

# INQUIRY

THE QUARTERLY NEWSLETTER OF THE INNOCENCE NETWORK UK

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## NOTE FROM THE EDITORS

DR MICHAEL NAUGHTON AND GABE TAN

Firstly, we would like to thank everyone who attended the 6<sup>th</sup> INUK Annual Conference for Innocence Projects on the 25-26 November 2011. It was a resounding success, attended by over 200 staff and students who spent the weekend learning about how to investigate and overturn an alleged wrongful conviction. We would also like to thank the other speakers – Michael O'Brien, Keith Hyatt, Mark George QC, Dr Eamonn O'Neill and John Cooper QC for their generosity in taking the time out of their busy schedules to deliver their respective sessions; Mark Newby, whom, despite being unable to make the conference at the last minute, took the effort to film his talk for the conference attendees. We are also grateful to Jack Adams (Human Rights TV) for filming the Victims' Voices session; Dr Damian Carney and Colleen Smith for chairing the sessions on the Saturday afternoon. Finally, we would like to thank Norton Rose LLP for hosting the conference, particularly Patrick Farrell (Partner) and Miranda Joseph (Associate), who is a fellow University of Bristol alumnus and one of the founding members of the University of Bristol Innocence Project.

Our annual conferences act as a platform for those who survived the ordeal of a wrongful conviction and incarceration to have their voices heard; and, where the wealth of knowledge and experience of criminal solicitors and barristers, investigative journalists, academics and experts in the field of wrongful convictions can be communicated and shared. These sessions are vital, both in motivating and



assisting innocence project caseworkers in their efforts to make progress with their investigations as they strive to achieve justice for the wrongly convicted.

To enable the valuable information and knowledge shared by the speakers at this year's conference to reach a wider audience, this edition of INQUIRY will focus on the proceedings of the conference. It will include a feature article by INQUIRY's editorial assistant, Laura Tomlinson, on Keith Hyatt and Michael O'Brien who had their convictions overturned following a wrongful imprisonment; excerpts from the practical sessions by Mark George QC and Mark Newby and a report on the rest of the sessions at the conference by Lianne Edwards, a caseworker with the University of Bristol Innocence Project.

We hope that INQUIRY readers will find this edition useful in enhancing their understanding of the causes and consequences of wrongful convictions, the legal barriers that need to be overcome to overturn them, and gain practical tips on how to investigate a claim of innocence.

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## VICTIMS' VOICES

BY LAURA TOMLINSON

At the INUK conference on 25 November 2011 the assembled audience heard two harrowing stories of miscarriage of justice from two victims of the criminal justice system, Keith Hyatt and Michael O'Brien. Though the English judicial system is often held up around the world as a paragon of virtue, an example of how best to do it, it has been proved time and again that we can still get it wrong. There is a fundamental flaw in a system which repeatedly locks up people who did not commit the crime they were convicted for. Juries do sometimes get it wrong, but there is apathy within the judiciary towards overturning convictions. The burden of proof on appeals is so high that very few innocent victims of a wrongful conviction manage to get their convictions quashed.

The impact of these wrongful convictions on the innocent people sent to prison is immense. Both Keith and Michael spoke about the ongoing mental difficulties both have struggled with since being freed from prison. Michael told me about days when he was unable to get out of bed because of the difficulties he faces dealing with his Post Traumatic Stress Disorder. Keith spoke about the days and weeks when he is unable to leave the house because of the severe depression he battles with on a daily basis and he has not been able to work since leaving prison. The lives of the people around those wrongly convicted of crimes are affected almost as much as those falsely sent to prison. The impact of the accusations and prison sentences on Keith and Michael's relationships was dramatic, ending a marriage in Michael's case and bringing such strain on Keith's relationship with his ill partner that they split up. Both men were very lucky to have extremely supportive

Both men were very lucky to have extremely supportive parents, families and close friends, who all worked tirelessly to see them freed from prison.

Without this on-going support whilst in prison and after leaving, both men would have suffered even more traumatic experiences than they already had.

Keith Hyatt  
(Right)



### Keith's story:

On the night of 9<sup>th</sup> December 2000 Keith Hyatt was asleep at home after visiting some friends in Tring, Hertfordshire, when he was woken by his friend Barri White looking for a lift home from a nightclub. Barri's girlfriend, Rachel Manning, had gone home alone, but called not long after Barri's arrival. They arranged to meet her outside Blockbuster, but when she didn't arrive, Barri and Keith left messages on her phone and searched the streets until they assumed she must have continued on to her home alone. There was still no sign of Rachel the next day and she was reported missing to the police.

On 12<sup>th</sup> December Keith left for work as a delivery driver, his route that day took him near the golf course where he noticed several police cars and the road shut off. Fearing the worst, Keith spoke to the police to find out if Rachel's had been found and he was asked to come to the police station to give a statement. Soon after this Keith was arrested and it transpired that Rachel had been brutally murdered.

During this time Keith went into deep shock and depression, he remembers very little about this time other than seeing Barri and realising that he had been arrested also. The police questioned

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them both several times, the first time with no solicitor present, and took his clothes and DNA samples. Keith was eventually released without charge.

When Keith got home, his house had been ransacked and his personal diaries had been taken. Since that day Keith has not been back to the house. He stayed with friends and family throughout the trial and following his release from prison. During the period following his arrest Keith felt unable to go out of the house alone.

He was recalled for questioning on several occasions, and questioned about a statement made by an ex-lover Jamie. It was on his evidence that the prosecution based its theory that Rachel had been killed by Keith's steering lock found in his van. Keith is convinced that this statement was coerced from Jamie as it was so technical and Keith rarely used the steering lock so it was unlikely Jamie would have seen it in the van.

Eventually Barri and Keith were charged with Rachel's murder. Keith was transferred to HMP Woodhill where he shared a cell with an elderly deaf, and largely illiterate cell mate. Keith often wrote letters for his cell mate, but in court the prosecution produced a well written statement which they reported was written by this man.

Keith was bailed in March 2001 on very stringent conditions. There were repeated hearings throughout the year where the bail conditions were relaxed and there were hearings to have the charges dismissed, but the police delayed each time, which only exacerbated Keith's mental health problems due to the stress and anxiety.

