

How the Presumption of Innocence Renders the Innocent Vulnerable to Wrongful Convictions

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This article argues, contrary to a straightforward reading, that the presumption of innocence and accompanying principles - the burden of proof on the prosecution to prove its case beyond a reasonable doubt - acts in reality against the interests of those who might be innocent at every stage of the criminal justice process. This is because the 'presumption', in effect, renders suspects of crime passive and generally inactive whilst the 'burden' places pressure on the police and prosecution to chip away at the presumed innocent status and construct cases that might obtain a conviction, rendering innocent victims vulnerable to wrongful convictions. This signals that the presumption of innocence needs to be understood in terms of the distinction between theory and reality. As it currently works in practise the presumption does not protect against wrongful convictions as is widely supposed. In fact, it can actually facilitate them. Alternatively, reflecting on the investigative approach of the University of Bristol Innocence Project, it is argued that the innocent will be better protected against wrongful conviction only when all resources and efforts are orientated towards subjecting the evidence claimed to indicate guilt to critical interrogation to see if it can be substantiated.

I - Introduction

The Presumption of Innocence (P.o.I.) is a long standing principle at the heart of the criminal justice system in England and Wales that can be traced to the 18th Century.¹ The right for those accused of crimes to be presumed innocent is enshrined in the Universal Declaration of Human Rights,² the European Convention on Human Rights³ and is enacted domestically in the U.K. by the *Human Rights Act 1998*.

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¹ F. Quintard-Morenas, "The Presumption of Innocence in the French and Anglo-American Legal Traditions" (2010) 58(1) *The American Journal of Comparative Law* 107.

² Article 11(1) states: "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

³ Article 6(2) states: "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

In theory, the P.o.I. requires that the criminal justice system is biased in favour of presuming that suspects of crime or defendants in criminal trials did not commit the offence. It places the burden firmly on the State (Crown) to prove guilt. The threshold of evidential proof that an accused person committed the alleged criminal offence is set high as evidence must be beyond a reasonable doubt.⁴ The overriding aim is an attempt to protect innocent people from being convicted even at the expense of guilty offenders escaping conviction for their crimes.⁵

Contrary to this, this article analyses key stages of the operations of the P.o.I. in practice, highlighting the need for a clear distinction between the P.o.I. in theory and how it operates in the context of the realities of an adversarial criminal justice system. It argues that the presumption of innocence and the burden of proof on the prosecution to prove its case beyond a reasonable doubt act in reality against the interests of those who might be innocent at every stage of the criminal justice process. This is because the ‘presumption,’ in effect, renders suspects of crime passive, which simultaneously justifies minimal resources to the defence, whilst the ‘burden’ places pressure on, and directs the bulk of the resources to, the police and prosecution to chip away at the presumed innocent status and construct cases from only incriminating evidence that might obtain a conviction, rendering innocent victims vulnerable to wrongful convictions. As a result, the defence side of the adversarial equation, widely thought to be the key safeguard against wrongful convictions, is largely ineffectual as it is resource poor and reliant on police and prosecution evidence that is not suitable for defending against cases constructed from such evidence. Political discourses on the need to be ‘tough on crime’ assist further in overcoming the apparent resistance of the P.o.I. by facilitating the creation of legislation that removes safeguards against wrongful convictions so that criminal convictions are easier to obtain.

Structured into four parts, the first three parts look critically at the key stages of the criminal justice process from the initial investigation by the police, the trial process and the

⁴ In *Woolmington v. The DPP* [1935] A.C. 462 at 481-482, Lord Sankey famously described the burden on the prosecution to prove the guilt of the accused beyond a reasonable doubt as a ‘golden thread’ that ran through the common law of England.

⁵ As expressed in Sir William Blackstone’s formulation: “[i]t is better that ten guilty persons escape than that one innocent suffer.” See W. Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-1769).

role of the prosecution in attempting to overcome the (theoretical) burden presented by the P.o.I., and the criminal appeal and post-appeal stages where alleged innocent victims of wrongful convictions seek to clear their names. Finally, the article reflects on the investigative approach of the University of Bristol Innocence Project (U.o.B.I.P.) that seeks to determine if claims of innocence by alleged victims of wrongful convictions are valid. It is concluded that the innocent will be better protected against wrongful conviction only when all resources and efforts are orientated towards subjecting the evidence claimed to indicate guilt to critical interrogation to see if it can be substantiated.

