the proper test. It would mean that if the new evidence was *ex facie* relevant and not obviously untruthful, the Court would be bound to say this might have affected the jury's minds and raised a reasonable doubt. Let us assume that in the present case the three new witnessess had appeared at the trial and said all that they are now expected to say. It is absolutely impossible on the facts of the present case to affirm with any confidence that, if the new evidence had been before the jury, they would have come to a different result ...

"We cannot tell what sort of impression the three new witnesses might have made. They might have been impressive enough to raise a reasonable doubt but they might have been cast aside. When there are some witnessess one way and some another, the effect of the evidence of fresh witnesses, had they been at the trial, would depend not only on the impression given by the new witnesses but on the strength of the impression made by the old. One can imagine cases, and they are illustrated in the reports, where new evidence appeared which was so overwhelming as to leave no doubt that, had it been before the jury, it must have affected the verdict. In such circumstances, a miscarriage of justice can be confidently affirmed. But where, as here, the most that could possibly be said is that had the new evidence been before the jury the issue might have been rendered doubtful, its admission might lead to a miscarriage of justice by allowing to go free men whom a jury has convicted and whom even in the light of the new evidence they might well have still convicted.

"Accordingly we do not think it is right to admit this new evidence, as we are

not satisfied that it would, had it been before the jury, have had a decisive effect. ..."

The appeal was dismissed and the case was followed in all subsequent appeals.

4.35 The 1980 reforms enlarged the powers of the High Court, the relevant provisions under reformed s.252 CJ(S)A 75 being power to:-

"(b) hear any additional evidence relevant to any miscarriage of justice or order such evidence to be heard by a judge of the High Court or by such other person as it may appoint for that purpose; and

(c) take account of any circumstances relevant to the case which were not before the trial judge."

However, there was nothing in the new provisions which required the Court to adopt a more liberal test for the admission of fresh evidence.

4.36 The scope of power (b) was considered by the High Court in the case of *Cameron v. H.M.Advocate* 1988 SLT 169. Cameron had been convited of the murder of two women, based largely on his own admissions to the police, which were hotly disputed. He sought leave to introduce fresh evidence which, he argued, would resolve the dispute as to the credibility of his or the police version. In dismissing his appeal, Lord Justice-General Emslie said:-

"In the first place, it is clear that the Court may allow an appeal against conviction on any ground only if it is satisfied that there has been a miscarriage of justice. In the case of an appeal in which it is contended that there has been a miscarriage of justice on the basis of the existence and significance of certain additional evidence which was not heard at the trial, it is obvious that the Court will be in a position to give effect to that contention if it is satisfied that, if the original jury had heard the new evidence, its significance was such that the jury would have been bound to aquit. In such a case the appeal court will quash the conviction. The problem arises, however, where in an appeal based upon additional evidence within the meaning of s.228 the Court cannot be so satisfied.

....There must nevertheless be circumstances in which a court, which would not be satisfied that had the jury heard the additional evidence they would have been bound to acquit, would be entitled to be satisfied that a miscarriage of justice had occurred. What then are these circumstances?.... Setting aside the verdict of a jury is no light matter and before the Court can hold that there has been a miscarriage of justice it will ....require to be satisfied that the additional evidence is not merely evidence which it would have been relevant to lead at the trial but that it is relevant evidence of such significance that it will be reasonable to conclude that the verdict of the jury, reached in ignorance of its existence, must be regarded as a miscarriage of justice.

....This, in our opinion, will require the appeal court to be persuaded, in the first place, that the witnesses who have given the additional evidence were credible, and that the evidence given was plainly reliable or was at least capable of being so regarded by a reasonable jury. It will also, however, require the appeal court to be satisfied that the additional evidence would have been likely to have had a material bearing upon, or a material part to play in, a reasonable jury's determination of a critical issue at the trial.... If the court is so satisfied it will be open to it to hold that a conviction returned in ignorance of the existence of that evidence represents a miscarriage of justice and may exercise its power to authorise the bringing of a new prosecution."

The High Court, like the Court of Appeal, starts from the standpoint that the jury must have believed most of the prosecution evidence, and disbelieved most of the defence evidence, and the new evidence is assessed in that light. As laid down in *Gallagher*, the test it applies is an objective one - the effect on the reasonable jury - and not the effect on its own view of the safety of the conviction.

4.37 The scope of power (c) was considered by the High Court in the case of *Rubin v. H.M. Advocate* 1984 SLT 369. Rubin and his co-accused, Walsh, were convicted respectively of incitement to fire-raising and fire-raising. They were convicted almost wholly on the evidence of Rubin's brother-in-law, Findlay, who claimed that Rubin had ordered him out of the hotel, where Findlay worked in reception, before it was fired by Walsh. The appeal was based on insufficiency of evidence and fresh evidence, consisting of a tape and letter, sent by Findlay to his wife after he had left her to live abroad, in which he retracted the evidence he had given at the trial, claiming that the police had pressured him into naming Rubin and Walsh as the fire-raisers. In giving judgment, Lord Justice-General Emslie described Findlay as

"a quite extraordinary witness .... a man who lived in a fantasy world, much given to recording his rambling "thoughts" on tape. He was verbose, bombastic and discursive, and found it difficult to give straight answers to simple questions. His use of the English language was bizarre and his vocabulary included words which find no place in any dictionary. His capacity for self-deception was illustrated in many ways.... There was weight in the defence contention that Findlay's critical evidence was a tissue of lies invented to cover his own dereliction of duty or in an attempt to injure Rubin who had refused to provide him with money."

In dismissing the appeal, the High Court appeared to accept the defence submission that power (b) applied only where relevant evidence was not led at the trial only because its existence was not known. As the tape and letter were not reliable evidence in the absence of Findlay for examination, it could not be admitted under (b). The Court rejected the submission that it could admit the material under power (c). This was only applicable to matters wholly within the province of the trial judge (e.g. matters of sentence) and did not apply to matters of

evidence which were within the province of the jury, particularly the question of the reliability and credibility of evidence. Lord Emslie stated:-

> "Questions of the reliability and credibility of witnesses are essentially, in our law, questions for the jury and we know of no case in which this court has interfered with any conviction upon the ground that, in its opinion, a jury had been perverse in treating a key witness as both reliable and credible."

As the jury had heard Findlay and the challenges to his credibility, there was no basis on which this could be challenged on appeal.

4.38 It seems clear from these cases that the High Court does not have as wide a discretion as the English Court of Appeal when dealing with appeals against conviction. Although Scotland and England and Wales are separate legal jurisdictions, the United Kingdom is not a federal state, and we think it is wrong that different standards of justice should operate within the appellate jurisdictions of one country. We believe that we have made out a convincing case for requiring the Court of Appeal to apply a subjective test of its assessment of the guilt or innocence of the appellant in England and Wales. We can see no reason why appellants in Scotland should not enjoy similar consideration. This is also true, we think, of the question of admitting fresh evidence. We suggest, therefore, that consideration be given to reforming the powers of the High Court so that it enjoys the same powers as the Court of Appeal (Criminal Division).

The House of Lords

4.39 The divergence between the appellate courts in Scotland and England also seems to us to point to the need for having a final court with power to ensure that the rails of justice stay parallel. The House of Lords fulfills this function in civil matters and can equally do so in criminal ones. We suggest therefore that consideration be given to enlarging the jurisdiction of the House of Lords to include hearing appeals from the High Court in criminal matters on points of law of public importance.

Judgments of the Appellate Courts

4.40 In England, the Court of Appeal (Criminal Division) keeps a written copy of the judgment of every appeal, as well as some of the more important refusals of leave to appeal. As noted in the Introduction, judgments were previously not available to the public but a copy of those published from 10 April 1989 will be lodged in the Supreme Court Library. We very much welcome this reform, which will enable the public to observe how the Court operates and to formulate its views on this.

4.41 In Scotland, the High Court sitting as a court of appeal has no obligation to

publish written judgments. In practice, the court issues a written opinion (judgment) when an appeal has been fully argued, but it seldom does so in any other case, including appeals in which the Crown do not support the conviction, appeals where some concession is made during the hearing which resolves the matter in dispute, or appeals abandoned during the hearing. As the High Court is presently the final court of appeal in criminal matters, it might be thought important for open public justice that its opinions should at least be available on tape for transcription so that its reasons for allowing or dismissing an appeal can be ascertained by those unable to attend the hearing. Quite apart from issues of principle, the absence of a written opinion is a considerable disadvantage for anyone seeking to continue to investigate the correctness of a conviction for the purpose of petitioning the Scottish Secretary of State. Technology should keep the cost of producing written opinions at a low level. We suggest that consideration be given to this.

CHAPTER FIVE

AFTER THE APPEAL

5.1 When the appeal court has dismissed an appeal, or refused leave to appeal, a person who wishes to continue to challenge his conviction must petition the Home Secretary (in England and Wales) or the Secretary of State (in Scotland or N. Ireland).

5.2 The Secretary of State has the following powers:-

(i) he can refer the case back to the appeal court, in relation to conviction, sentence or both, where the matter is treated as a full appeal, at which any relevant matter can be raised. [1]

(ii) he can recommend to the sovereign:-

(a) to grant a free pardon, whose effect is not to expunge the conviction but relieves the person of its penalties and consequences;

(b) to grant a conditional pardon, which is used to vary the terms of a punishment, usually to commute a death penalty to life imprisonment [2], or

(c) to remit all or part of the penalty imposed by the court.

References to the Court of Appeal and High Court

5.3 The Secretary of State will not act on a conviction unless fresh information has come to light which casts doubt on the verdict of the jury. He will usually refer such a case back to the appeal court unless the fresh information is such that he thinks it would be inappropriate for the Court to deal with the matter. This arises where, for example, the information consists of inadmissible hearsay evidence, or is so old that it could not adequately be tested in court. The test applied by the Secretary of State in assessing whether the fresh information is sufficient to warrant a reference back to the Court is the same used by the Court in determining the appeal, i.e. whether the conviction might be unsafe or unsatisfactory in the light of

1. S.17 Criminal Appeal Act 1968 (England and Wales); s.263 Criminal Procedure (Scotland) Act 1975 (Scotland).

2. The death penalty is available in the UK only for the offences of high treason (s.1 Treason Act 1914) and piracy with violence (s.2 Piracy Act 1837).

the new evidence (or, in Scotland, a miscarriage of justice might have occurred).

5.4 In the years 1980 - 1986, the Home Secretary referred back to the Court of Appeal the cases of 34 persons, in respect of their convictions, and 14 persons in respect of their sentences [3]. Between September 1985 and September 1987, the Home Secretary received representations (either by the persons concerned or others acting on their behalf) alleging wrongful imprisonment in 1161 cases; he also received representations concerning 346 cases involving non-custodial sentences. [4]

Free Pardons

5.5 The Secretary of State will recommend a free pardon only where there are not just doubts about someone's guilt but convincing reasons for believing that he is innocent. In the years 1980 - 87, the Home Secretary recommended pardons in two cases involving conviction on indictment.