The trial was eventually set for February 2002. Keith now feels that the outcome was set from the start; the prosecution argued their case strongly despite Keith's defence team repeatedly

relying on their view that there was insufficient evidence to support the prosecution's case. The jury also consisted of local people many of whom would have been well aware of the case from newspaper reports. Keith is convinced that numerous witnesses, including the police, lied in the witness box at his trial. Keith now feels that he naively believed that the criminal justice system would vindicate his innocence.

The forensic evidence against Keith and Barri was based on a rare combination of particles claimed to have been found on Rachel's skirt and on Keith's van seat. The prosecution's forensic expert did not supply the defence with his papers until three days into the trial, giving the defence very little time to review them and develop a strategy to rebut the theories put forward.

When the verdict came, Keith was found not guilty of murder, but guilty of perverting the course of justice and disposing of Rachel's body. He was sent back to HMP Woodhill where he was put on suicide watch. Keith found the psychological toll of prison immense and became institutionalised very quickly, having panic attacks when he was allowed out on home leave to Milton Keynes.

Keith requested his files and began to review them after he was moved to HMP Littlehey and obtained a cell of his own. He was contacted by BBC Rough Justice who took on his case and began its own investigations. Keith wrote over 3000 letters in total about his case, to MPs and Ministers. The BBC's help in freeing Keith was invaluable, especially in the realm of forensics. They obtained DNA evidence where the police had said there was none and countered the prosecution expert at trial by proving that the particles the prosecution relied on could have stayed on Rachel's clothes for up to 60 hours; the forensics expert admitted he had not tested his theories

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before the trial.

This pressure eventually led to Keith's release in 2004 pending an appeal, Barri was still in prison at the time. It took Keith over a year to be able to leave the house alone due to the long lasting effects of prison on his mental health. The BBC Rough Justice programme came out in 2005 following which Keith received thousands of letters in support from the general public. When the appeal hearing eventually came it was difficult for Keith to understand the implications of the judgment; the conviction had been quashed.

Following quashing of their convictions Barri and Keith applied for compensation but their application was rejected on the ground that there was not sufficient evidence of their innocence.

In December 2011, the police formally charged Shahidul Ahmed with Rachel's murder.

### Michael's story:

In 1987 Phillip Saunders' newsagents shop in Cardiff was burgled and Phillip himself was murdered. The police brought all known criminals and their associates in



for questioning about the attack. Though Michael O'Brien himself had no criminal record, he was out on the night of the murder with two associates who did have criminal records, and so he was brought in for questioning alongside Darren Hall and Ellis Sherwood, who together would become known as the Cardiff Newsagent Three.

Michael was arrested on 1<sup>st</sup> November 1987, he was very young, only 19, and had never been in any trouble with the police before so was scared.

Michael didn't know Darren well, but saw clearly that he perhaps had learning difficulties. Even the prosecution's own psychiatric expert had felt that his evidence was unreliable; Darren had previously confessed to other crimes which he had could not have committed as he was in prison at the time. Darren confessed to the murder of Phillip Saunders on 14 different occasions, with 14 different versions of events. The three men who had been arrested were kept in jail for three days without food or water, at times handcuffed to radiators and denied access to a solicitor before eventually being released on bail.

Michael ended up in a psychiatric unit following this extremely traumatic experience, but relied on his belief in the inherent goodness of the police and the criminal justice system. The police followed him on his release from jail, threatened him and the other two men with serious consequences if they did not admit to the crime. When the police eventually arrested Michael they informed his mother, before even interviewing him, that they intended to charge him with murder.

He was again handcuffed to a table for hours with the police taking it in turns to play 'good cop, bad cop' routines. The charge came about after the police allegedly heard a confession between Michael and Ellis when they were in their cells. Michael's life disappeared before him after his conviction in 1988 for murder; his son grew up without a father and his second child, a daughter, died of cot death while he was in prison. Michael's wife eventually left him and his son was looked after by his grandparents in Michael's stead. In his first few years in prison Michael became deeply embroiled in prison life, taking a variety of drugs to numb the pain and anger of his wrongful conviction. After a few years Michael decided to give up the drugs and began to educate himself.



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This education enabled him to start a campaign to get his conviction overturned; he channelled his anger into writing nearly 100 letters per week to journalists and MPs and others who might be able to help his cause. He later studied the law and began to advise other prisoners of their rights and address the prison authorities about their infringements on prisoners' rights. The more Michael stood up to the prison authorities, the more harassment he received. One such occasion led to a disciplinary hearing when he refused to submit to a strip search. Michael took the prison to court over civil rights breaches in relation to this incident and eventually won. At the time it resulted in a transfer to a Frankland prison in Durham. After Durham, Michael was moved to another prison, this time in Bristol, where he suffered a great deal of abuse by prison officers, some of which was carried out in the presence of representatives from human rights organisations such as Liberty and Amnesty.

Following this campaign, journalists and campaign organisations became very interested in his case and began visiting Michael in prison. ITV in particular were investigating a programme focussed on the police officer who had also been in charge of the Cardiff Newsagent Three's case, and highlighted his repeated breaches of the Police and Criminal Evidence Act on a variety of cases.

The BBC was an enormous support to Michael as well, investigating the case in detail and broadcasting a programme in 1996 where Darren Hall was filmed stating that his confession was entirely false. Soon after this the Criminal Cases Review Commission became involved in the case but it took another two years before Michael received bail. Thames Valley Police had been recruited to investigate the actions of the South Wales Police and produced a damning report of their activities highlighting repeated breaches of the Police and

Criminal Evidence Procedure. After his release on bail the campaign increased in strength further, with a BBC Panorama programme on the plight of victims of miscarriages of justice. This all eventually led to a successful appeal and the quashing of the convictions of all three men. They were awarded some of the highest compensation payments ever made at the time of their receipt, and Michael has not stopped there.

Not long after Michael's release his health deteriorated rapidly. Michael continues to suffer from PTSD, extreme mood swings and on some days is unable to get out of bed or leave the house due to the serious mental distress he faces. Michael is still campaigning for other victims of miscarriage of justice and maintains that he is a survivor not a victim.