II - Police Investigation Stage

Critical analyses of the role of the police in causing wrongful convictions⁶ in England and Wales have tended to focus on established cases of successful appeal against criminal conviction that demonstrate flagrant violations of the principles enshrined in the P.o.I. This has generated a list of notorious cases of wrongful conviction caused by police misconduct. For instance, it is well documented that the Guildford Four⁷ and the Birmingham Six⁸ were tortured into making false confessions for Irish Republican Army (I.R.A.) bombings in England that killed 26 people between them and injured hundreds more; Paul Blackburn spent 25 years in prison from the age of 15 when he was pressured by the police to sign a 'confession' that was later proven to be entirely fabricated;⁹ Keith Twitchell spent 13 years in prison following a 'confession' for his alleged part in an armed raid on a local factory in which a security guard was killed. At his appeal it was revealed that eight or nine police officers handcuffed his wrists to the back legs of the chair upon which he was sitting. Next a plastic bag was placed over his head and pressed against his nose and mouth. This suffocation procedure was repeated until finally his resolve was broken and he agreed to sign the statement put in front of him;¹⁰ and Reg Dudley and

⁶ The terms 'wrongful conviction' and 'miscarriage of justice' are used synonymously in this article and relate to successful appeals against criminal convictions in the Court of Appeal (Criminal Division), official acknowledgement by the legal system that a conviction was erroneous. See for instance M. Naughton, "Redefining Miscarriages of Justice: a Revived Human Rights Approach to Unearth Subjugated Discourses of Wrongful Criminal Conviction" (2005) 45(2) *British Journal of Criminology* 165; M. Naughton, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg* (Basingstoke, Palgrave Macmillan, 2007) Chapter 1.

⁷ G. Conlon, *Proved Innocent* (London: Hamish Hamilton, 1990).

⁸ C. Mullin, *Error Of Judgement: The Truth About The Birmingham Bombs* (London: Chatto & Windus Ltd., 1986); P.J. Hill & G. Hunt, *Forever Lost, Forever Gone* (London: Bloomsbury Publishing Plc., 1995).

⁹ See L. Naylor, *Judge for Yourself how many are Innocent* (London: Roots Books, 2004) Chapter 5.

¹⁰ *R v. Twitchell* [2000] 1 Cr. App. R. 373.

Robert Maynard each served over 20 years of wrongful imprisonment as a consequence of a 'bargain' between the police and an informant who received a reduced sentence for his part in a robbery in exchange for the necessary evidence for conviction.¹¹

However, the way in which police investigations act against the P.o.I. is not limited to cases where the police clearly breached policing guidelines and codes of conduct that are supposed to act as safeguards against miscarriages of justice, such as the guidelines that currently govern police investigations in England and Wales as contained in the *Police and Criminal Evidence Act 1984*.¹² On the contrary, analyses of recent successful appeals demonstrate how normal and acceptable methods of police investigations fundamentally undermine the P.o.I. at the initial and most crucial stage of the criminal justice process when information is being gathered and cases are being constructed and can lead to wrongful convictions. This is because the role of police investigations in an adversarial system is *not* to find evidence that suspects of crime are innocent but, rather, to treat situations that they are called to as potential crime scenes and seek evidence that incriminates suspects for alleged criminal offences to pass to the Crown Prosecution Service (C.P.S.) to supply a criminal charge.

For instance, in cases such as Sally Clark¹³ and Angela Cannings¹⁴ the police investigations were focused on finding evidence that suggested that they murdered their children rather than on possible innocent explanations for why their children may have died or why children generally die suddenly or in unexplained circumstances, such as Sudden Infant Death Syndrome (S.I.D.S.) or 'cot death' research.¹⁵ For Ken Norman, the police in investigating such cases display 'lynch-mob syndrome' and 'dirty thinking' and come to see unexplained child deaths as possible murders and investigate them as such rather than family tragedies.¹⁶

¹¹ See R. Dudley "We were Victims Too" *The Observer* (7 July 2002); also D. Campbell, "Fall Guys," *The Guardian* (10 July 2002).

¹² *Police and Criminal Evidence Act 1984*, s.66 (London: H.M.S.O., 1985).

¹³ J. Batt, *Stolen Innocence: The Sally Clark Story - A Mother's Fight for Justice* (London: Ebury Press, 2005).

¹⁴ A. Cannings & M. L. Davies, *Against All Odds the Angela Cannings Story: A Mother's Fight to Prove her Innocence* (London: Time Warner Books, 2006).