Remission of sentence

5.6 The power to remit the remainder of a sentence is normally used for reasons unconnected with the merits of the conviction. (e.g. as a reward for assistance to the authorities, or on medical or compassionate grounds). However, in some cases fresh information may arise to cast serious doubt on the conviction which is not regarded as appropriate for the Court of Appeal. In the years 1980 – 1986, the Home Secretary remitted the sentences of three persons on this ground.

5.7 The investigation of these petitions alleging wrongful convictions was described by the Home Office in its evidence to the Home Affairs Committee of the House of Commons, whose Sixth Report entitled "Miscarriages of Justice" was published in 1982 [5] (referred to hereafter as "the Sixth Report"):-

> "HOME OFFICE CONSIDERATION OF INDIVIDUAL CASES
>
> "18. Consideration of cases involving possible exercise of the powers described in paragraph 1 of this note" - i.e. the powers set out in para 5.2 above - "and of requests for compensation for wrongful charge or conviction, is undertaken by a division of the Home Office's Criminal Department. The staff concerned are one Assistant Secretary (who has other responsibilities), four Principals (one of whom is mainly employed on other

3. Criminal Statistics for England and Wales, Supplementary Tables Vol.4.
4. Letter from John Patten, Minister of State at the Home Office, to Jerry Hayes MP dated 9th May 1988.
5. H.C. 421

work) and eight Higher Executive Officers (HEOs), with appropriate clerical support. The total of rather more than twelve executive and higher level staff involved in the consideration of this work compares with the divisional complement of 14 mentioned in the Devlin Report, but there has since then been a sharp fall in the number of cases requiring consideration. Precise aggregate figures of cases handled by these staff are not maintained, but divisional records indicate that since 1976 there has been a reduction of over a quarter, from some 3,700 a year to some 2,650.

"19. For the purpose of presenting analytically the work undertaken in the Home Office, which procedurally has changed little since it was reviewed by the Devlin Committee, the Home Office has undertaken a sample survey .... of all cases which, at any stage in their progress, were in some way dealt with by the division between 1 October and 31 December 1981."

"20. Each case is in the first instance considered by one of the HEOs. In view of the importance of the work, and the variety of issues which can arise in its discharge, this consideration is at one grade higher than that normally applying to initial Home Office casework. The initial consideration will normally entail establishing two key facts: whether normal avenues of appeal have been exhausted, and whether the arguments put forward constitute new evidence (i.e. evidence that has not been considered by the courts). In order to establish the latter the HEO will usually examine the Court of Appeal's papers (which normally include a copy of the trial judge's summing up) or call for a report from the police on the evidence produced at the trial. Where a formal complaint has been made about the conduct of police officers involved in the case it is also normal practice to seek a copy of the report of the officer appointed to investigate it by the Chief Officer of the force concerned."

"21. Where there is new evidence in the case it will also be necessary to consider whether supplementary enquiries need to be made to elicit further information. In making this assessment Home Office staff scrutinise documents such as police complaints reports and court transcripts which are immediately available. But as these were compiled for specific puposes distinct from that of examining the facts of the case as a whole in relation to the conviction, it is frequently necessary to make further enquiries, often of the police, from this different standpoint. For example, this may be necessary when considering a police complaints investigation report; here a decision by the Director of Public Prosecutions, or a chief officer of police, to take no action against the police officers concerned has no direct bearing on the Home Office's quite separate scrutiny of such reports."

"22. In exceptional cases it will be necessary to call for a systematic futher inquiry into the circumstances of the case, often by a senior officer of an "outside" police force. Very occasionally there have been public enquiries by

independent figures of legal standing, most recently that by Sir Henry Fisher into the murder of Maxwell Confait. In short, the Home Office consideration of a case seeks to ensure that all relevant available informaion is assembled to enable an assessment to be made as to whether any of the powers available to the Home Secretary, set out paragraph 1, should be exercised."

These proceedings are all conducted in writing; the officials interview witnessess only in exceptional circumstances, and never interview prisoners. The investigation by the Secretary of State's officials seems to us to have a number of deficiencies.

The criteria

5.8 No fresh information. We accept that the Secretary of State should not substitute for that of the jury his own opinion of the guilt or innocence of the defendant, and that he should be wary of intervening in a case where there is no fresh information. However, from time to time the hazards of the adversarial system described in the preceding chapters do result, in the views of many responsible people, in a miscarriage of justice. Examples of this in recent years include the case of *John McGranaghan*, set out in Appendix One, and the *Guildford Pub Bombing* case (a detailed account of which is contained in "Trial and Error" by Robert Kee) [6] and the case of *Cooper and McMahon* (whose life sentences were remitted by the Home Secretary in 1980). These cases involved lengthy and careful analysis of all the various statements made before and after the trial, the evidence given at the trial, as well as the manner in which the courts of first instance and appeal dealt with them. Inevitably such an analysis is far more thorough than is possible at the trial or the appeal. The Home Secretary does not have the benefit of seeing the witnesses' demeanour at the trial, but against this he frequently has much material which was never considered by the jury or the judges, whether because it was hearsay or because its significance was never appreciated. Moreover, this is frequently the only way in which the conduct of the lawyers or the judges can be assessed in the light of the known facts.

5.9 We think that it would be a proper exercise of the royal prerogative if the remainder of the sentence was remitted in a case where there is no fresh information but the Home Secretary is persuaded that there are serious reasonable doubts about the correctness of a conviction, particularly if the recommendation was made in accordance with the methods for investigation we propose below. We therefore *recommend*

(i) that the Secretary of State should not exclude cases from investigation just because there is no fresh information.

(ii) where an investigation without fresh information reveals serious doubts

6. Published in 1986.

about the correctness of a conviction, the Secretary of State should remit the remainder of the sentence.

5.10 Fresh information. In its Sixth Report, the Home Affairs Committee recommended that any review of a conviction should not exclude evidence which would not be regarded as "fresh" for the purposes of its admission on appeal, e.g. evidence available but not called for tactical reasons (para. 28).
The Government replied to the Report in April 1983. [7] It stated:-

> ".... the Home Secretary will in future be prepared to exercise his power of reference more readily; and the Lord Chief Justice, who has been consulted about this reply, sees room for the Court to be more ready to exercise its own powers to receive evidence or, where appropriate and practicable, to order a retrial.
>
> 11. The Committee suggest that, under the current procedures, there is no scope for reviewing a case (and by implication for referring a case to the Court of Appeal) unless fresh evidence has emerged which could not have been adduced at the trial or on appeal. In fact, however, petitions are not currently rejected simply and solely because the evidence presented could have been placed before the courts. The Lord Chief Justice has confirmed that the Court of Appeal is very ready to use its discretion to admit new evidence, under section 23 of the Criminal Appeal Act 1968, when the interests of justice so require."

5.11 In the ten years prior to the Sixth Report, 1972 - 1981, the Home Secretary referred back to the Court of Appeal an average of five cases a year. If the special circumstances of the cases involving Dr. Clift, the discredited forensic scientist, are ignored, the average number of cases referred back in the five years following the Sixth Report, 1982 - 1986, was four a year. [8]

5.12 This is perhaps not surprising when one considers that the test applied in respect of fresh information is whether it might render the conviction unsafe and unsatisfactory. In the last chapter we described how this test is applied in the Court of Appeal and what the difficulties are in persuading the Court to doubt the verdict of the jury. The practice of the Court is, of course, well known to the Home Office, and if cases are referred back to the Court of Appeal which are bound to fail the test as applied by it, the Home Office will be criticised for this, as indeed it was in respect of some of the Clift cases which were referred back.

5.13 The inaccessibility of the transcripts of the Court of Appeal judgments has

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7. Cmnd. 8856.
8. Sixth Report, Minutes of Evidence, p.8, and Vol. 4 supplementary Tables, Criminal Statistics, England and Wales. Almost all of the cases involving Dr Clift were referred back to the Court of Appeal in 1984; the majority of appeals were dismissed.

prevented us from making a comparison of the practice of that Court before and after the Lord Chief Justice expressed the views reported in the Government Reply. In *R. v. Lomas* (1969) 53.Cr.App.R. 256 the Court said that it will only be in most exceptional circumstances that it will be possible to say that there was a reasonable explanation for not adducing evidence of scientific or medical opinion at the trial. This view was re-affirmed in 1985, in the case of *R. v. Glynn* [9]. A similar view has been adopted where the defendant sought to raise on appeal for the first time the issue of diminished responsibility. [10] JUSTICE's experience is that the situation has not noticeably changed. This is perhaps not surprising, as the Court must continue to apply the rules of evidence, and it has said that its power to receive fresh evidence is no greater on a reference by the Home Secretary than on an ordinary appeal [11]. It would clearly not be just or proper for the Court to adopt different practices depending on whether the appeal took place in the ordinary course of events or following a reference back e.g. refusing to admit evidence as not being "fresh" because of a tactical decision by counsel at the trial on an ordinary appeal within time, but admitting it on a reference back.

5.14 The difficulties involved have been recognised by all concerned. During the course of a previous (unpublished) JUSTICE inquiry into Criminal Appeals, the then Lord Chief Justice, Lord Widgery, wrote to the chairman of the inquiry in June 1975 and stated:

> "We have about 6,000 criminal appeals per year. The sentence appeals present no particular problem. The majority of the conviction appeals are based on a particular irregularity or misdirection at the trial, and the Court is well equipped to deal with these.
>
> Where we begin to get into trouble is when it is argued that a conviction is unsafe because the evidence was insufficiently convincing. If, at the same time, further evidence is tendered, we are on the brink of conducting a re-trial in the guise of an appeal. Stafford, Cooper and McMahon were all examples of this. After the Cooper case there appeared in "The Times" (amongst some uncomplimentary remarks) a suggestion that this type of case should be under continuous review in the Home Office because it is not suitable for "once and for all" decision in the Courts. I think there is something in this, but it would need to be carefully thought out.
>
> One need only compare a reference under s.17 with the sort of police enquiry which the Home Office have as an alternative. The former creaks along with due regard to the rules of evidence whereas in the latter the investigator can choose his own sources of information and use them as he thinks fit. In most

9. C.A. 7.11.85 Ref.No. 2141/B/84.
10. *R. v. Kooken* [1982] 74. Cr.App.R. 30, affirmed in *R. v. Straw* C.A. 29.6.87 Ref.No. 4406/D/86.
11. *R. v. Conway* (1979) 70. Cr.App.R.4.

fresh evidence cases it is the truthfulness of the new witness which matters, and this is not easy to assess in the circumstances in which we hear him. It might also be helpful if the Home Secretary made more use of s.17(1)(b) to take the Court's opinion on specific points instead of giving the Court the whole case to decide."