The psychological impact of wrongful imprisonment and conviction cannot be overestimated. These people will live forever with the memories of their struggles and the stigma attached to their original convictions. Despite their convictions being quashed, there will always remain those members of the public who believe that the accused were guilty of their crimes, despite their convictions being overturned. This puts huge mental pressure on people who are already struggling with serious mental health problems as a result of their experiences. The problem can only be rectified by overhauling the judicial system to ensure that such wrongful convictions do not take place and, when they are discovered, by working quickly to prove innocence and provide better ongoing support for those who have had the misfortune to be a victim of such an injustice. Both Keith and Michael have demonstrated immense courage in dealing with the aftermath of their traumatic experiences, showing others how such an experience can be overcome. I

## WHAT'S IN THE BOX? - A GUIDE TO THE CONTENTS OF THOSE DUSTY BOXES BY MARK GEORGE QC GARDEN COURT NORTH CHAMBERS

***The following is an abridged version of the presentation given by Mark George QC at the 6<sup>th</sup> INUK Annual Conference for Innocence Projects.***

Most case investigations would entail getting your hands dirty, or at least dusty, by taking the lids of those boxes of case papers and having a good rummage around inside. It can however be a bit daunting to find that you have been given a number of large boxes full of bundles of papers with no index and no indication as to what any of it is. The reason they are in this condition is usually because what you have received is what the original solicitors have retrieved from storage where the papers have lain undisturbed since the end of the trial or earlier appeal. There is likely to be a degree of duplication because the boxes may well contain more than one copy of various bundles, probably because counsel's brief, sent back to the solicitor after the trial, has been added to the papers that the solicitor already had.

It is vital that you try to work out just what you have got and then try to distinguish what is helpful from what is not. To some extent this will depend on what issues you have been told to consider.

### **Getting organised**

It is important to get organised at an early stage. I was once told that there was no point in having a document if I could not find it in under 30 seconds! If you imagine yourself in court cross-examining a witness and you suddenly realise that there is a document you want to put to the witness, you need to be able to find it immediately. You will look increasingly silly and you will feel more and more embarrassed the longer you are frantically searching through files whilst the jury, judge and witness are looking at you. If you can't

find the document you will eventually have to give up and you may end up not making a very good point simply because you were not organised enough to be able to find the document you knew you had. You would not want to find yourself in that position later in your career. You should apply the same principle to these cases.

The papers may be in a mess but you are unlikely to be able to make much progress until they have been sorted out. Separate the witness statements from the exhibits. Do the same for the interviews and the unused material. Put these papers in separate files. Draft an index to each file so that you know where things are. Flag up the important documents so they can be found quickly.

Try and work out what may be missing from your papers. See the list below as a guide to what you are likely to need. Check with your client as to whether he has things that you do not have. In particular keep a record of any work you do on the case whether it is researching a specific issue or a visit to the prison to see the client. Keep a log of the work that you do whether in electronic format or hardcopy. Make sure this is available to the whole team. That way you can see at a glance where you are up to. That should save duplication of work and mean that new members of the team don't have to reinvent the wheel!

In general terms you should be able to find the following types of documents

**The bundles of witness statements** – One of the first things the Crown Prosecution Service will do in a case after a person has been charged with a criminal offence is to serve the evidence on which the Crown intends to rely. These are the statements of all the witnesses. This will usually include the statement of the complainant (if alive)

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any eye witnesses, police officers who attend the scene or find exhibits at the scene or who have any dealings with the defendant(s) after arrest such as interviews and charging. If you are dealing with something like a drugs conspiracy there may well be surveillance evidence from police officers who spent time following and observing the movements of member of the gang. Other statements will be from scenes of crime officers (SOCOs) (these days known as Crime Scene Investigators or CSI) who may have found exhibits, taken samples of blood, lifted fingerprints, taken measurements or photographs of the scene. These statements should have a cover sheet with the name of the case on the front sheet and an index. The bundles will also usually be paginated.

In most cases the prosecution will serve further evidence (both statements and exhibits) as the case progresses including after the trial has begun. This further evidence will usually be the scientific or technical evidence which will not have been ready at the time when the bundles of prosecution witnesses were first served. This may cover all manner of expert evidence including physical items such as DNA, blood spatter, footwear and fibres. There may also be experts regarding telephones who will produce reports or experts regarding the contents of computers involved in the case.

It will be important to distinguish the papers that were used in the trial from those that were not and which form what is known as unused material. As a general rule you can take it that if a witness statement is paginated, usually in the bottom right hand corner it was part of the evidence and not just unused material served during the case (see below).

**Bundles of documentary exhibits** – again

these usually have a front cover and an index and should be paginated. What these consist of will often depend on the type of case you are dealing with but it could include reports setting out details about telephone calls between defendants usually in the form of multi-coloured charts, reports of forensic examinations of phones to extract phone numbers, text messages etc. Expert's reports may show which of the defendants' phones was in contact with which other ones at certain times or cell site evidence (evidence which helps to show the location of a mobile phone when a telephone call was made). In certain cases computers associated with the defendants may have been analysed and their contents will have been the subject of a separate report.



Mark George QC

**Interviews** - All interviews with suspects these days are taped recorded and the tapes may be included. You are unlikely to benefit from listening to these as they will have been summarised or recorded in full in the bundles of interviews. Summaries are comparatively short but full transcripts may run to hundreds of pages. There may also be videos or DVDs included. These days the police often record on video or DVD the first statement taken from what is called a 'significant witness', e.g. the victim or an eye witness. The

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police then use these to write up the statement for the witness. Other videos or DVDs may include CCTV recordings or reconstructions by the police. How helpful these will be to you, will depend on the type of case you are dealing with and the likely issues.

There may also be map, plans and bundles of photographs. These may be of the scene, surveillance photographs, injuries to the complainant etc. Also included may be transcripts of 999 calls to the emergency services, medical reports and body charts showing injuries.

**Unused material** – A police investigation of a serious case such as you are likely to get will have generated a huge amount of paperwork or physical exhibits which, in the end, the prosecution decided not to rely upon at trial for various reasons. If it is not relied on as part of the prosecution's case then it becomes 'unused material'. Historically, the failure on the part of the police to disclose evidence which proves the defendant's innocence has been the basis of many wrongful convictions. The cases of Judith Ward and the Guildford 4 are merely a couple of the most well known examples.

The Criminal Procedure and Investigations Act 1996 (CPIA) introduced a statutory framework for the disclosure of such unused material by the prosecution to the defence. The CPIA remains a limited safeguard in so far as this leaves in the hands of the police and prosecuting authority the responsibility for ensuring that all relevant material should be identified and disclosed to the defence. There continue to be examples of flagrant breaches of the duty to disclose and whether such misconduct is discovered is often a matter of chance.