¹⁵ For instance, B.U.P.A. Factsheet "Cot death and sudden infant death syndrome (S.I.D.S.)" <<http://www.bupa.co.uk/individuals/health-information/directory/c/sids>> (date accessed: 29 December 2010). See, also, J. Sweeney & B. Law, "Gene find casts doubt on double 'cot death' murders," *The Observer* 15 July 2001.

¹⁶ K. Norman, *Lynch - Mob Syndrome* (Elton, Cheshire: Infinity Junction, 2001).

This approach to crime investigation is not unusual or peculiar to the phenomenon of unexplained child deaths but is also apparent in other successful appeal cases too. For instance, Barry George¹⁷ spent seven years in prison for the shooting and murder of television presenter Jill Dando on the doorstep of her Fulham flat in South West London in April 1999 until he was acquitted at a re-trial in August 2008. Having identified him as a 'loner' and 'misfit' who lived near to the crime scene, and therefore a potential suspect in the eyes of the police, the police embarked on what can only be described as a 'suspect-led policing' operation. They actively manufactured an incriminating case against him by trawling through 800 newspapers that George hoarded at his flat and found eight stories relating to Miss Dando, which they then presented as evidence of his 'obsession' with her, thereby establishing a motive.¹⁸ To establish that Barry George was capable of carrying out the shooting, reference was made to him joining the Territorial Army almost 20 years earlier, although he left the following year before completing his basic training, and to gun magazines and books found at his home on firearms also dating from the 1980s.¹⁹

As Eamonn O'Neill has argued,²⁰ we tend to see what we are looking for, what we want to see, and investigations often work from an approach that he termed 'hypothesis in', *i.e.* finding evidence to support a predetermined hypothesis of guilt, rather than from the 'facts out', *i.e.* neutrally assessing the evidence to ascertain what might have occurred. As this relates to the aforementioned cases, instead of objective fact-finding investigations the police actively trawled for (and found) circumstantial evidence to link Barry George to the murder of Jill Dando and accumulated hearsay testimonies to depict Sally Clark and Angela Cannings as 'bad mothers' to support the hypothesis that they had, indeed, killed their own children.

Yet, the way in which the police investigated the deaths of the children of Sally Clark and Angela Cannings and Jill Dando's murder to help to secure Barry George's conviction was entirely legitimate and no police officers did anything contrary to normal,

¹⁷ See *R. v. Barry George* [2007] E.W.C.A. Crim. 2722.

¹⁸ A. Bloxham, "Barry George: I was Stalking Another Woman at Time of Jill Dando Murder," *The Telegraph* (3 August 2008).

¹⁹ S. Lomax, *Trial and Error: The Case of Barry George* (London: Libertarian Alliance, 2003).

²⁰ Compare with E. O'Neill, *Investigative Journalism after Watergate in the U.S.A. and U.K.: A Comparative Study in Professional Practice* (Unpublished Ph.D. Thesis, University of Strathclyde, 2010) 6.

routine policing: they did not put guns into people's mouths or beat them up for confessions (as in the cases of the Guildford Four and the Birmingham Six); they did not put plastic bags over their heads (as in the case of Keith Twitchell); they did not extract coerced confessions from vulnerable children (as in the case of Paul Blackburn); and they did not do deals with criminals to obtain incriminating testimonies against suspects (as in the cases of Dudley and Maynard). Nonetheless, such methods can be conceived as fundamentally against the rationale of the P.o.I. as the working hypothesis was to presume guilt at the beginning of the process and the entire investigation was focused on constructing a case against the suspects to substantiate (prove) that hypothesis.

III - Trial Stage

Prosecutors, too, have been implicated in causing miscarriages of justice in England and Wales, most notably in cases such as Judith Ward,²¹ Johnny Kamara²² and the M25 Three²³ where evidence favourable to the defence case was not disclosed in the interests of circumventing the burden of proof placed on them by the P.o.I. and securing the convictions. The burden placed on the prosecution by the P.o.I. seems at odds with the adversarial tension with the defence and the wish to win cases can take precedence over the need to ensure justice.²⁴ Indeed, a burden is generally not a good thing. It is defined by the Oxford English Dictionary as “a load, typically a heavy one,” “a duty or misfortune that causes worry, hardship or distress.”²⁵

To ease the ‘misfortune’ on the prosecution to thoroughly prove its case, a legislative framework favourable to facilitate obtaining convictions can be conceived to have been created in response to the supposed obstacles of the P.o.I., bolstered by political discourses calling for statutory changes to increase criminal convictions.²⁶ For instance, the *Criminal*

²¹ J. Ward, *Ambushed: My Story* (London: Vermilion, 1993).