The investigation

5.15 The officials employed to investigate cases do not have any legal expertise. This may not be important when the matter is one of factual analysis, but it can be disadvantageous when regard must be had to the quality of the trial or the appeal, or of the competence or conduct of trial counsel. Moreover, the officials do not themselves investigate, but usually ask the same police force which investigated the offence to carry out the further investigation. This, in our view, is inherently unsatisfactory. The adversarial system inevitably generates a competitive element, and the police are being called upon to examine their own competence, or honesty in the conduct of their "side". In JUSTICE'S experience, the nature of the re-investigation seems more often an attempt to shore up the case against the defendant than a disinterested examination of the complaints.

5.16 The police report is confidential to the Secretary of State, so that neither the petitioner nor his lawyers are able to assess or question the basis of the police conclusions. Even where the police report expresses disquiet about the conviction, the officials will not necessarily act upon the information (as happened in the case of *Roy Binns*, described in para 3.14 above) or as speedily as they should (see, for example, the report of the Ombudsman in the Home Office and Scottish Office investigation of the *Preece case* in which he severely criticised the investigation carried out into Preece's murder conviction). [12]

5.17 The Home Affairs Committee endorsed the criticisms made of the present procedure, and it adopted the recommendations made to it by JUSTICE and other non-official bodies for an alternative procedure. Their report concluded:-

"32. .... We would wish to see a revised procedure for the handling of alleged miscarriages of justice which would operate as follows. Petitions from convicted persons would continue to be directed to the Home Office and would be examined in the first instance by officials. It if appeared to them that new evidence, defined in the way we suggest (i.e. all evidence which was available, whether used at the trial or not), had emerged since the trial, the case would be referred to an independent review body whose chairman would allocate it to one or more of its members for consideration, or submit it

12. Fourth Report for Session 1983 - 1984, "Investigation of a complaint about delay in reviewing a conviction for murder" 1984 H.C. 191.

to a formal hearing if necessary. The review body would then advise the Home Secretary either not to intervene or to invoke the Royal Prerogative in order to remit the sentence or to set aside the conviction."

The Committee suggested that section 17 references would no longer be necessary, except on points of law, and that this tribunal should have a wide measure of discretion in the procedures it applied.

5.18 The Government, in its Reply, rejected these recommendations. It argued as follows:-

"7. The Government agrees with the Committee on the need to ensure that alleged miscarriages of justice are thoroughly and authoritatively examined. Ministers consider, however, that as a matter of constitutional principle it should primarily be for the courts and the judicial process to review convictions and, if necessary, upset them; and that, accordingly, action under the Royal Prerogative should be limited to the exceptional case which could never be brought within any judicial process."

It then outlined the changes in procedure already mentioned above which would mean referring more cases back to the Court of Appeal and making that Court less restrictive in matters of fresh evidence. The Government suggested that, in exceptional cases, a lawyer might be appointed to carry out an investigation. This was done in respect of the case of *James Hanratty* [13], the *Confait* case [14], and the case of *Patrick Meehan* [15]. The Reply concluded:-

"15. This analysis, coupled with the improvements which can be made to existing arrangements, leads the Government to the conclusion that it should not establish an independent review body as proposed by the Committee. As a matter of principle, priority should be given to improving and enhancing the part played by the courts in these matters, rather than - as the Committee propose - curtailing the present arrangements for referring cases to the Court of Appeal. The establishment of a standing review body would be a move in the opposite direction. It would to a large extent replace the present jurisdiction of the Court of Appeal in these cases, yet it would include lay members. It would come to decide a considerable number of cases which could at present be examined and determined by the Court of Appeal.

"16. It cannot be assumed that where the judicial process might have failed to arrive at a just solution (*vide* paragraph 21 of the Committee's report), an alternative arrangement can be devised which will be certain to get it right. The issue involved turns in the end on a judgment of the facts (often complex

13. Lewis Hawser Q.C. 1975 Cmnd. 6021.
14. Sir Henry Fisher, op.cit.
15. J.MacLean 1982 72 SCOLAG 76.

and obscure) of each individual case. The introduction of an advisory body, or any other institutional change, would not ensure that such decisions are infallible. Nor would they offer any guarantee that in every instance the petitioner would accept the eventual decision as just." [16]

5.19 We consider that the Government Reply does not meet the criticisms made of the present procedure, and that there has been no discernible change in Departmental practice or in the Court of Appeal since then. We think that the solution proposed by the Home Affairs Committee is the one most likely to achieve a just and proper investigation into alleged miscarriages of justice. The Committee recommended that:-

"26. .... Once supplied with the facts of the case and such documents as were already available to the Home Office, the review body would decide for themselves what further enquiries were necessary and how or by whom any additional information should be gathered, whether by the police force who brought the original prosecution, an outside force or through other sources.

"27. We would expect that, in the majority of cases, the review body would be able to assess the evidence and make their recommendation to the Home Secretary without the need for a formal hearing. They should, however, be empowered, where they considered it necessary, to hold a full hearing with legal representation on both sides, and also to recommend the award of legal aid in respect of representation by counsel. It would also be normal practice for the Home Office to supply the parties concerned with a copy of the reasoned judgement of the case which the review body had submitted to the Home Secretary."

5.20 The Government Reply did not deal with the criticisms made of the investigation of a petition by the same police force that investigated the offence, but in a short debate in the House of Lords on 9th April 1986 [17] on miscarriages of justice, Lord Glenarthur, then Minister of State at the Home Office, said

"The noble Lord, Lord Foot, suggested that perhaps a different police force should be used to carry out re-investigations. This is done where it seems appropriate, but in most cases it seems preferable in the interests of speed that the police force originally concerned with the investigation should re-examine the case. It will know it well and have its own records and papers. I do not think it right to assume that in every case where police inquiries are undertaken there has been some original police malpractice and thus it

16. In a debate in the House of Commons on 16th June 1988, during the Report stage of the Criminal Justice Bill, the Government defeated an attempt to give statutory effect to the recommendations of the Sixth Report. It adhered to the views it expressed in its Reply.

17. Hansard Vol. 473, cols. 278 - 300.

requires investigation by a new force." [18].

We do not agree with this approach. Apart from the issue of force loyalty, the petitioner is always going to be dissatisfied with the results of a secret report compiled by the force which was responsible for bringing what he regards as wrongful charges against him and whose evidence may well have been instrumental in getting him wrongly convicted.

5.21 We accept that it would be undesirable to set up an alternative Court of Appeal. We do not agree that the establishment of an independent review body would necessarily have this effect any more than the Secretary of State has this effect at present in advising on the use of the Royal Prerogative. We have described in Chapter Four the limitations under which the Court of Appeal (probably inevitably) operates. It has no means by which it can carry out independent investigations and is totally dependent on the information put before it by counsel. It must operate under the rules of evidence, many of which have become technical and artificial over the years. It operates in a very formal setting, which many ordinary people find intimidating when giving evidence. It is undoubtedly the best forum for determining issues of law and procedure at the trial, but it is not the best forum for determining the truth in a case which, as we pointed out in Chapter Three, is not in any event the purpose of the trial in our adversarial system. These views apply with even more force to Scotland, where the High Court takes an even more restrictive view of its role than its English couterpart.

5.22 The review body would not have power to quash a conviction or alter the sentence; its function would be to attempt to establish the truth in a case and to advise the Secretary of State accordingly. This body would be able to examine the conduct of the lawyers on both sides to see to what extent tactical considerations affected the trial and/or appeal, and it would provide a detailed analysis of all of the information available both to the prosecution and the defence. The Secretary of State would not have to follow its advice, although he would undoubtedly have to answer searching Parliamentary questions if he rejected it. Such a body would avoid all the present constitutional difficulties about the Executive interfering with the work of the Judiciary, and its independence would reduce considerably those suspicions (however ill-founded) that accompany Departmental investigations in sensitive cases, of which the IRA pub bombing cases are the most celebrated in recent years. It would, moreover, be far more satisfactory than the appointment of a single investigator who, however experienced a legal analyst, would always lack the kind of experience and expertise which a body could provide.

5.23 We do not anticipate that such a body would have a large case-load, particularly if the recommendations we have made above relating to pre-trial, trial and appellate proceedings are implemented. The kind of inquiry conducted by the body would probably be very detailed and time-consuming, and so we think that an

18. Col. 297.

applicant would have to make out a good case before it would embark on an investigation. We would not want to see the body overloaded with summary offences, and so it would still be necessary fo the Departmental officials to handle many cases. We anticipate that the sort of cases it would deal with would involve forensic evidence, witnesses who retract their evidence, third-party confessions and new evidence. We do not think that this body should consist solely of lawyers, but it should always be chaired by a lawyer. Its members should be appointed by the Lord Chancellor in consultation with the Chairman of the Bar and the President of the Law Society. Such a body should be able to operate along inquisitorial lines, examining the petitioner, his lawyers, the police and the prosecution, as well as any of the witnesses and transcripts, and should thus be in a far better position than the Secretary of State, the Court of Appeal or the High Court of Justiciary to get at the truth of the matter.

5.24 We accept that such a review body will not be infallible and will not satisfy everybody; we doubt whether this will ever be possible whatever system is devised. However, we believe that the present procedures are not capable of providing the requisite qualities of thoroughness, impartiality and independence that an inquiry into a serious complaint of miscarriage of justice requires. In his report into the investigation of the *Preece case*, the Ombudsman stated:-

> "58. A miscarriage of justice by which a man or woman loses his or her liberty is one of the gravest matters which can occupy the attention of a civilised society. And it seems to me that when an unprecedented pollution of justice at its source is discovered, quite an exceptional effort to identify and remedy its consequences is called for."

We share that view, and indeed think that such an effort is required whenever someone loses his liberty for a considerable period for something he may not have done, and that the quality of that effort is one of the hallmarks of a civilised society. We believe that the present arrangements do not meet these exacting standards.

5.25 We *recommend*, therefore, that an independent review body should be established to investigate petitions to the Secretary of State alleging a miscarriage of justice after a trial by jury which resulted in imprisonment. This body should operate throughout the United Kingdom. Cases should principally be referred back to the appellate courts when they turn on points of law or procedure. It should operate under its own procedures and not be bound by formal evidential rules. It should be able to pursue its own investigations and to call on the police to assist it. It should have the powers of a Tribunal of Inquiry and a person summoned to give evidence before it should be allowed legal representation. It should publish a report of its findings and recommendations, and the Secretary of State should report to Parliament on what steps he takes in relation to those findings.

5.26 As we expect the number of cases investigated to be small, we do not think that such a body would involve very much extra public expenditure. Indeed, if it was able to identify institutional failings in the criminal justice system as a result of

its inquiries, it might in the long term lead to substantial savings.