**Schedule of Non-Sensitive Unused Material** - The prosecution will have served a 'schedule of

non-sensitive unused material'. In a major investigation this will run to many pages and include hundreds of items. These are supposed to have been described in a way that makes it easy to tell what they are and whether they are likely to be of value to the defence. Whether any of this unused material has been disclosed to the defence is linked to and will have depended on what the defence have said in the defence statement. Essentially, under sections 3 (initial duty to disclose) and 7A (continuing duty to disclose) of the CPIA, the prosecution is under a duty to disclose any material they have which either undermines the prosecution case or may assist the defence.

You should note that the statutory duty to disclose under the CPIA does not extend to appeals. The wording of s.7A makes it clear that the duty of disclosure ends once a conviction has been recorded. However there is authority at common law for the proposition that the duty of disclosure does in fact continue so long as there are proceedings ongoing including on appeal. This appears to derive from the common law duty on the prosecution to act fairly and assist in the administration of justice. This material is likely to include other witness statements, documentary and physical exhibits, and interviews with suspects not subsequently charged.

I mentioned above that statements of witness that were intended to form part of the prosecution case and to be relied on at trial will normally be paginated. This should apply even to statements that are not served until the trial has actually begun. If you have a bundle of statements which were unused because the prosecution took the view that they did not materially advance the prosecution's case there may even be a cover sheet indicating that they were unused material. If not, however, it is probably safe to assume that any bundle of such statements or any individual statements that are not paginated were not relied



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on and are in fact unused material.

The reason you need to know the difference is simply that if a statement was unused material then it follows that the conviction cannot have been obtained in reliance on it. On the other hand it is possible that there may be something in that statement which might be of assistance to the defence. Either way you need to be able to distinguish material that was relied on by the Crown from that which was not.

In addition in the course of the police investigation there will have been a large number of enquiries made by the police. Whenever the senior investigating officer (SIO) wants anything done by way of an enquiry he will have issued what is called an "Action". This is a request to another officer to carry out some specific task such as to trace and interview a witness. Once the task has been fulfilled the results will also be recorded.

Every person identified to the inquiry is called a 'Nominal' and referred to as, for example, 'N105' or whatever number has been allocated to that name. Since all this information is recorded on the HOLMES (Home Office Large Major Enquiry System) computer system used by the police for major enquiries, using this system of recording allows a search to be made of every time a certain 'Nominal' has been mentioned.

A reply to an Action will usually take the form of a Message (M) or Report (R) or will generate another document (D) and will be recorded on the Unused Schedule itself. In addition there may be other witness statements (S) as well as exhibits (X) or Interviews (Y).

**The prosecution case summary or counsel's opening note** - This will be very helpful to you in working out what the case was about and what it was thought at the time the issues in the trial were going to be.

**Trial transcripts** - There may be official transcripts from the trial, particularly if the case has already previously been appealed. These are likely to include various rulings made by the judge during the trial such as on the admissibility of evidence and on any submissions of no case to answer. There may be some transcripts of the evidence of a particular witness but these are unusual. Most important however will be the transcript of the summing-up by the judge. This, if you have it, is likely to be the best document for helping you to understand the case because it will set out the case that the jury had to decide. By contrast the prosecution summary will have been written long before the trial and may not reflect what the real issues were at the trial itself.

**Defence's trial notes** - You may be lucky enough to have the notes made by the defence solicitor's clerk who will have attended the whole trial and should have made a note of discussions between the client and counsel as well as a note of the evidence. However bearing in mind that these will be in long hand they are inevitably going to be incomplete and probably also hard to decipher. They are however a useful way of checking which witnesses gave evidence, especially if you do not have a transcript of the summing-up.

### What's missing and where might it be?

The original solicitors **should** have kept copies of everything they were served with during the case so in theory none of the above should be missing. If, however, you think they are and you think you ought to have them, the first place to check is with the original solicitors. Failing them ask the client. Many clients do keep a copy of at least a part of their case papers and they may be able to help you locate what you are looking for.

## WHAT'S IN THE BOX

If any of the core papers are missing such as witness statements, documentary exhibits etc. you may be able to get copies from the CPS. The CPS is badly under-funded and under staffed. Those that work for the CPS are over-worked and will often be reluctant to help in a case that they thought had long finished. What level of help and co-operation they will give you may depend on how you approach them. A blunt demand for 2000 pages of documentation will probably not even get a reply and if it does it will be short and terminal! Here is a chance to develop your skills in diplomacy and negotiation. Treat people nicely and it is surprising how they will respond. Tell the CPS you are sorry to have to bother them but you are working on this case and seem to be missing some important documents and ask for their help and you may get somewhere. Always acknowledge that you appreciate they are busy and emphasise the importance of what is at stake. Set out as clearly as you can what it is you want.

If you believe there has been a previous appeal and you do not have the transcripts such as the summing-up you should write to the Registrar of Criminal Appeals at the Royal Courts of Justice, Strand London WC2A. If they have them in their storage they should be prepared to let you have

them.

### Funding

Funding is a perennial problem in criminal appeal work. The legal order (these days called a representation order) granted for the trial will cover the costs of advice on appeal including the drafting of any grounds of appeal. If an appeal has been lodged and either leave to appeal was refused by the Single Judge or if the case got to the Court of Appeal the appeal was dismissed the legal aid order will have expired. However, if the defendant was in fact advised that there were no grounds for an appeal and consequently never did so then there will still be funding for an appeal to be lodged. If in the case you are working on you consider that there are grounds for an appeal you will need to contact your supervising solicitor and get them to arrange for a barrister to be instructed.

Limited funds can be obtained from the Legal Services Commission through the Criminal Defence Service on forms CDS 1 and 2. This provides limited funding for initial advice to be sought from qualified lawyers and possible further funding for any additional work. Consult your solicitor for advice on funding through this route. I



## Fresh Evidence – Getting it into the Court of Appeal

By Mark Newby

Solicitor Advocate, Jordans LLP

*Due to unforeseen circumstances, Mark Newby was unable to personally attend the 6<sup>th</sup> INUK Annual Conference for Innocence Projects. We are however grateful to him for sending a video clip of his speech, which was shown at the conference. The following is an abridged version of his speech.*



Mark Newby

We are often told by the courts and the Criminal Cases Review Commission that to win an appeal, you need evidence that is entirely fresh. However, contrary to what they might officially tell you, your evidence, in reality, need to be about

as fresh as a British rail pork pie.