²² *R. v. John Kamara* [2000] E.W.C.A. Crim. 37.

²³ *R. v Rowe, Davis and Johnson* [2001] 1 Cr. App. R. 115.

²⁴ For the classic statement see M. McConville, A. Sanders & R. Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (London: Routledge, 1993).

²⁵ Oxford Dictionaries Online <<http://oxforddictionaries.com>> (date accessed: 23 December 2010).

²⁶ A dominant discourse over the last decade has been the need to ‘rebalance’ the criminal justice system from start to finish as, in the words of the then Prime Minister, Tony Blair, “... it's perhaps the biggest miscarriage of justice in today's system when the guilty walk away unpunished” (see, T. Blair, “Prime Minister's speech on ‘Re-balancing of criminal justice system’” 18 June 2002<<http://www.pm.gov.uk/output/Page1717.asp>> (date accessed: 29 December 2010). This led to a raft of reforms aimed at reforming a 19th century criminal justice

Justice and Public Order Act 1994 eroded the historical safeguard of ‘the right to silence’ by providing statutory rules under which adverse inferences of guilt may be drawn from a suspect or defendant’s silence to police or prosecution questioning.²⁷ Likewise, long-standing safeguards against miscarriages of justice were removed by the *Criminal Justice Act 2003* such as the introduction of ‘hearsay’ evidence, where a witness testifies that s/he heard a matter stated that s/he believes to be true and the person who is claimed to have made the statement is not present in the court proceedings to give evidence directly,²⁸ and ‘bad character’ evidence, which can include not only the previous convictions of the defendant but also previous misconduct other than misconduct relating to the offence(s) charged.²⁹

In this context, it is clear that prosecutors do not need direct evidence, such as fingerprints, D.N.A., C.C.T.V., eyewitness identification, confessions, and so on, linking defendants with alleged crimes to obtain convictions. The rules give an upper hand to the prosecution in the adversarial contest, allowing highly circumstantial and tenuous evidence to be legally admissible³⁰ and sufficient to be put before a jury and for convictions to be obtained.

In theory, the defendant in a criminal trial has a defence team to fight their corner, representing what might be believed to be the greatest safeguard against innocent people being convicted. Yet, the evidence presented in a criminal trial is largely a product of the police investigation to prove the suspect, now defendant, guilty of an alleged crime. Knowledge produced by the police investigatory method seeking only to find and present evidence of possible guilt does not lend itself to defence attempts to prove innocence.³¹ It is simply not fit for defence purpose.

system not fit for 21st century crime problems. For a critical discussion, see M. Naughton, “‘Evidence-based-policy’ and the Government of the Criminal Justice System – Only if the Evidence Fits!” (2005) 25(1) *Critical Social Policy* 47.

²⁷ *Criminal Justice and Public Order Act 1994*, ss. 34–38.

²⁸ *Criminal Justice Act 2003*, ss. 114–124.

²⁹ See *ibid.*, ss. 98–101.

³⁰ This accounts for why police investigations hunt for such evidence to incriminate suspects and assist the prosecution to obtaining convictions in the absence of any direct evidence linking them with the crimes that they are alleged to have committed.

³¹ For a detailed explanation see A. Green, *Power, Resistance, Knowledge: The Epistemology of Policing* (Sheffield: Midwinter and Oliphant, 2008).

In reality, then, the defence in the adversarial process has to work within the agenda, the pre-existing narrative that has been constructed by the evidence collected by the police investigation and presented at trial by the prosecution. This renders the defence at a significant disadvantage. Without the resources to actively investigate cases for positive proof of their client's innocence they can be conceived as trying to make the best of a bad lot, a situation only worsened by the recent major cuts to legal aid provision upon which so many alleged innocent victims of wrongful convictions are reliant.³² In response, defence lawyers strive to achieve the best outcome for their clients by employing strategies such as advising clients to give 'no comment' interviews to the police, despite the adverse inferences that can be drawn, often attempting to counter prosecution evidence at trial with little more than unsupported counter arguments that the evidence presented is not beyond a reasonable doubt and even advising them to plead guilty to receive a reduction in their sentence.³³

Despite this, it is widely believed that the requirement for the prosecution to prove guilt beyond a reasonable doubt sets a high evidential bar, protecting the innocent from being convicted. It is this belief that underpins the theory of the P.o.I., renders suspects of crime passive whilst cases are constructed against them and justifies minimal resources to the defence: the logic seems to be that the suspect/defendant/defence does not need resources when the burden is entirely on the prosecution to prove the case against the defendant.