Conclusion

5.27 There can be little doubt that in the United Kingdom a just verdict is reached in most cases. We also believe there is little doubt that when an unjust verdict is reached, it is very difficult to rectify it. Although the reasons for this are understandable, i.e. the desire to uphold constitutional conventions and respect professional sensibilities (judicial, legal, police and bureaucratic), we do not think they should be allowed to obscure this fact or prevent changes which would improve the present situation. Even if it is only a handful of individuals who are wrongly imprisoned each year after a trial by jury, we believe that the criminal justice system should be capable of making the extraordinary efforts which are needed to remedy this, as well as to take any necessary measure to lessen recurrences. We think that our proposals will go far to achieving both these aims without making fundamental changes in the method of investigating offences or the manner of trying them. In recent years a number of influential persons have called for such changes, for example, putting a judicial figure in charge of investigations; conducting an inquisitorial trial; abolishing juries and replacing them by a reasoned verdict by judge alone, or with assessors. If the present system of criminal justice in the United Kingdom is incapable of change, and continues to throw up cases of serious miscarriage of justice, it may well be necessary to consider creating a new system. We believe that that time has not yet arrived, but we consider that, while no criminal justice system will ever be perfect, the present system can and should be made to work better. We hope that this report will contribute to that necessary improvement.

SUMMARY OF RECOMMENDATIONS

1. Consideration should be given to the introduction of an office of public defender to assist the potential defendant, as well as defence lawyers in pre-trial work (para.2.6).

2. Improvements should be made in identification procedures in the investigation of offences (paras.2.7 - 2.14)

3. Adequate resources and training need to be given to the police to record all interviews and identify false confessions. The police and prosecution should be under a duty to check out confessions. Consideration should be given to introducing the Scottish procedure of the judicial examination into England and Wales (paras.2.14 - 2.24).

4. It should be a breach of professional duty for the police or prosecution to fail to observe the Attorney-General's guidelines on disclosure in England and Wales. Similar provisions should apply in Scotland (paras.2.25 - 2.28).

5. The legal profession should improve the monitoring of the competence of its members, and incompetence should be treated more seriously by the disciplinary bodies (paras.2.29 - 2.35)

6. The proposals on identification evidence made by the Devlin Committee in 1976 should be given statutory force (paras.3.8 - 3.12).

7. Expert evidence about the reliability of a confession based on the psychological and psychiatric state of the confessor should be admissible in evidence (paras.3.13 - 3.18).

8. No confession should be admissible unless made in the presence of a solicitor, or tape-recorded, or put to the confessor by an examining magistrate, or the truthfulness of the facts in the confession is corroborated by independent evidence (paras.3.19 - 3.29).

9. Consideration should be given to increasing the majority for juries to convict in Scotland (para.3.30).

10. The Court should have power to receive hearsay evidence at the request of the accused and should do so if it considers it reasonable in the interest of justice in the circumstances of the particular case (paras.3.31 - 3.44).

11. The Court should have power to call a witness at the request of either counsel or the jury if the judge agrees, as a court witness, who would then be

available for cross-examination by prosecution and defence counsel (paras. 3.45 - 3.47).

12. The question of the scope, or even retention, of the right to silence, should be re-examined (para.3.48).

13. The powers of the Court of Appeal (Criminal Division) should be reformed to enable it to quash a conviction where it has doubts about its correctness (paras.4.1 - 4.22).

14. Where the tactics of defence counsel turn out to have been mistaken, so that a reasonable doubt is left about the correctness of the accused's conviction, the Court of Appeal should either quash the conviction or order a re-trial (paras.4.23 - 4.26).

15. Greater use should be made of technology in the courts to produce a cheap taped record of the proceedings (para.4.31).

16. Consideration should be given to harmonising the powers of the appellate courts in Scotland and England (paras.4.32 - 4.38).

17. Consideration should be given to extending the jurisdiction of the House of Lords to criminal law in Scotland (para.4.39).

18. Consideration should be given to publication by the High Court of Judiciary of its written opinions when deciding full criminal appeals (para.4.41).

19. The Secretary of State should not exclude cases from re-investigation because there is no fresh information (para.5.8).

20. Where serious doubts arise about a conviction where there is no fresh information, the Secretary of State should more readily exercise his power to recommend remission of sentence to the monarch (para.5.9).

21. The present system for investigating possible miscarriages of justice after appeal is wholly inadequate for the discharge of this important function. An independent review body should be established to examine allegations of miscarriage of justice made to the Secretary of State after trial on indictment. It should have the powers of a tribunal of inquiry and should publish the recommendations it makes to the Secretary of State. Reference back to the appellate courts should principally concern matters of law and procedure (paras.5.10 - 5.27).

APPENDIX ONE

Ernest Barrie (para. 2.7)

In 1986 at Glasgow High Court Barrie was convicted of robbery, on a majority verdict, and was sentenced to 18 years imprisonment. The charge arose out of a robbery at the Clydesdale Bank in Blantyre, some seven miles from Glasgow, on Friday 2nd May 1986, when two Securicor guards were robbed of a case containing £40,000 in ten-pound notes. At 10.22 a.m., a video showed the indistinct image of a man, wearing a dark double-breasted suit, entering the bank. He stood with his back to the camera. Thirty seconds later, the two Securicor guards arrived and deposited bags of coins. Some 45 seconds later still, the man by the window turned round. It appears that he was waiting for the case of notes to be unloaded from the van. At that point, the first camera switched off and missed the following action. From eye-witness accounts, the man at the window had rushed outside. A guard who had been in the bank quickly followed, but was pushed back into the doorway. Eye-witnesses saw the man holding a gun to the security guard's head. A second robber, wearing a black balaclava helmet, elbowed his way through people in the street (including customers queuing outside to use the cash dispenser) and clubbed the guard holding the case to the ground with a pick- axe handle. Witnesses then stated that the two robbers (and possibly a third) ran back through the crowds and entered a red Cortina motor car and drove off. When Barrie was arrested some 12 days later at his girlfriend's house, a suitcase containing, amongst other items, a blue double-breasted pin-striped suit was discovered hidden behind a washing machine.

Barrie was taken to Hamilton police station. He was alleged to have stated during the journey "I hope I'm not the only one going to Hamilton - there's more than me." He has always denied making this remark. He was put on two identity parades. Nine eye-witnesses to the robbery failed to pick Barrie out, but three did pick him out as the robber by the window. Barrie's defence was one of alibi. He claimed that he was at the home (some seven miles away) of a family friend, Violet Fullerton, on that Friday. She specifically remembered Barrie being there on that date as it was the anniversary of her husband's death. Her son, James, suffered from multiple sclerosis and remembered Barrie, as usual, bathing him at about the time of the robbery. This would take about 50 minutes. Barrie left the house at 11.55 a.m., walked to his weekday residence at the Bell Street men's hostel, and booked his room for the next week, witnessed by a fellow resident. The two men then went for a drink together. At 1.15 p.m. they went to the bus station where Barrie was to catch a bus to Glenrothes. One of them recalled the top of a bus clipping a station canopy.

Such an incident was recorded on that day. Two witnesses had used the cash dispenser outside the bank barely more than a foot away from the robber. Neither of them identified Barrie. One gave evidence at the trial that Barrie had only a slight resemblance to the man she had seen. The other witness did not attend court but saw a newspaper photo of Barrie and was sure he was not the robber from the bank.

About 20 people witnessed the robbery and 40 statements were taken. There were discrepancies between the testimonies of the three who identified Barrie. They were (a) a customer in the queue outside the bank (b) one of the Securicor guards and (c) a woman using the cash dispenser. One claimed the robber was wearing "perhaps" a grey suit and had about a day's growth on his face. Another stated that the man was clean shaven with a moustache and a "distinctly" blue suit. The third stated that the man had a carefully cropped beard. There was no forensic scientific evidence linking Barrie to the scene or the getaway car, or to the case that had been stolen which was found (along with the gun) a few hours after the robbery. After his trial, the suit found at Barrie's girlfriend's house was examined by a forensic expert, who concluded that he had "no hesitation (in saying) that the trousers would very readily yield fibres to a suitable surface in contact". He would have expected to find fibres on the car seat after a rough ride. There was no fibre evidence from the scene of the struggle or the car.

The evidence from the video was played at the trial, but no enhancement work was done on the image. When this was done after the trial, it revealed the following:-

First, the man's height could have been estimated by using the distance of the camera from the man and its height. One expert estimated that the man was 5'10 ½". Barrie is 5'9" in his stockinged feet. A second expert estimated that the man's height was "at least 5'10" and possibly 5'11". A specialist in measuring the characteristics of human faces scaled down a photo of Barrie and compared it with the video image. There were several discrepancies but the major difference was in the level of the nose. He then examined the profiles of the two men. The man on the video had a different shaped forehead and chin from Barrie, and there were discrepancies in the level of the two men's eyes and ear lobes. The expert concluded that there was more than a 90% likelihood that the man on the video and Barrie were two different men. After a BBC TV programme on this case, two persons (one of whom was a solicitor) telephoned Barrie's solicitor and identified the man on the video as being someone other than Barrie. Following an investigation by the Scottish Office, the case was referred back to the High Court in October 1988 where the Crown did not oppose the appeal and the conviction was quashed in March 1989.

Luke Dougherty (para. 2.31(b) extracted from the Devlin Report

"**(4)** *The Preparation of the Defence*

2.8 Mr Dougherty has for some considerable time been a client of Mr P.A. Hamilton, a solicitor whom he has consulted about domestic troubles and such like. He was, Mr Hamilton says, 'a constant visitor'. Mr Hamilton is a partner in the firm of Freedman, Hamilton and Emmerson and is a very experienced solicitor, in practice, apart from war service, since 1937; from 1953–1967 he served also as Clerk to the Justices. Ninety per cent of his firm's work is in crime and they have about 20 or 30 criminal cases a week.

"**2.9** On 17 September – that is, the morning after he was charged – Mr Dougherty took the charge sheet round to Mr Hamilton. 'It just could not have been me', he said, 'because there is a whole bus load of people who can say I was somewhere else'. They had a general discussion about the alibi. Mr Dougherty said there were 40 people who could be called as witnesses; he says that Mr Hamilton told him that the legal aid would not pay for more than 5 or 6. Mr Hamilton agrees that he said that 'half a dozen good sound citizens' would be sufficient, but not that he said that the legal aid would not pay for more. (He added later that the question of calling or not calling witnesses was never affected by the fact that the costs were being paid by legal aid.) It was left to Mr Dougherty to select 5 or 6 witnesses and to send them along to Mr Hamilton's office so that statements could be taken. Mr Dougherty knew most of the passengers as friends or neighbours and Mr Hamilton emphasised that the witnesses selected must be of good character....