A review of any case should be focused on the overwhelming test to which the court applies, namely, is there material now before it which persuades it that the conviction is unsafe. Under section 2(1) of the Criminal Appeal Act 1968, the court shall allow the appeal against conviction if it considers the conviction to be unsafe and shall dismiss any other appeal.

Whilst the court may so quash a conviction based on error (and often does) or for some other substantial reason, inevitably, the process is drawn to an examination of whether there is any fresh evidence. As a result this brings us to the thread of section 23 of the Criminal Appeal Act 1968, which we would be best placed to re-fresh our memories upon before getting down to the specifics. Specifically, section 23(2) states:

The court of appeal shall, in considering whether to receive any evidence, have regard in particular to—

- (a) Whether the evidence appears to the court to be capable of belief;
- (b) Whether it appears to the court that the evidence may afford any ground for allowing the appeal;
- (c) Whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
- (d) Whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.”

So the key issues for us to face are:

- Whether the evidence is capable of belief?
- Whether the evidence may afford a ground for allowing the appeal?
- Whether the evidence would have been admissible in the proceedings on an issue the subject of the appeal?
- Whether there is a reasonable explanation for the failure to adduce evidence?

The key-determining factor will be does the evidence, if it is admitted, go to the heart of the safety of the conviction. This should never be underestimated

Take for example the appellant who offers a great piece of evidence attacking the credibility of the complainant. But does it actually show the specific allegation(s) to be unsafe? Similarly, the appellant who can prove he could not have committed one particular offence or a series of offences relating to only one of his complainants - this is unlikely to help him with the safety of the remaining convictions.

## Fresh Evidence

This also points us to another golden rule that, in general terms, one piece of fresh evidence is a start, two pieces are handy and a clutch of fresh evidence might just get you where you want to go. Fresh evidence can come in a variety of forms - documentary evidence contradicting the case at trial; expert opinion not available at trial; expert evidence that might have been available at trial; and, non-specific fresh evidence and linked material

### Fresh evidence – handle with care

There are a number of crucial points to bear in mind when handling fresh evidence. Fresh evidence, like any other forms of evidence, brings with it a danger of being contaminated. It is therefore important that you tread with care and keep an audit trail of all your actions right at the start of your enquiry into the evidence.

To safeguard against any allegation that the appellant has contaminated the evidence, keep the appellant away from the fresh evidence at all costs, bearing in mind that someone is going to have to give a Gogna statement about the actions you took. A Gogna statement will be required by the court in all cases. It records what the fresh evidence is and how it was obtained.

As an illustration as to how important this can be, let me take you to the first appeal of Anver Daud Sheikh. At the time permission to appeal was sought fresh material came into our possession to suggest that a witness was prepared to say that the two complainants were part of a conspiracy to make false allegations against Sheikh. The witness wanted us to go to the prison to see him. This was a care home case and of course it would have been very easy to simply roll up to the prison, show him the past resident lists and ask him whether he recognised any names and question whether they were part of the conspiracy.

However that would have resulted in the fresh evidence being contaminated.

Instead we sat with the papers and completed two sets of questions. The first set dealt with general questions and what his recall was – it disclosed no aspect of the evidence in the appeal. It was designed specifically to get him to introduce evidence. It was only once he did so that we then asked him to confirm the school register and dealt with the second set of more confirmatory questions. As a result we had obtained the evidence we needed without any danger of the contamination of the evidence.

This was then fully evidenced in our Gogna statement to the court and significantly contributed to getting leave to appeal. In the end we abandoned that ground in favour of further fresh evidence but it does illustrate the importance of caution in taking the approach.

### The legal principles the court applies

The Court of Appeal has wide powers under section 23 of the Criminal Appeal Act 1968 and exercises a very wide discretion in the way it approaches fresh evidence. It has the power to order disclosure under s. 23(1)(a), can call any witness who could have given evidence at the original trial (s.23(1)(b)), and hear any evidence which was not called at the trial (s.23(1)(c)) such as an expert witness who was not called at the trial.

I will give you some (and there are plenty more) examples of expert evidence being called at an appeal which was not called at the trial for some reason, such as that the condition was not one that was recognised by experts at the time<sup>1</sup> or that expert knowledge has changed.<sup>2</sup>

The 4 provisions of section 23(2) stated above are important. The leading case on the approach to

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be taken is *R v. Pendleton*<sup>3</sup>, in which it was held that, where fresh evidence is admitted, the decision for the Court of Appeal is the same as in any other appeal - it has to make a judgment whether the conviction is unsafe. It is not incumbent on the court to ask itself what effect the evidence would have had on the jury; but the Court of Appeal should bear in mind, first, that it is a court of review and that it is not and should never become the primary decision-maker.

Whilst the Court of Appeal can make its own assessment of the evidence that it has heard, it is, clear cases apart, at a disadvantage in seeking to relate that evidence to the rest of the evidence that was before the jury. Accordingly, it will usually be wise for the Court of Appeal to test its own provisional view by asking whether the evidence, if given at trial, might reasonably have affected the decision of the jury to convict; if it might have done, then the conviction must be thought to be unsafe. This is known as the 'jury impact test'. The court has recently stressed that it is for the court to assess safety and it is not a simple matter of testing that by reference to the jury - that is to say the jury impact test is a back up to the key decision.<sup>4</sup> In addition, where by its nature, the fresh evidence could not have been given at trial (e.g. a post-trial retraction by a prosecution witness), the court will have no alternative to making its own assessment of the evidence, and then deciding, in the light of that assessment, what effect it has on the safety of the conviction. In such a case, to ask what effect the evidence would have had on the jury's verdict would be meaningless.<sup>5</sup>

### Admitting the evidence

In *R v. Erskine*; *R v. Williams*,<sup>6</sup> the court said that the decision whether to admit fresh evidence is case and fact specific; the discretion to receive such evidence is a wide one focusing on the inter-

ests of justice, with the considerations listed in section 23 (2)(a) to (d) being matters that require specific attention, but being neither exhaustive nor conclusive; the fact that the issue to which the fresh evidence relates was not raised at trial does not automatically stop its reception. However, unless a reasonable and persuasive explanation for the omission is offered, it is highly unlikely that the 'interests of justice' test will be satisfied. In *R v. Beresford*,<sup>7</sup> it was held that there is a 'reasonable explanation' for a failure to adduce evidence at trial if the evidence could not with reasonable diligence have been obtained for use at the trial.