IV - Criminal Appeal and Post-Appeal Stages

Once convicted, appellants are treated as guilty and the P.o.I. dissipates and is, effectively, reversed. Criminal appeals for serious offences in the Court of Appeal (Criminal Division) (C.A.C.D.) are not concerned with whether appellants are innocent.³⁴ They seek, instead, under the current criminal appeal arrangements, to determine whether convictions are 'unsafe' under the precise terms of the *Criminal Appeal Act 1968*, which will normally

³² The Law Society "Defending Rights: Access to Justice Review" (London: Law Society, 2010).

³³ M. McConville & C. Mirsky, *Jury trials and Plea Bargaining: A True History* (Oxford: Hart Publishing, 2005).

³⁴ Although this article is not concerned with appeals in the Crown Court for criminal convictions given in magistrates' courts it does acknowledge how common they are and their significance to critical analyses of miscarriages of justice. See, M. Naughton, "How Big is the 'Iceberg?': A Zemiological Approach to Quantifying Miscarriages of Justice" (2003) 81 *Radical Statistics* 5; Naughton, *supra* note 6 *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg* at Chapter 2.

only accept new evidence or an argument that was not available at the time of the original trial.³⁵ As such, compelling evidence of innocence available at the time of the original trial may not constitute grounds for appeal. In deciding whether or not a conviction is 'unsafe', the C.A.C.D. will consider a number of issues including any procedural breaches at the pre-trial or trial stages, the correctness of any legal rulings made by the judge in the course of the trial, whether there were any misdirections by the trial judge, and any new evidence not available at the time of the trial that could impact upon the safety of the conviction. If it is decided that the conviction is unsafe, the C.A.C.D. will allow the appeal and quash the conviction.³⁶

Crucially, even successful appeals against criminal convictions for serious criminal offences in the C.A.C.D. do not exonerate alleged innocent victims of wrongful conviction entirely, either in a legal sense or in the eyes of the public. This is evident in the successful appeal judgment of the Bridgewater Four (Patrick Molloy, Jim Robinson, Michael Hickey and Vincent Hickey), widely considered to be innocent of the murder of Carl Bridgewater:³⁷

[t]his Court is not concerned with the guilt or innocence of the appellants, but only with the safety of their convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction.³⁸

This position was reiterated by the C.A.C.D. in the successful appeal of the M25 Three, in which Raphael Rowe, Michael Davis and Randolph Johnson were convicted of a series of robberies and violent attacks just off the M25 motorway near London in December 1988, where Lord Justice Mantell held:

... we are bound to follow the approach set out earlier in this judgment, namely assuming the irregularities which we have identified had not occurred would a reasonable jury have been bound to return verdicts of guilty? In all conscience we cannot say that it would Accordingly we cannot say that any of these convictions is safe. They must be quashed and the appeals allowed For the

³⁵ *Criminal Appeal Act 1968*, s. 23.

³⁶ *Criminal Appeal Act 1968*, s. 2. Section 7 of the Act also provides that the C.A.C.D. has the power to order a re-trial for the case to be heard again at the Crown Court.

³⁷ P. Foot, *Murder at the Farm: Who killed Carl Bridgewater?* (Harmondsworth: Penguin Books, 1986).

³⁸ *R. v. Hickey & Ors* [1997] E.W.C.A. Crim. 2028.

better understanding of those who have listened to this judgment and of those who may report it hereafter this is not a finding of innocence, far from it.³⁹

Such judgments can be seen as failing innocent victims of miscarriages of justice who seek to clear their names by having their convictions overturned in the C.A.C.D. They suggest that victims of wrongful conviction 'got off on a technicality' as successful appeals are not declarations of innocence. This can support lingering doubts about the innocence of victims of miscarriages of justice for as long as their innocence is not proven and can deny them from compensation from the state to redress for the extensive range of social, psychological, physical and financial harm that they and their families can continue to experience long after they have overturned their convictions.⁴⁰