"**2.48** On 7 June Mr Fenwick replied that if the appellant desired to press the ground in his own notice of appeal relating to fresh evidence, obviously a solicitor would be required to enlarge it and prepare it for presentation; the appellant must be the final arbiter on the decision to press this second ground. 'If the Appellant wishes to press the "fresh evidence" ground, and indeed really, in any event, it seems to me... that the Appellant MUST have a solicitor to advise him, and entirely fresh counsel, also.' If the appellant, after he had been separately advised, wished Mr Fenwick to argue the appeal on the identification point, then he would be willing to do so, but only on that ground.

"**2.49** On 18 June the Registrar wrote to Mr Fenwick to say that the single judge had refused to extend legal aid to include a solicitor. He sent a second copy of the letter 'so that you can send it to the applicant and explain its effect to him'. In an accompanying letter the Registrar said that it would unquestionably be best in Mr Dougherty's interest that Mr Fenwick should continue to represent him since he was aware of what happened at the trial and had settled the grounds which the single judge considered should be argued before the Full Court. Moreover, if his client insisted on pressing his application to tender fresh evidence, Mr Fenwick could draw the Court's attention to the papers and ask at least for an adjournment and extended legal aid so that there could be an investigation of what the prospective witnesses would say. There was still a chance that the hearing could be

fixed for that term.

"**2.50** There followed a telephone call between Mr Fenwick and the Registrar and an exchange of personal correspondence. We can best deal with this by summarising what emerged.

First, it is clear that both the Registrar and Mr Fenwick thought the application to call further evidence pretty hopeless. The single judge had plainly thought nothing of it. The Registrar told Mr Fenwick that 'this kind of case is unlikely to get off the ground', and added that there were unreported cases of unsuccessful applications in which counsel had at the trial refused to call witnesses in spite of his client's request that he should do so. Mr Fenwick's view as expressed to us was: 'Up until this moment it has always been axiomatic that the Court of Appeal would not let you call additional evidence if with due diligence you could have got it at the time.'

Secondly, Mr Fenwick was not prepared himself to argue the point. He felt it would be too embarrassing; he had himself advised his client not to accept an adjournment but to proceed with two witnesses; indeed he had virtually decided that matter on behalf of his client and this decision stood as an obstacle in the way of the application: some other counsel should attack it.

Thirdly, Mr Fenwick was not prepared to write to Mr Dougherty or to see him in prison without a solicitor.

Accordingly, it was arranged that the Registrar should write to the applicant to explain the position.

"**2.51** On 20 June the Registrar despatched a long letter to Mr Dougherty in prison and sent a copy of it to Mr Fenwick. The letter began with the reference to the refusal of the single judge to grant legal aid for a solicitor and continued:

> The point shortly is that the circumstances in which this Court will hear fresh evidence are rare especially in cases where the additional witnesses were known to the defence or could have been traced before the trial. On the face of it you must have known, or known how to find, most, if not all, the persons you now want the Court to hear. This is no doubt the principal reason why the Judge said that he did not consider the requirements as to calling fresh evidence were satisfied.
>
> If Mr Fenwick were to attempt, despite the Judge's decision, to resubmit the applications for leave to call fresh evidence he would be in difficulty as a great deal of preliminary work by a solicitor would be necessary before the applications could be perfected for presentation. The Judge has refused him the assistance of a solicitor.

If Mr Dougherty wanted to try to get the Full Court to consider the question of fresh evidence, the letter went on, Mr Fenwick thought he should be represented by someone else. On this the Registrar made various observations. The identification

point was the only one concerning which the single judge's decision gave any hope of success. The preparatory work necessary for an application to call fresh evidence would inevitably cause delay in the hearing: Mr Fenwick was clearly in the best position to present the case. 'If you do not wish to accept Mr Fenwick's services on the only basis on which he can act, the whole matter, including an application for change of counsel, will have to be referred to the Full Court as a non-counsel application... If anyone other than Mr Fenwick were to represent you it is likely that a full transcript would be necessary. If so there would be many weeks more of delay.'

So Mr Dougherty must decide whether Mr Fenwick should continue to represent him, 'it being understood that he is unable to present your application for leave to call further witnesses'. The Registrar urged a prompt reply; there would then be a fair chance that the application could be heard before the end of July; otherwise the delay might be considerable.

On 22 June Mr Dougherty replied: 'I have all faith in my barrister and accept that he handles my case in Full Court without any witnesses being present.'

"**2.52** Some communication took place between the Registrar and Mr Fenwick relating to the *Justice* questionnaire and the answers to it. On 19 June Mr Fenwick sent the papers to the Registrar 'for safe-keeping if he insists to you on pressing the fresh evidence aspect'. On 21 June the Registrar replied that it was a misunderstanding to suppose that he could act as a solicitor and that the papers should not be left with him. On 25 June Mr Fenwick invited the Registrar to retain the papers 'until Dougherty has decided precisely what he wants to do'.

"**2.53** On 5 July Mr Dougherty made an application to be present at the hearing of the appeal. He said in his letter that he understood about the witnesses and that it was not Mr Fenwick's fault or his. The Registrar replied on 9 July that arrangements had been made for him to be brought to the cells in the Royal Courts of Justice and that the Court itself would decide whether or not to give him leave to be present at the hearing.

"**2.54** On 12 July 1973 the application was heard by the Court of Appeal in open court. Mr Dougherty had been brought up to the cells; prisoners cannot travel in the ordinary way and the cost of the expedition with two warder escorts was £66.08. Mr Fenwick did not see him and did not apply to the Court for him to be present and the Court made no order. Mr Fenwick said to us:

> "I was not prepared to embarrass myself by seeing him. I know he stayed down below and was not allowed up... I was not prepared to go down and see Dougherty and have him say, 'Will I get off? Will the appeal succeed?' I had a pretty fair suspicion that the appeal would not succeed.

"**2.55** The case was strenuously argued by Mr Fenwick. He appreciated that the principal difficulty in his way lay in the strength of the warning that the judge had given the jury; he urged that it could not be safe to convict in a case in which such a

strong warning was necessary. The Court dismissed the application. They held that the effect of the authorities was 'that it is undesirable to have dock identifications, which should be avoided if possible'. But the most recent case of *R v. John* made it clear that the dock identification was relevant evidence and that the only ground for excluding it lay in the judicial discretion to exclude legally admissible evidence, the prejudicial effect of which, in the opinion of the judge, would exceed the probative value. Accordingly, 'the Learned Judge in the exercise of that discretion was fully entitled to let the matter go before the jury provided he did give explicit warnings of the dangers of that type of evidence. Those warnings he undoubtedly gave.' The court said that it was desirable that photographs should only be shown to witnesses in strict conformity with H.O. Circular 9/1969; and it was also desirable that an identification parade should be held. But there being some doubt as to why an identification parade was not held, the Court felt that there would be no useful purpose in saying more.

"**2.56** Some, if not all, of the material relating to the fresh evidence was before the Court. The Court remarked in its judgment that the case had been brought to the attention of *Justice* who had raised the matter very properly with the Criminal Appeal Office. Mr Fenwick told us that he said that he could not argue that point. Whatever he said, it is evident that the Court treated it as an abandonment of the application. They said that counsel in his discretion had not pursued it and that they considered that he had accurately exercised his descretion. Two of the witnesses named in the alibi notice had been convicted of shoplifting and the bus driver 'could not be called without grave risk to the interests of the applicant without counsel and solicitor knowing in detail what the evidence was to be'. The court affirmed that the decisions taken by Mr Fenwick were beyond criticism, and added, 'Moreover, it would seem to us that even if he had taken a different course that the conditions necessary before such evidence could be received before this Court could not be fulfilled'."

William Funnell (para. 2.31 (c)

Funnell was convicted of the murder of his wife, Ann, in 1984. An application for leave to appeal was refused by the Full Court in June 1985.

Anne Funnell's body was found on waste ground near the matrimonial home in Dover on the evening of 5 May 1984, covered by brushwood and foliage, with some of her possessions scattered round about. As the face had been disfigured by predators, identification was from fingerprints. She had been manually strangled, and there were severe injuries to one side of the head. The trial pathologist thought the body had been there between three and 14 days and subsequent tests indicated that death had occurred on 24 or 25 April.

Funnell suspected that his wife was having an affair with one Peter Brown. On 21 April Funnell confronted her, and during the ensuing quarrel seized her by the

neck and caused visible bruising. On 23 April she twice told him she was leaving with Brown, and wanted to take their three children. On 24 April Funnell went to see a solicitor, getting home soon after 11 a.m. Anne came back from work between 3.15 and 3.30, and went upstairs. She was not seen alive again.

Funnell was interviewed by the police three times on 6 May and again on the following day. During the second interview he was arrested on suspicion of murder. His account of events was consistent throughout, and he strenuously denied the crime. The next day, 8 May, he was again interviewed and then allegedly confessed to murder, signing a statement to that effect. In this he said he had followed Anne upstairs on 24 April, that another quarrel had developed, and that he had gripped her by the throat and afterwards found that she was dead. He had kept the children first from the house and later, from the bedroom, on various pretexts and, after dark, had carried the body 170 yards to the waste ground – he could not remember how. The only indications that this might be true were a number of blood marks on the carpet underlay (but not on the carpet itself) that could not be grouped, and a very small splash of blood on a wall of the same comparatively rare group as Mrs. Funnell's (shared by one person in 310). No conclusions could be drawn from these blood traces and during the BBC investigations it was discovered that Funnell had the same group as Anne.

At the trial Funnell reverted to the substance of the first four interviews: when the argument flared up in the bedroom on 24 April he went downstairs, and shortly afterwards Anne appeared carrying a black handbag. She picked up her glasses and went out without speaking. He thought she had gone shopping, but, when she failed to return, assumed she had gone off with Brown, leaving the children. He explained his confession thus: by the third day of intensive questioning, knowing himself to be under suspicion, he was at a low ebb. The police said the evidence against him was strong, and that if he confessed he would be allowed bail. He yielded to persuasion, hoping that the police would then leave his house and that the pressures on his children and his brother (who lived with the family) would thereby be relieved. His interviewers outlined a scenario, and he accepted it.

The confession made no mention of the head injuries which, it was estimated, must have bled to the extent of at least half a pint. The confession entailed that the body was in the bedroom until dark, but household routines often took the chilren into their parents' bedroom, and had done so that evening. It entailed also that he had been able, without the knowledge of his brother or any of the three children (aged 15, 13 and 11) to carry a body rigid in death and shedding blood down a narrow staircase and 170 yards along the road. The means of containing the blood would have had to be absolute to avoid traces on stairs, walls, or door-frames. Anne's dog, easily aroused, was not in fact disturbed during the night. Two of the children were camping in the tiny garden through which he must have passed. A subsequent experiment at Birmingham University showed that an experienced fireman had great difficulty carrying out a comparable task.