### To admit or not to admit

The existence or otherwise of a reasonable explanation for not calling the evidence at trial is, however, but one factor to be taken account of in deciding whether it is necessary or expedient in the interests of justice to receive the evidence.<sup>8</sup> Occasionally, evidence may be received even though none of the conditions under section 23(2) are satisfied.<sup>9</sup> The Court of Appeal may examine such material as it thinks fit in deciding whether to order production of documents at the hearing of the appeal; it will not in principle restrict itself to reading material relating to the trial and such documents as the parties place before it.<sup>10</sup>

In *R v. Boal and Cordrey*,<sup>11</sup> where a co-defendant who had pleaded guilty was willing to give evidence on appeal, having been unwilling to do so at trial, it was held that since he had been compellable, the evidence could not be regarded as 'fresh', it being the practice of the Court of Criminal Appeal at that time to insist on this requirement. This is no longer a requirement with the current provision allowing of considerable flexibility.<sup>12</sup>



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### When fresh evidence may be received

Evidence may be received of matters which have arisen only after conviction, which, of course, is itself the explanation for the failure to adduce it at the trial.<sup>13</sup> In *R v Ditch*, evidence was admitted of a confession of a convicted co-defendant of the applicant made after conviction, which exculpated the applicant. Although the court would be careful in acting on such evidence, it will nevertheless in a proper case, where it accepts the co-defendant's evidence as genuine, quash the conviction.

In *R v Conway*,<sup>14</sup> the evidence, which it was sought to adduce, was of statements made by prosecution witnesses after the conclusion of the trial, which, it was said, were inconsistent with their evidence at the trial. It was held that the proper procedure in such circumstances, in accordance with section 4 of the Criminal Procedure Act 1865, was for the witnesses themselves to be called so that the alleged statements could be put to them and, thereafter, if they denied making them, the court could hear the evidence of the witnesses that the applicant sought to call.

In *R v. Williams and Smith*,<sup>15</sup> evidence of discreditable conduct of police officers subsequent to the trial of the appellants was admitted. Their integrity had been in issue and the court held that the evidence discredited their earlier testimony. In *R v Blackwell*,<sup>16</sup> the conviction was quashed on the basis that.

*'There is new evidence available which gives rise to a very real doubt that [the complainant] was the victim of an assault by another person. [The complainant] had previous convictions for dishonesty. She has made other allegations, including allegations of sexual assault, to the police which, when investigated, were considered to be false. [The complainant] has a demonstrable propensity*

*and ability to lie. There is material contained in her medical and psychiatric history which indicates that her evidence might not be credible or reliable...'*

And,

*'Following the appellant's conviction, the complainant made a number of allegations of sexual assaults in other circumstances on other occasions, some of which include allegations strikingly similar to those made by her in the present case.'* (Emphasis added)



Remember also that the Court of Appeal has power to hear evidence 'de bene esse' which means it can hear the evidence provisionally prior to making any determination that it will admit the evidence. There are advantages to inviting the court to adopt this approach in a case which technically might fail on one or more elements of the test on a strict interpretation.

### Case Studies

I am going to finish with some practical examples of the various forms of fresh evidence.

#### Documentary fresh evidence

In the case of Anver Daud Sheikh, a seed had been planted post-leave that there was the possibility of some fresh evidence over the appellants working patterns. The idea was to see whether it

## Fresh Evidence

could be proven that the applicant could not have been present at the school at the same time as the main complainant.



Anver Daud Sheikh

We managed to access the school records, which showed that our client started working at the

school in September 1979 and had left by September 1980. The Inland Revenue pay records supported this. Armed with this information we got access to the school register, which showed that the complainant did not arrive at the school until 1<sup>st</sup> August 1980. We also discovered at that time that a witness the complainant referred to support his account was not even at the school at the relevant time.

Accordingly the case was made. We then served on the court a Gogna statement that sets out the full detail of our enquiries - our visits to access the school records, a statement from the school records holder confirming the records, a copy of the Inland Revenue records admissible under the hearsay regulations as computer records and the school register which formed part of the unused material in other cases but not our own. As a result the Crown conceded and the conviction was quashed.

A recent case before the Court of Appeal, *R v Wilkinson*<sup>17</sup> illustrates a similar approach by the CCRC. In *Wilkinson* housing benefit records were obtained to show that the complainant had made a rape allegation on the day she had been told she was losing her home. She had a history of similar problems and was aware that rape was a criterion that would enhance her accommodation prospects. The CCRC had obtained the housing

file and interviewed housing officers who had confirmed this position, which was adduced to the Court of Appeal. The Crown again conceded the appeal.

### *Expert opinion not available at trial*

The next category of fresh evidence is covered in such cases as the shaken baby syndrome cases where the development of knowledge leads to new evidence not available at the time of trial.

In *R v. KF*,<sup>18</sup> the appellant was convicted of sexual offences against one complainant. Both crown and Defence experts were called at the time of trial that produced gynaecological reports, which presented evidence to the jury supportive of some sort of sexual assault upon the complainant. Some concerns raised by one defence expert at trial were discounted and not considered by the other experts or indeed given much weight at all by the trial judge.

It took two attempts to get the CCRC to actually look at the matter seriously but finally, it instructed a fresh expert Dr Peter Dean who noted that there was no evidence of sexual abuse at all and the experts had made a serious error. One of the Crown's experts when confronted with this evidence withdrew her previous opinion.

The CCRC had no doubt that in such a case where the conviction was almost exclusively based upon medical evidence, which was proven to be unsafe, the evidence should be admitted and the Court of Appeal swiftly agreed. This was new evidence not available at the time of trial, which was admissible and went to the heart of the conviction. Once again the Crown did not oppose the appeal.

### *Expert opinion that might have been available at the time of trial*

This covers a scenario where the defence could

## Fresh Evidence

have called evidence but failed to do so. Let's start here by looking at the case of Ian Lawless whose conviction was overturned in 2009.

Lawless was convicted of conspiracy to murder. He was arrested in 2001 and was said to have acted as a lookout when Alf Wilkins was burnt to death in his own flat. The prosecution witnesses said Ian Lawless confessed to the murder to them. However, they all knew him and were aware that he had the



Ian Lawless reputation of being someone who couldn't hold his drink and told stories all the time. Despite his stories, when the police interviewed him, Lawless denied the allegation and told the police he had made it up.