Sion Jenkins, for instance, was convicted in 1998 for the murder of his step-daughter Billie-Jo Jenkins.⁴¹ His first appeal was unsuccessful in 1999 but his second appeal in August 2004 was successful and the C.A.C.D. ordered a retrial, with Sion Jenkins being released on bail. The juries in two subsequent retrials were unable to reach majority verdicts and at the Central Criminal Court in London (Old Bailey). In February 2006, the C.P.S. announced that it would seek no further retrials and Sion Jenkins was officially declared not guilty and acquitted. Sion Jenkins applied for compensation but was refused in August 2010 with a spokesperson from the Ministry of Justice quoted in a B.B.C. News story on the decision as follows: "[t]he Court of Appeal has made clear that, in the court's view, the right test to adopt in deciding whether someone is entitled to compensation is whether they have been shown to be clearly innocent."⁴²

This illustrates how the criminal justice system can take the P.o.I. away from victims of wrongful conviction which is only rarely restored when factual innocence can be

³⁹ *R. v Rowe, Davis and Johnson* [2001] 1 Cr. App. R. 115.

⁴⁰ See M. Naughton, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg supra* note 6 at Chapters 7 & 8; G. Tan, "Structuration Theory and Wrongful Imprisonment: From 'Victimhood' to 'Survivorship'?" [2011] *Critical Criminology: An International Journal* (Forthcoming); A. Grounds, "Psychological Consequences of Wrongful Conviction and Imprisonment" (2004) 46(2) *Canadian Journal of Criminology and Criminal Justice* 165; A. Grounds, "Understanding the Effects of Wrongful Imprisonment" (2005) 32 *Crime and Justice* 1.

⁴¹ See S. Jenkins & B. Woffinden, *The Murder of Billie-Jo* (London: Blake, 2008).

⁴² B.B.C. News "Sion Jenkins fails in compensation bid" 10 August 2010 <<http://www.bbc.co.uk/news/uk-10922487>> (date accessed: 28 December 2010).

established by D.N.A. evidence.⁴³ Yet, the innocence or otherwise of innocent victims of wrongful convictions is not dependent on the real offenders being apprehended. Put simply, they are either innocent or they are not. It is also true that innocent victims can be wrongly convicted of serious offences when no crime has even occurred: for instance, in the cases of Sally Clark and Angela Cannings cited above, if the children did die of unexplained natural causes no crime actually occurred.⁴⁴

Mike O' Brien, one of the so-called Cardiff Newsagent Three,⁴⁵ convicted in 1988 for the murder of Philip Saunders, was so keen to prove his innocence in the eyes of the public that almost ten years after he overturned his conviction in 1999 he took, and passed, a televised lie detector test. However, there are still those that will doubt his innocence and probably will, until such time as the killer of Philip Saunders is brought to justice.⁴⁶

V - The Investigative Approach of the University of Bristol Innocence Project

An alternative approach to police and prosecution case constructions that aim to incriminate and obtain criminal convictions is the investigative method applied by the U.o.B.I.P. to claims of innocence by alleged victims of wrongful convictions that have exhausted the normal appeal processes.

The U.o.B.I.P. works on no strong presumptions as to whether the prisoner maintaining innocence is innocent or guilty. Instead, the starting position for investigations is an acknowledgment that innocent people can be, and are, wrongly convicted,⁴⁷ that legal

⁴³ As in the case of Seán Hodgson convicted in 1982 for the rape and murder of Teresa de Simone who recently overturned his conviction after spending 27 years in prison when D.N.A. testing proved he could not have committed the crime. See S. Laville, "Miscarriage of Justice Victim Served Extra 11 Years due to 'Lost' Evidence," *The Guardian* (19 March 2009).

⁴⁴ The phenomenon of 'convictions for crimes that never occurred' is not limited to mothers convicted for murdering their children who die in unexplained circumstances and can be seen in other established miscarriage of justice cases in which forensic science expert witnesses give unsupported opinions, as they are allowed, on the likely cause of deaths in other areas too. For a discussion see M. Naughton "Why the Failure of the Prison Service and the Parole Board to Acknowledge Wrongful Imprisonment is Untenable" (2005) 44(1) *Howard Journal of Criminal Justice* 1.

⁴⁵ M. O' Brien & G. Lewis, *The Death of Justice* (Ceredigion: Yllofa, 2008).