Three witnesses, not called at the trial, were traced. They had passed very close to the site of the body in daylight between the presumed date of death and the date of discovery, 11 days later. One was the boy who ultimately found the body when chasing a football. According to these witnesses they could not have missed it if it had been there on the first occasion. A police colour-video film of the removal of the body showed the state of the vegetation clearly enough for a photosynthesist to doubt that it had lain there for as long as 11 days.

Anthony Burke (para.2.34)

In November 1978 Burke was convicted of the murder of Roy Phillips in a Liverpool night club frequented by homosexuals. On 25 June 1978, at about 1.30 a.m., Phillips had been attacked by two men in the club, Carl Williams and Pat Macdonald (who was Burke's cousin). The fight had broken out in the club and Burke, who was employed as a "bouncer", had bundled all three men out through a very small foyer. While still in the foyer, Phillips had suffered severe kicking. He was found shortly after outside the club, his nose fractured, larynx bone and two ribs broken, his abdominal muscles torn, and covered in severe brusing. He died in hospital later that day. The police arrived soon after the fight, and many people in the club, including Burke, were detained and questioned. None of the witnesses saw Burke attack Phillips, but two witnesses did see Burke bundle Phillips, Williams and Macdonald out of the club. After an appeal by the police, three witnesses came forward, two of whom were inside the club. Glynis Jones, a social worker aged 21, said she saw Burke trying to stop the fight but, when he could not, he bundled them out. A 16-year-old boy at the club said he heard Burke shouting to Williams and Macdonald to leave Phillips alone. The third witness, Frank Grue, said he saw Burke outside the club, trying to hold back two men whose description matched Williams and Macdonald.

Burke was charged with the murder because his trousers were bloodstained. He admitted to having sluiced blood off the foyer and steps, and to having advised Williams and Macdonald to flee. He had also refused to identify them initially to the police, although he subsequently confirmed the names when put to him by the police. Williams was also charged with the murder; Macdonald was never found.

A fortnight before the trial, Burke's QC and junior counsel withdrew from the case because of another, conflicting engagement. Six days before the trial, the DPP delivered two bundles of statements to Burke's solicitors but informed them that, on the advice of counsel, four other statements had been withheld. Among those withheld were the statements of Glynis Jones and the 16-year-old homosexual.

At the trial, the prosecution relied heavily on the evidence of a forensic science expert, Dr. Moore, who said that the blood smears on Burke's left shoe and trousers

were consistent with the wearer having kicked the deceased, although the blood spots could have been caused by standing near (witnesses claimed to have seen Burke "sandwiched" between Williams, Macdonald and the deceased). There was also hair on Burke's left shoe which could have come from Phillips. However, the defence failed to ask Dr. Moore why there was no blood staining on Burke's right shoe (although Burke was right-footed) and failed to call forensic science evidence that the hair could also have come from Williams.

At the close of the prosecution case, Burke's QC, who had taken over the defence a few days before the trial, decided not to call any evidence but instead to make a submission that there was insufficient evidence to let the case go to the jury. Although the judge agreed that all the eye-witnesses had described Burke as trying to stop the fight, the scientific evidence, and the fact that Burke had "tipped off" Williams and Macdonald and had initially concealed their identities was sufficient evidence to put before the jury. Burke's QC continued to advise that no evidence be called, although by then the defence had become aware of the statements of Glynis Jones and the 16-year-old boy. He took the view that their evidence was marginal and that, as Burke had been convicted of wounding with intent some 9 ½ years earlier, his credibility would be poor. He did not wish to call the defence forensic expert because he understood that he would say that the bloodstains on Burke's trousers must have been caused by the wearer standing astride the victim while he was being kicked. In fact, the scientist's report was to the exact opposite effect.

At the appeal in October 1979, Burke's conviction was quashed on the ground that the scientific evidence was of insufficient weight to support the conviction. The Court had refused leave to call Glynis Jones and the 16-year-old on the ground that they were not fresh and there was no reasonable excuse for failing to call them at the trial.

The Broadwater Farm Cases (para.2.22)

(i) **Hassan Muller**

Muller was 17 years old when arrested on 1 November 1985. He was held for three days and questioned for 8 ½ hours on the first day and 3 ½ hours on the second. He had no access to a solicitor or member of his family and admitted to causing affray, throwing petrol bombs and committing burglary. At the trial, he denied that he had signed the custody record to the effect that he did not want a solicitor; he alleged that the interviewing officer had put his hands over the form he was asked to sign, and he had been told he could not have a solicitor. He said the statement written down by the police was different from what he had told them. He alleged that the police had said "We will get it out of you the easy way or the hard way", by which he thought he would get beaten if he did not make admissions. He was continually

told he could go home if he confessed. These allegations were denied by the police, except that the Detective Chief Superindent in charge of the questioning agreed in court that Muller had been denied a solicitor; he considered that "the administration of justice would be hindered if they (the suspects) had a solicitor". A clinical psychologist called by the defence testified that Muller had a reading age of 9 ½ years and that he was more suggestible than a normal person. Muller was acquitted of all charges.

(ii) **Howard Kerr**

Kerr was 17 years old at the time of his arrest on 31 October 1985. He was kept incommunicado for 54 hours and made a 57-page admission about his own involvement and that of 27 others on the night of the riot. He was not allowed access to a solicitor, and was charged with affray. At the committal proceedings an educational psychologist stated that Kerr had a mental age of seven. Six witnesses gave evidence that on the night of the disturbance Kerr was at a party in Windsor, some 20 miles away. The prosecution withdrew its case and the magistrates dismissed the charges.

(iii) **Juvenile B**

B was 15 at the time of his arrest on 9 October 1985. He was detained for 35 hours, the first four in total isolation. He was subsequently questioned on six occasions. His solicitor and mother were refused access to him, but a school teacher attended his interrogations at the request of the police. He admitted kicking and cutting the face of the policeman and making petrol bombs. He was charged with murder, riot and affray. Defence expert witnesses gave evidence that the boy was severely mentally disabled, with a mental age of seven, that he was illiterate, innumerate and had a severely diminished capacity to recall events. The judge ruled that four hours of isolation for a boy of his mental age amounted to oppressive conduct. He also ruled the confession unreliable because

- the boy was arrested at school, contrary to the administrative guidelines;
- he was put in a police cell and not the care of a local authority, as required by statute;
- he was denied access to a solicitor;
- there was undue delay in notifying an appropriate adult of his arrest;
- the attending teacher was not informed of the offences being investigated, and his mother should have been notified promptly of his arrest and permitted to attend his questioning;
- the circumstances of his detention without access to the outside world "must have been disquieting and crushing".

The jury was ordered to acquit the boy of all charges.

(iv) **Juvenile C**

C, then aged 13, was arrested on 11th October 1985 suspected of burglary. He was held in custody for 52 hours before being taken to a magistrates court and was not allowed a solicitor during the period of his detention even though he had requested one. At the same time C's entire family was arrested. C was questioned on four different occasions. During the first interrogation he admitted to burglary. A social worker was present and said that he wished to instruct the boy to be careful in answering the questions, but he was not allowed by the police to do so and was therefore excluded from subsequent interrogations. The boy was then interrogated in the presence of a woman who was the chairman of a police liaison committee. She only observed the interrogation sessions but did not give any advice to the boy concerning his rights in custody. During the second interrogation session the boy broke down emotionally and started crying. It was then that he began to make statements to the police about his involvement.

The boy was questioned for 15 hours in total. During most of the police questioning he was only wearing a blanket and his underpants. His clothes had been removed for forensic tests. After the boy had been taken to a magistrates court one further interrogation took place during which the boy retracted all his previous admissions. A solicitor was present at the time. The boy was later charged with murder, riot and affray.

After the prosecution opening, the defence submitted that the circumstances of the interrogation rendered the confession unreliable, and that it should be excluded under s.76 of PACE. The judge upheld this submission. He noted that the statements made by C were "fantastical" and "strange" and that the child's interrogators should have noticed that he was "drifting more and more into fantasy". He said: "Unreasonable and unjust burdens were put on the child."

C was acquitted by the jury of all charges.

(v) **Engin Raghip**

Engin Raghip, then aged 19, was arrested on 24th October 1985. He was interrogated on ten occasions over a period of five days. During the interrogations he admitted to throwing stones at the police. On the third day of his detention he was charged with affray and taken before a magistrates court. This was the first occasion on which he spoke to a solicitor. He said that he told the solicitor that he was scared he would get beaten. The magistrate ordered that a solicitor be present during the course of any subsequent police questioning. However, the police ignored this ruling and he continued to be interrogated without a solicitor. During subsequent questioning he told the police that he saw the attack and that he wanted to get near the policeman to hit him with a broomhandle but that he did not touch him because he could not get in the crowd. He signed all but three of the

interrogation records after they had been read over to him by senior police officers. He was not allowed access to his family throughout the period of his detention. He was charged with murder on the basis of his admissions.

At the end of the prosecution's case the defence application to exclude the confession as unreliable was rejected.

Raghip called alibi witnesses in defence. He stated that his previous admissions about having attempted to hit the police officer were untrue, that his admissions were extracted under pressure by the police and that they had threatened him on many occasions. He told the court that when he asked for a solicitor the police officer said he was not going to get one and that he was going "to kick the hell out of me". He also stated that the investigating officers had taken advantage of his illiteracy by making him sign false admissions and that the written statement contained things he had never said. He was convicted of murder, riot and affray and sentenced to life imprisonment.

Raghip applied for leave to appeal against conviction and to admit fresh evidence about his mental age, which a psychiatrist described as between 10 and 11, and about his level of suggestibility. These applications were dismissed by the Court of Appeal on 13 December 1988 on the grounds that the jury had heard Raghip give evidence and it was in as good a position, if not better, than the psychologist to judge how amenable he was to suggestions. The further information would not have affected the jury's verdict, which the Court considered to be safe and satisfactory.

Anthony Mycock (para.3.11)

In May 1983 a Miss Fitzpatrick claimed to have been attacked in the course of a burglary late at night in her home in Manchester. She identified her attacker as having hazel eyes and light hair, being 5ft 7in tall, thin, with a helmet-type tattoo on the base of his thumb and wearing a stud earring. Despite the fact that Mycock had none of the features and, in addition, had both hands and arms heavily tattooed (which she had not noticed) she identified him at a parade some three week after the incident. He was convicted in October 1983 and sentenced to five years imprisonment. The judge did not assess whether the evidence was of good or poor quality. However, he did point out all the discrepancies in the evidence and warned the jury that a mistaken witness can be a convincing one. He directed them that there was no other evidence which supported the identification. JUSTICE arranged an application for leave to appeal to the Court of Appeal, but in December 1984 the Court dismissed the application. It stated:-

> "The learned recorder summed up this case entirely in accordance with the directions given by this court in the case of *Turnbull* (1976) 63 Cr.App.R. 132. Mr. Hornsby for the applicant today has described the summing-up as

impeccable, and we would like both to echo that and to congratulate the Recorder upon it. It could not have been better nor fairer. He gave a clear warning to the jury of the danger of relying upon the identification of a single witness. He told them (and told them forcefully) that a convincing witness can be a mistaken witness. He said that if they found (as they undoubtedly did) that Miss Fitzpatrick was convincing, nevertheless she might still be mistaken. He directed them as to the various factors set out in *Turnbull* which they should take into account in deciding whether or not the identification was a proper one and he went through the description Miss Fitzpatrick had given and the characteristics of the applicant (as he was then the defendant) himself.....