With a past history like this you would have thought alarm bells would have been ringing with the defence. However, all the junior counsel at trial relied on, was a telephone call with the prison authorities where he spoke to someone about Lawless's psychiatric condition. The defence wholly failed Ian Lawless by not obtaining evidence from a psychological expert.

A standard appeal failed and we then submitted an application to the CCRC. We recommended fresh psychological evidence and Professor Gisli Gudjonsson was instructed. He concluded that the confessions were entire fabrications based upon Lawless's need for attention. As a result the referral to the Court of Appeal was made, with the Crown conceding to the appeal.

### *Other evidence and interlinked material*

The final category of fresh evidence deals with evidence, which is wider in nature but only succeeds because of its impact on other evidence.

Take for example the case of *R v France*.<sup>19</sup> This involved an argument over genital deformity in a sexual offence case. The evidence adduced to the court was from an urologist who had produced a report confirming the appellant's deformity and taken photographs of it. The appellant suffered from a deformity, which would have been patently obvious to any witness.

However it was not that evidence alone that was to quash the appellant's conviction. It was the interplay with the flagrant incompetence of counsel that delivered the end to the case. Counsel had been made aware of the condition although he had himself not asked for an urologist to be instructed. He even went so far as cross-examining the complainant about the appellant's acts. But either due to an error or out of some embarrassment, counsel failed to ask the crucial questions about the genital issue. This was a matter that was so crucial that Lord Justice Moses concluded that the outcome was astonishing and that the conviction could not possibly be safe.

In terms of practicalities, there is a note of caution. Even at the hearing the court was prepared to stand the case down so that the Crown could call the original defence counsel to answer the criticisms. The Crown was unable to do so and as a result the court quashed the conviction. So be ready for every eventuality in the court when calling or relying on fresh evidence.

I am sure you appreciate on a strict interpretation of the law this was evidence that could have been deployed at the original trial and so the court could have declined it. However it was admitted on the basis that the failure to deploy it must have been a failing and not a tactical decision, in which case it would have not been admitted.

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### Conclusion

Where does this leave us in terms of some clear principles to approach fresh evidence and getting it in to your appeal?

1. Make sure the evidence is evidence, which could potentially go to the heart of the safety of the conviction.
2. Remember that it is the courts assessment that counts and the jury impact test is only a back up to the overriding test.
3. Keep a full audit trail of all your investigations.
4. Keep the defendant and supporters away from the fresh evidence.
5. Prepare a Gogna statement detailing how you got the evidence.
6. Remember that fresh evidence is documentary, it is expert evidence, it is non-disclosed material, and it is ultimately anything that can suggest to the court the original verdicts are unsafe.
7. Look for any other evidence that might contradict the fresh evidence.
- 8 Try to get more than one piece of fresh evidence if you can.
9. Focus your argument on the courts criteria.
- 10 Get your appeal in and hope for the best.

I hope what I have said helps focus your efforts to get evidence of innocence into the court. It is a difficult road but it is one that the court ultimately prefers more than any other ground. I

### Acknowledgement

With thanks to Mark George QC for his additional input.

### References

- 1 E.g. R v. Hobson [1998] 1 Cr. App. R 31 relating to evidence on 'battered women's syndrome'.
- 2 E.g R v. KF [2007] EWCA Crim 2787 relating to gynecological evidence.
- 3 [2002] 1 WLR 72 HL
- 4 Dial v. State of Trinidad and Tobago [2005] 1 WLR 1660, and, again in R v. Noye [2011] 5 Archbold Review 1 CA. In the latter case the Court of Appeal roundly rejected an argument, based on the law in Australia (R v. Weiss 223 ALR 662, High Court of Australia) and New Zealand (R v. Matenga [2009] 3 NZLR 145, Supreme Court of New Zealand), that the question should be as to the impact that the evidence might have had on the verdict of the jury, recently re-affirmed in R v Wilkinson [2011] EWCA Crim 2289.
- 5 See R v. Ahmed (Ishtiaq) [2002] EWCA Crim. 2781.
- 6 [2009] 2 Cr App. R. 461
- 7 56 Cr. App. R. 143.
- 8 R v. Cairns (Robert Emmett) [2000] Crim.L.R. 473
- 9 R v. Sale, The Times, 16 June 2000.
- 10 R v. Callaghan, 86 Cr. App. R. 181.
- 11 [1965] 1 Q.B. 402, 48 Cr. App. R. 342.
- 12 Nevertheless, it seems highly unlikely that the Court of Appeal would allow any application to call a co-defendant who could have been called at trial (see *R v. Stokes* [1997] 6 Archbold News 1 and *R v. Simpson* [2010] EWCA Crim 1528, where the Court of Appeal held that an omission to enquire of a co-defendant whether he was willing to give evidence could not amount to a "reasonable explanation" for failure to call him).
- 13 R v. Ditch, 53 Cr. App. R. 627; R v. Conway, 70 Cr. App. R. 4; R v. Williams and Smith [1995] 1 Cr. App. R. 74; R v. Twitchell [2000] 1 Cr. App. R. 373.
- 14 Ibid.
- 15 Ibid.
- 16 [2006] EWCA Crim 2185
- 17 [2011] EWCA Crim 2289
- 18 See n. 2 above.
- 19 [2010] (Unreported).

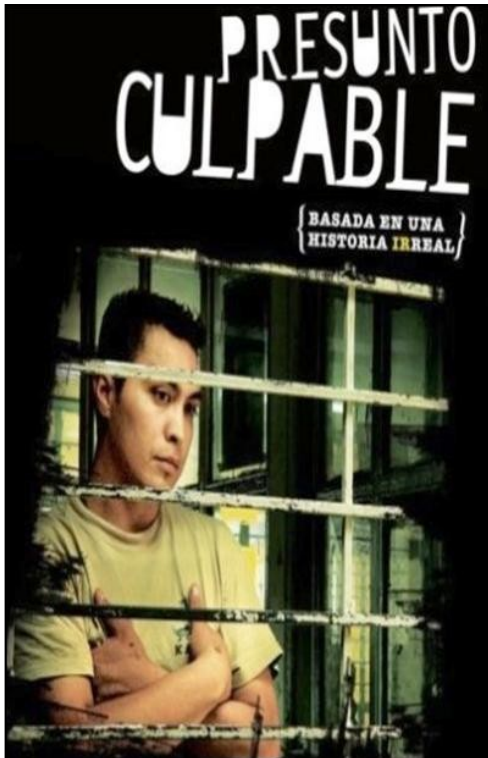
## JUSTICE SERVED FREE OF CHARGE?