⁴⁶ See M. Naughton & G. Tan, *Claims of Innocence: An Introduction to Wrongful Convictions and how they Might be Challenged* (Bristol: University of Bristol, 2010).

⁴⁷ For an overview of the key causes of miscarriages of justice in England and Wales see M. Naughton, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg* *supra* note 6 at Chapter 3.

guilt is not synonymous with factual guilt,⁴⁸ and that miscarriages of justice as evidenced by successful appeals against criminal convictions are routine occurrences that occur on a daily basis.⁴⁹ In full concordance with the *raison d'être* of theory of the P.o.I., the 'burden' on the U.o.B.I.P. is to interrogate the evidence that is claimed to prove the guilt of the alleged innocent victim of a wrongful conviction to determine its reliability.⁵⁰ A second strategy is to simultaneously actively attempt to find evidence that may prove the factual innocence of the alleged victim, such as through new D.N.A. testing and other forensic techniques that may or may not have been available at the time of the original trial or appeal.⁵¹

From this approach, the U.o.B.I.P. has assisted with a landmark⁵² successful referral back to the C.A.C.D. by the Criminal Cases Review Commission (C.C.R.C.), the statutory public body that reviews alleged miscarriages of justice.⁵³ In the case of Simon Hall, convicted for the murder of 79-year old Joan Albert in 2003, the U.o.B.I.P. made various submissions to the C.C.R.C. that significantly undermined the fibre evidence that was claimed to link him to the crime scene.⁵⁴ In addition, and relating to the second simultaneous strategy to seek evidence that may conclusively prove factual innocence, the U.o.B.I.P. investigation found evidence that could potentially exonerate Simon Hall completely. In particular, a witness statement that suggests that the murder weapon (a knife) was in fact stolen during another burglary on the same night that Joan Albert was murdered which Simon Hall could not have committed was found and evidence was also found of the existence of a mixed D.N.A. profile on the handle of the knife which the C.P.S. did not disclose at trial.⁵⁵

⁴⁸ M. Naughton, "Factual Innocence versus Legal Guilt: The Need for a New Pair of Spectacles to view the Problem of Life-Sentenced Prisoners Maintaining Innocence" (2008) 117 *Prison Service Journal* 32.

⁴⁹ Naughton, *supra* note 6 at Chapter 2.

⁵⁰ See, M. Naughton, 'The Importance of Innocence for the Criminal Justice System' in M. Naughton, (ed.) *The Criminal Cases Review Commission: Hope for the Innocent?* (Basingstoke: Palgrave Macmillan, 2009).

⁵¹ For an extensive discussion of this approach see M. Naughton & G. Tan, "The Right to Access D.N.A. Testing by Alleged Innocent Victims of Wrongful Convictions in the U.K.?" (2010) 14(4) *International Journal of Evidence & Proof* 326.

⁵² It is the first case investigated by an innocence project in the U.K. to be referred back to the C.A.C.D. See <<http://www.bristol.ac.uk/law/news/2010/190.html>> (date accessed: 28 December 2010).

⁵³ For information of the role and scope of the C.C.R.C. see <<http://www.ccr.gov.uk>> (date accessed: 28 December 2010). For a series of critical analyses from the perspectives of academics, practitioners, investigative journalists and victim support workers see Naughton, *supra* note 50.

⁵⁴ Submissions available on the U.o.B.I.P. website at <http://www.bris.ac.uk/law/aboutus/law-activities/innocenceproject/newsitems/index.html> (date accessed: 28 December 2010).

⁵⁵ For more information see <<http://www.bris.ac.uk/law/aboutus/law-activities/innocenceproject/newsitems/index.html>> (date accessed: 28 December 2010).

In this sense, the processes of the U.o.B.I.P. can be conceived as the mirror opposite of routine criminal investigations and criminal trials that work counter to the P.o.I. by seeking to obtain convictions by proving guilt. Rather than presuming innocence, rendering the criminal suspect/defendant passive and chipping away at that presumed innocent state by constructing cases that incriminate, all resources and investigatory efforts are directed towards determining whether the claim of innocence is valid.