"In the view of this court, recognising as we do the difficulties and dangers inherent in evidence of this sort, those difficulties are overcome by a proper direction to the jury. As I have already said, the direction to this jury was entirely proper. It contained all the necessary elements and the discrepancies were all pointed out to the jury. From then on, it became a matter purely for the jury. The points which Mr. Hornsby has made, forcefully and clearly though he made them, in the judgement of this court, were points entirely for the jury and they were very properly left to the jury. Having considered them, the jury were entitled to convict. We cannot say, therefore, as we are invited to say, that there is anything unsafe or unsatisfactory in this conviction. The application fails and it is dismissed."

After the appeal, further investigations were carried out from which it emerged, *inter alia*, that Miss Fitzpatrick had herself subsequently sold many of the items she claimed had been stolen, and that she had identified someone else, also called Mycock, as the robber shortly after the robbery was alleged to have taken place. This other information, which must have been known to the prosecution, was never disclosed to the defence. The Home Secretary referred the case back to the Court of Appeal because of these discrepancies and Mycock's conviction was quashed in December 1985.

John McGranaghan (para.3.11)

On 21 July 1981 at the Central Criminal Court, after a trial lasting five days, John McGranaghan was convicted of rape, robbery, aggravated burglary and indecent assault and was sentenced to life imprisonment. All the offences involved breaking into the houses of the victims in the early hours of the morning, robbing them and subjecting three of the women residents to frenzied sexual abuse.

In September 1980 an Italian girl was abducted late at night in Chelsea by three or four men, driven to a golf course, and there raped and otherwise abused. The car was traced to McGranaghan, who claimed to have been visiting a mistress at the time; the car had been borrowed by acquaintances. Because of this, he was

suspected of the three Surrey offences. McGranaghan, who had several previous convictions for burglary and receiving, agreed to appear on identification parades, with and without a beard, but his offer to appear clean shaven was not taken up. In the event, each of the three victims, after some hesitation, pointed him out as their attacker. The prosecution case rested on this evidence of identification and the similarity of the facts. All three intrusions took place in the early hours of the morning, and were noisy and clumsy. The intruder wore no mask or disguise and stayed for long periods. He talked continually and told various tales of his origins and family. The sexual abuse which he inflicted on the women followed a pattern of attitude and behaviour which all suggested the same man.

The critical issue in the case was the reliability of the identification evidence, and the manner with which it was dealt at the trial and the appeal. Although the intruder spent a considerable period of time with each of his victims, he took great care to avoid his face being seen so that identification had to be based on speech as well as visual impression. The intruder spent several hours altogether in the three houses. He talked for much of the time and five witnesses reported much of what he said. Most attempted to name his origin and some to characterise his voice. Two claimed to recognise the intruder's voice at the ID parade when McGranaghan repeated the words "Four o'clock. Information is requested as to notes and currency" after the Officiating Inspector.

McGranaghan is a native of Fisherrow in Scotland, and his accent is conspicuously Midlothian. The other marked characteristic of his speech is a pronounced stutter. When speaking at normal speed he is difficult to comprehend, as both his solicitors and others have found. As a result of his studies and interviews, a speech impediment expert concluded that he had no doubt that McGranaghan was a severe stutterer, and he did not think that McGranaghan could have been fluent on three separate occasions for over an hour, but none of the five witnesses noticed any speech impediment in the intruder. Only one witness mentioned a momentary difficulty in understanding the intruder, which, in her initial statement to the police, she attributed to his Irish accent. As a result of further questioning by the police, she later changed this to a Scottish accent.

McGranaghan several times requested that expert evidence be brought concerning the stutter, but his trial counsel decided not to call any such evidence, apparently on the ground that the speech impediment would become clear when McGranaghan was in the witness box. However, the nature of his questioning was such that only short answers were called for and the jury did not hear him in extended speech, so as to enable them to judge whether it would have been possible for anyone to notice McGranaghan's stutter. The defence also failed to call other important evidence regarding the identifications and the psycho-sexual differences between the intruder and McGranaghan.

The striking similarities in the behaviour of the intruder conduced strongly to the belief that he was the same man; however, they did *not*, of themselves, in any way

point to McGranaghan as being the intruder. In each case the evidence identifying McGranaghan as the intruder was poor:

(i) First intrusion

An analysis of the first victim's statements and evidence showed that what she could have seen, and what she actually saw, of the intruder were fleeting glimpses in the dark of no more than a few seconds duration. Her identification was some two years and four months after the incident.

(ii) Second intrusion

An analysis of the second victim's statements and evidence showed that she only saw the intruder for two brief moments which lasted seconds. Her identification was made nine months after the incident.

(iii) Third intrusion

The third victim had had the opportunity of seeing the intruder clearly as the bedside light was switched on throughout the incident. However, in her statement immediately afterwards, she said that she only saw his face briefly. She did not look at him and had kept her eyes shut. She described various physical features and thought she might know him again if she saw or heard him. Her one sight of him could also not have lasted more than a few seconds duration. Her identification took place some four months after the incident.

The visual identifications of all three victims amounted to brief glances; in two cases, almost in the dark. However, at the trial, they all claimed to recall features which had not figured in the initial statements. Other features were not noticed (such as a beard) which ought to have been if a good sighting had been made. The voice identifications were in each of the two cases concerned based on one short sentence, but no one had noticed any stutter. A considerable time had elapsed between the incidents and the identifications. In all three cases, the identification evidence was exactly of that kind which needed (*per* Devlin) to be independently corroborated if it was to be safely relied upon to found a conviction.

The trial: The trial judge gave the usual *Turnbull* warning, but he failed to make any decision on whether the evidence was poor, and if so, to identify other evidence which might support the identifications. He also failed to point out to the jury critical differences between the witnesses' initial statements and the evidence they gave at the trial, as well as attributing a more positive identification to one victim than she had in fact made. He also mistakenly directed the jury that the similar fact evidence would support the identifications, despite the fact than none of the similar facts pointed to the intruder being McGranaghan.

The appeal: In June 1982, the Court of Appeal rejected these criticisms. It ignored the judge's mistakes about the evidence and failed to deal with the discrepancies in evidence or the mistaken use of similar facts to support the identifications.

Douglas Blastland (1986) AC 41 (para.3.42)

In October 1983 Blastland was convicted of the buggery and murder of a 12-year-old boy. He admitted some homosexual activity on the night of the death but denied buggery and murder. Another man, Mark, had come under suspicion after the boy's death. Blastland had seen him near the scene around about the time of death. Formal admissions were made by the prosecution about this other investigation, which were put before the jury. However, the jury was not told that Mark had, in a series of interviews with the police, successively made and withdrawn admissions of his own guilt of the offences of which Blastland was convicted. Applications by the defence to call the interviewing officers and Mark himself, and treat him as a hostile witness, were rejected by the trial judge. Other witnesses had been given details by Mark about the murder (but he had not told them that he was himself the murderer), and the judge likewise rejected applications to call them on the ground that their evidence of what Mark said to them was hearsay. The House of Lords refused to grant leave to appeal on the question of the inadmissibility of the police interviews and upheld the inadmissibility of the statements of the other witnesses on the ground that what Mark had said to the other witnesses about the murder would not have revealed the source of his knowledge, and would simply amount to speculation.

Steven Gayle (para.3.42)

Steven Gayle was convicted on one count of murder on 16 October 1985 at Birmingham Crown Court. The charge related to the attack and subsequent death of David Harris on the morning of 29 March 1984. Harris, the licensee of a public house in Birmingham, was walking to Barclays Bank to pay in the pub's takings of £1550. Before he reached the bank, he was attacked by a black man inside the entrance to the bank's car park, stabbed some 23 times and died of a massive blood loss. Several witnesses saw the attack from various vantage points, but only one, Christopher Evitt, saw it close up. In April 1984, one Derek Gordon was charged with the murder and committed for trial. The evidence against him was based on an admission he had made to a friend shortly after the attack, and subsequent confession he made to the police while in their custody. The alibi Gordon had originally given to the police was proved to be false, and he could not subsequently account for his whereabouts on that morning. Knives and items of clothing were taken from his house, but forensic tests based on them were inconclusive. Gordon

was put onto an identity parade but was not picked out by any of the witnesses.

Shortly before Gordon was due to stand trial in December 1984, Julie Smedley gave evidence to the police that indicated that Gayle was the attacker. The substance of her allegation was that, on the morning in question, she had seen Gayle with blood on his hands and arms getting into a car belonging to, and being driven by, Rewald Burke. Burke and Smedley shared a flat, together with Burke's brother, Walter Burke. Smedley said that in the afternoon Gayle returned and told her and others in the flat that he had knifed a man that morning.

Rewald Burke gave evidence that Gayle had stopped him in his car that morning. Once Gayle had entered the car he admitted to Burke that he had just "juked" a person, which Burke took to mean "knifed". Burke did not mention any blood on Gayle until his second statement to the police, made on the same day. Walter Burke failed to confirm that Gayle returned to the flat in the afternoon and that he had admitted the stabbing, as Smedley had alleged. However, he did give evidence that on the evening after the attack Gayle admitted to him that he had stabbed a man that morning. This evidence was rebutted by evidence that Gayle was clearly elsewhere that evening.

Smedley, when she made these allegations to the police, was facing charges relating to certain cheque offences and was a known prostitute. Rewald Burke, by his own admission, knew Gordon.

As a result of this evidence, the police made enquiries into Gayle's whereabouts, and ultimately he surrendered himself to the police. He was transferred to Steelhouse police station by police car and it was alleged at the trial that en route he confessed to the stabbing, showing the police the scene of the crime. Once at the station, he was interviewed and he admitted the stabbing. These interviews were taped. The next day, he retracted his confession, stating that he had made up the story through what he had heard on the television and the radio. In these admissions Gayle strongly maintained that he had stabbed the victim only once, and that the motive for his attack was anger at the victim's behaviour towards him. He denied any knowledge of the victim's possession of the pub takings. However, Evitt clearly states that the attacker tried to take the takings bag away from Harris and kept on stabbing him when he refused to give it up.

There was no forensic science evidence against Gayle and no witness identified him in or out of court as the attacker. The prosecution case was based entirely on the confessions and the evidence of Smedley and Burke.