On occasion,⁵⁶ the evidence that is claimed to prove guilt withstands the critical assaults by the U.o.B.I.P. and evidence that may prove factual innocence cannot be unearthed, leading to the conclusion that the conviction is correct and the person is, indeed, guilty as charged and convicted. However, such instances are not seen as 'failures' by the U.o.B.I.P., which is not against the conviction of the guilty. On the contrary, akin to public enquiries, the U.o.B.I.P. seeks to get to the bottom of claims of innocence, one way or the other, in line with a vision of the interests of justice that fits well with the underpinning ethos of the P.o.I. and with that expressed on the Criminal Justice System website: "[t]he purpose of the Criminal Justice System (C.J.S.) is to deliver justice for all, by convicting the guilty ... while protecting the innocent."⁵⁷

VI - Conclusion

The preceding analysis has emphasised the need to distinguish between the P.o.I. in theory and how it operates in the realities of an adversarial criminal justice system. Contrary to popular belief, in reality the P.o.I. does not protect the innocent from being convicted for crimes that they did not commit as the routine investigative methods of police investigations and prosecutions, aided by legislation that accepts circumstantial and inherently unreliable forms of evidence as legally admissible, do not have to breach lawful procedures to obtain criminal convictions. At the same time, in rendering those accused of crimes passive, the P.o.I. justifies the channelling of resources to the police and prosecution 'side' of the adversarial battle. As a result, criminal defence is largely ineffectual as a safeguard against wrongful conviction as it is resource poor and, therefore, ill-equipped to

⁵⁶ This has so far happened in two of the six cases that the U.o.B.I.P. has investigated.

⁵⁷ Criminal Justice System <http://www.cjsonline.gov.uk/aims_and_objectives> (date accessed: 29 December 2010).

actively construct robust cases for clients who say that they are innocent. This raises the crucial question of how the criminal justice system should operate to truly protect the innocent from wrongful conviction.

In reflecting on the alternative approach of the U.o.B.I.P. to claims of innocence, it seems clear that the way to better protect the innocent from wrongful conviction is to re-orientate the investigatory process of crime control to the pursuit of the truthfulness or otherwise of whether an alleged suspect, in fact, committed the alleged crime. However, overturning wrongful convictions at the post-conviction stage is too late in the process as it cannot erase the harm already caused to victims, their families and wider society in terms of financial costs and diminishing faith in the system. Moreover, overturning convictions because they are unsafe fails to exonerate victims and restore the P.o.I. to victims of wrongful convictions except in exceptional circumstances when D.N.A. proves categorically that victims are factually innocent.

The overall conclusion to be drawn, then, is that wrongful convictions and the harm that they cause need to be prevented from occurring in the first place. This signals an urgent need for reforms along the following lines. First, police investigations and prosecutions need to radically change to take the P.o.I. and the possibility of innocence seriously, rather than orientated towards gaining convictions of suspects and/or defendants who may, in fact, be innocent. Second, changes in legislation are required to reinstate safeguards that have been removed in the interest of obtaining a greater number of convictions and which leave the innocent vulnerable to wrongful conviction, such as the admissibility of hearsay and bad character evidence. Third, as the best form of defence is attack, there needs to be a true equality of arms between defence and prosecution with sufficient resources to enable defence teams to conduct independent investigations prior to trial to determine the reliability of the evidence against their clients and attempt to find evidence that may positively support claims of innocence. Fourth, the criminal appeal system needs to be reformed too, so that is alive to the apparent flaws of the criminal justice system to which the innocent can fall prey, including the possibility that juries make mistakes,⁵⁸ and evidence of innocence must always be allowed to be grounds of appeal

⁵⁸ Although space would not allow for a specific discussion, the role of juries in criminal trials is also crucial when thinking about the P.o.I. As the Report of the Royal Commission on Criminal Justice, for instance,

irrespective of whether it was or could have been made available at the original trial. Finally, the P.o.I. should be restored to all who are able to discredit the evidence that led to a finding of guilt and overturn their convictions in the appeal courts. This is all the more relevant in a jurisdiction that abolished the double jeopardy rule under the *Criminal Justice Act 2003* as if new evidence of guilt emerges successful appellants can be charged and tried again for the same offence.⁵⁹

These would be major changes to the existing criminal justice system. Yet, if the underlying aim of the criminal justice system is to ensure truly that the innocent are not convicted as it is claimed, more heed must be taken of both the letter and the spirit of the P.o.I. and new approaches adopted by the agencies of crime control.

acknowledged, juries can play a part in 'mistaken verdicts'. See, "Royal Commission on Criminal Justice Report" (H.M.S.O.: London, 1993) 3.

⁵⁹ For a discussion see Naughton & Tan, *supra* note 46 at Chapter 13.