The defence case was that the confessions were unreliable and therefore should not be put to the jury. To this end, the defence asked for leave to cross-examine police witnesses about the arrest and confessions made to them by Gordon, with a view to showing that Gayle's confessions, in all the circumstances of the case, might also be as unreliable as that made by Gordon. The judge refused permission on the ground

that what Gordon said was inadmissible as hearsay. The Court of Appeal refused leave to appeal.

Martin Foran (para. 4.24)

In October 1977 Foran was arrested and charged with two burglaries and aggravated robbery. He was alleged to have made a detailed confession to the robbery of a jewellery shop ("the Rice robbery") and named an accomplice, a West Indian called Campbell. Foran denied having made the confession. In April 1978 Campbell was arrested and pleaded guilty to a series of burglaries. On being told that Foran had implicated him in the Rice robbery, Campbell implicated Foran in two other burglaries, whose victims were a Mr. Apechis and a Mr. Trikam. The police visited Foran in prison, read the statement to him and said that he assented to it. He strongly denied this. In June 1978 Foran was convicted of all three offences and sentenced to 10 years imprisonment. At the trial, Campbell did not give evidence but his statement was read to the Jury. The prosection did not call Mr. Apechis or Mr. Trikam, and defence counsel allowed their statements to be read without comment. In these, Apechis had described a white man who bore little resemblance to Foran, and Trikam described a white man with whom he had grappled, whose face was covered but who was much smaller than Foran. These victims were traced by JUSTICE after the trial. On being shown a photograph of Foran, Apechis said he was not the robber. Trikam said he knew Foran well, and the robber was not him. Statements were also obtained from two prisoners to whom Campbell was alleged to have said that he had falsely given Foran's name to the police at their instigation.

At the hearing in the Court of Appeal in March 1980, the Court refused leave to call Apechis and Trikam on the ground that they could have been called by the defence at the trial and there was no reasonable excuse for not having done so. The Court was later persuaded, *de bene esse,* to allow Mr. Apechis into Court and he was asked by the Presiding Judge if the man in the dock (Foran) was the man who had robbed him. He said it was not. Despite this, the Court dismissed the application for leave to appeal on the ground that this was not an identification case but a confession case (i.e. Foran's assent to Campbell's statement).

David Cooper and Michael McMahon (para.4.29)

Patrick Murphy, David Cooper and Michael McMahon were convicted of the murder of a Luton sub-postmaster in 1969 and sentenced to life imprisonment. Their defence was based on alibis. The chief prosecution witness was a man called Matthews who had been charged with the murder but turned Queen's evidence. He claimed that he had accompanied the three men to Luton for an innocent purpose. The case turned on his credibility. On 10th September 1969, Matthews and three

other men drove from London in three cars to rob a post office in Luton. They failed but one shot dead the sub-postmaster. Matthews' car was identified and he was arrested in October 1969. He lied about getting rid of his car before 10th September and set up a false alibi. When these lies were exposed, he made a statement that he had been persuaded to take his car to Luton by a man he knew as "John". He had never met the other two men before. At Luton two of the cars were parked in the station car park where he stayed; the other three men went off in the third car and returned later saying that a man had been shot. An appeal against conviction was dismissed. In December 1972, the Home Secretary was persuaded to refer the case back to the Court of Appeal by fresh evidence about an alibi in the case of Murphy, but he refused to refer back the cases of Cooper and McMahon. The Court of Appeal quashed Murphy's conviction. Another Home Secretary was then persuaded to refer back the cases of Cooper and McMahon on the ground that the quashing of Murphy's conviction raised doubts about the reliability of Matthews' evidence concerning them.

The Court refused leave for Matthews to be re-examined and dismissed the appeal. Further alibi witnesses were found for Cooper, and the Home Secretary referred the case back yet again in April 1976, specifically inviting the Court to consider the credibility of Matthews. He was examined on this occasion, as were several other witnesses. Matthews was shown to have lied on several points, but nevertheless the Court dismissed the appeals on the grounds that his evidence in respect of Cooper and McMahon was credible. An unprecedented fourth reference of the case to the Court was made by the Home Secretary in respect of yet further alibi witnesses relating to McMahon. On this occasion, the Court dismissed the appeal without hearing argument from counsel, on the grounds that the fresh evidence was not credible. By this stage, of course, the evidence relied on against Cooper and McMahon was considerably different from that advanced at the trial. Apart from JUSTICE, several influential voices added their disquiet, including Lord Devlin and Ludovic Kennedy, and eventually the Home Secretary released the two men by remitting the rest of their sentences in June 1980.

APPENDIX TWO

The names in this transcript have been changed to ensure anonymity.

UNDER THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1975.

as amended by the

CRIMINAL JUSTICE (SCOTLAND) ACT 1980,

and relative Act of Adjournal

TRANSCRIPT OF PROCEEDINGS AT JUDICIAL EXAMINATION WITHIN THE SHERIFF COURT OF ABERDEEN AT ABERDEEN

RELATING TO

the questions asked and answers given, including declining to answer, under Section 20A

in the Petition of

Procurator Fiscal, Aberdeen against JAMES STUART

DATE:	10 April 1988
SHERIFF:	A Scott, Esq
NAME OF ACCUSED APPEARING:	JAMES STUART
FOR THE PETITIONER:	Mr M Church, Procurator Fiscal Depute
FOR THE ACCUSED:	Mr J McTavish, Solicitor.
SHERIFF CLERK:	Miss J McCloud, Sheriff Clerk Depute

Sheriff: Are you James Stuart?
Accused: I am.
Sheriff: Mr Stuart, Mr Church, the Procurator Fiscal here, is going to ask

you some questions, but before he does so there are certain things that I have to tell you. The first thing is that you are not obliged to answer all or any of these questions but if you do your answers will be recorded and may be used in evidence at any trial which takes place later. Do you understand that?

Accused: Yes I understand that.

Sheriff: The second thing is before you decide what you want to do about any question you are entitled to consult with Mr McTavish about it. Do you understand that?

Accused: Yes I understand.

Sheriff: The third thing is that should it happen at any trial arising out of these matters later on, you or any witness on your behalf should say something in evidence that you could have said today in reply to a question, but didn't, then comments might be made to the Jury by the Judge or the Prosecutor or any other Lawyer involved in the case and that comment might be against your interests. Do you understand what I mean by that?

Accused: I understand that yes.

Sheriff: Alright. If you do want to say anything would you please try and speak loudly and not too quickly?

Accused: Yes.

Fiscal: Thank you M'Lord.

Fiscal: Is your full name James Stuart?

Accused: Yes.

Fiscal: Is your date of birth the 19th of July 1956?

Accused: Yes.

Fiscal: What is your usual address?

Accused: 10 South Street.

Fiscal: Is that in Camberwell in London?

Accused: Yes.

Fiscal: Now have you received a copy of the Petition containing a charge against you?

Accused: I have.

Fiscal: Have you read the charge?

Accused: I have.

Fiscal: Do you understand its terms?

Accused: Yes.

Fiscal: The allegation against you, Mr Stuart, is that on the 26th of March this year, a couple of weeks ago, in the house at 40 James Road, Aberdeen, that you were concerned in supplying to other persons a controlled drug namely Diamorphine also known as Heroin contrary to Section 4(3) (b) of the Misuse of Drugs Act. Do you deny that charge?

Accused: Yes.

Fiscal: Is there any explanation or comment you want to make in respect of the charge?

Accused: The only connection that I had at 40 James Road is my brother's house.

Fiscal: What is the name of your brother?

Accused: Bruce Stuart

Fiscal: Do you deny on the 26th of March being in the house of your brother at 40 James Road?

Accused: I don't deny being there on the 26th of March.

Fiscal: Do you deny that there was at the time in the house any Diamorphine or Heroin?

Accused: Yes I deny it, there was no drugs what so ever.

Fiscal: It's open to you of course at this stage to blame someone else for committing this offence, if you say it was someone other than you. Do you wish to do that?

Accused: I do not.

Fiscal: Do you wish to say at this time what your purpose was in being in your brother's house on that date?

Accused: Yes I do. I came up from London when my brother was arrested and went to his house, his house was completely wrecked. I went there to try and tidy it up as best as possible because he's got several Alsatians and things like that and there was no one there what so ever to take care of them, and that was the only concern what so ever I had at that address.

Fiscal: When you went to that house on 26th March were you alone there?

Accused: No I was not.

Fiscal: Was there anyone else with you?

Accused: Yes.

Fiscal: Do you wish to say who?

Accused: Yes. There was a man that works with my brother in the video shop.

Fiscal: Who is that?

Accused: Someone called Hamish I don't know his second name.

Fiscal: Have you any idea where he stays?

Accused: I don't know, he used to live in a caravan site other than that I don't know.

Fiscal: Whereabouts is the video shop?

Accused: It's, I think it's Parkhead.

Fiscal: Was anyone else there apart from this person you have mentioned?

Accused: His girlfriend was there.

Fiscal: Do you know her name?

Accused: I don't know her name at all, Liz, that's all I know.
Fiscal: Anyone else?
Accused: Another man called William Johns.
Fiscal: Do you know where he stays?
Accused: I couldn't tell you his address, I don't know his address.
Fiscal: Are these people friends of your brother?
Accused: Friends of my brother yes.
Fiscal: Was there anyone else there apart from these 3?
Accused: No that was all.
Fiscal: Is there anything else you want to say about you being in the house of your brother on 26th March?
Accused: Not really no.
Fiscal: Now have you today received another piece of paper containing remarks you are alleged to have made to police officers investigating this matter, I'm just asking you if you've received the piece of paper?
Accused: Yes I've got that yes.
Fiscal: The first remark is alleged to have been made by you on 2nd April at London Road Police Office to Detective Sergeant Smith and Detective Constable Jones. It is alleged you said "Its okay I was only going to say that me and Bill will have to sort something out. I can't let Jane get done for this". Do you deny saying that?
Accused: I do deny saying that.
Fiscal: Do you remember if you said anything to the police officers?
Accused: I didn't say anything what so ever.
Fiscal: The second remark is alleged to have been made on 2nd April 1988 in John Street, Aberdeen, to Detective Sergeant Smith and Detective Constable Jones and Detective Constable Brown. It is as follows "I was taking them to London as you can't buy them there". Did you say that?
Accused: Yes these were askit powders that I purchased in Aberdeen, you can't buy them in London.
Fiscal: Do you wish to say what quantity of askit powders you purchased?
Accused: Six packets.
Fiscal: Is there anything else you want to add?
Accused: No that's all.
Fiscal: Thank you. I have no further questions M'Lord.
Defence: No questions M'Lord.
Sheriff: That's all thank you.

I hereby certify that the foregoing transcript is a complete and accurate record, as provided for in paragraphs 2(7) and 2(8) of the Act of Adjournal (Procedures under

Criminal Justice (Scotland) Act 1980, No 4) 1981, of all questions to and answers by the said JAMES STUART in examination.

signed ....E. Smith.....

(Shorthand Typist)

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