By Aine Kervick

### Film Review

#### 'Presunto Culpable'

Directed by Roberto Hernández and Geoffrey Smith



This documentary tells the heroic story of a young man facing the corrupt and seemingly impassable Behemoth that is Mexico's criminal justice system. Providing unprecedented access to the inner workings of Mexico's legal system, *Presunto Culpable* has been as controversial as it is harrowing. After a Mexican Court ordered a ban on the film being shown in cinemas in March of this year, it became the highest grossing documentary in Mexican history. In March 2011, a Mexican judge ordered a temporary ban after the sole witness said he never gave his permission to the filmmakers. The ban was subsequently lifted on public interest grounds.

The film offers a unique insight into the corrupt and incompetent world of Mexico's criminal justice

system where:

- 95% of verdicts are convictions
- 93% of defendants never see a judge
- 93% of inmates were never shown arrest warrants
- 92% of accusations are based exclusively on witnesses.

The documentary introduces viewers to Antonio Zúñiga, a break-dancing street-vendor and the protagonist of this true story. 'Toño' has been convicted of a murder he did not commit and is serving a 20-year sentence. Sharing a cell with 20 other inmates, he sleeps underneath a bunk bed in what is known as 'la tomba'. When arrested, he was not told what he was accused of and no evidence was provided that placed him at the scene except one eyewitness testimony from the victim's cousin.

The story was made possible through the actions of two Berkeley Graduate Students and Mexican lawyers Roberto Hernández and Layda Negrete. After being contacted by friends and relatives of Antonio, they study his case and notice that the attorney for the original trial was practicing illegally under a false certificate. This provides grounds for an appeal and the process is set in motion with the help of defence lawyer, Rafaél Ramírez Heredia.

The focus of this gripping documentary is the retrial of Toño, where the extent of corruption and incompetence of the criminal justice process comes into sharp focus. In Mexico, a defendant has to prove his or her innocence and this is against incomparable odds whereby witnesses are seen conversing with corrupt police, where the prosecution submits all evidence on a floppy disc and the sole transcript of the proceedings is based



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on what the Judge repeats to the recorder.

During the trial, Toño faces the Detective and police that arrested him and subjected him to excessive force during questioning. In turn, each police member states, 'I do not remember', when asked for information regarding the arrest. Refusing to comment on anything except to confirm what is contained in the incontrovertible 'record' the viewer understands something of the helplessness facing 'los inocentes'. Negrete observes: *'there is no real trial. From the moment they accuse somebody, the prosecution has won'*.

Tension reaches new heights as Antonio skilfully cross-examines the prosecution witness until he withdraws his testimony. What looks like a breakthrough in the trial is dismissed and Zuñiga is found guilty and sentenced to 20 years for the second time. When he asks the Prosecutor what her reasons are for prosecuting him, she laughs and replies *'Because it's my job'*. At this point in the film the camera focuses on a sign in the courtroom illustrating Article 17 of the Mexican Constitution *"Justice is served free of charge"*. There is a dark irony that this sign is displayed in the very place where we are witnessing justice being undone.

On appeal, Negrete and Hernández join the defence team as they focus all attention on their attempt to obtain justice for Antonio, whose wife gives birth to their daughter on the day of the appeal. The defence team persuade the appeal judges to watch the videos of the trial and not base their decision solely on 'the record'; after almost 3 years, Zuñiga is immediately released.

On the 26<sup>th</sup> of September 2011 *Presunto Culpable* won the Emmy for Best Investigative Journalism at the 31st Annual News & Documentary Emmy ceremony in New York City. Dedicating the win to Troy Davis, Roberto Hernández commented that

while the Mexican system has a long way to go, it does not have the death penalty. *"That's why we were able to save Toño,"* Hernández says, *"and why Troy Davis is not longer here."*

The value of this documentary comes from its harrowing message that factual innocence and a lack of evidence is nowhere near enough to guarantee freedom. Indeed, in Mexico where guilt is presumed and corruption assumed, innocence is virtually impossible to prove. For anyone interested in law, justice and the concept of due process this film is a must-see. For anyone interested in the concept of innocence and the plight of innocent individuals wrongly convicted, it is an imperative.

At the same time it is necessary to remember that one does not need to travel to Mexico to witness systemic failures within the criminal justice system that leave innocent people languishing in prison. It is worth noting that Antonio was an intelligent and articulate young man with a supportive network of family and friends. He also had the support and determination of Negrete, Hernández and Heredia on his side. Undoubtedly there are innumerable individuals internationally who are incredibly vulnerable and isolated and have no one to take up their cause.

Everyone should watch this film and appreciate the gravity of its message. Not just that Mexico's criminal justice system is in need of drastic improvement but rather, a reminder that we must question the actions and motives of those in positions of authority within the criminal justice process who are given the power to take away our liberty. The message is one of heroism; the importance of questioning the status quo, questioning 'the record' and the fight for justice to be done. I



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## Other Highlights from the Conference

*The following is adapted from a report on the conference proceedings written by Lianne Edwards, 3<sup>rd</sup> Year LLB, University of Bristol Innocence Project*

### Legal Barriers to Overturning Alleged Wrongful Convictions

By **Dr Michael Naughton**, Senior Lecturer, University of Bristol, Director and Founder of Innocence Network UK (INUK)

The purpose of this session was to gain a critical awareness of the legal hurdles that people alleging innocence have to struggle against to overturn their convictions, as well as to highlight how innocent people can fall through the gaps in the system we currently have.

There are two routes to appeal for those convicted in the Crown Court: first, through the Court of Appeal (Criminal Division) and, if that fails, through the Criminal Cases Review Commission (CCRC).

The CCRC was set up following the recommendations of the Royal Commission on Criminal Justice (RCCJ). The RCCJ was in turn set up following high profile miscarriages of justice such as the Birmingham Six and the Guildford four, which had undermined public confidence in the system. However, it is increasingly apparent that the CCRC is not operating as envisaged by the RCCJ.

The CCRC was intended to be entirely independent of the courts and the Government. However, s.13 (1)(a) of the Criminal Appeal Act 1995 shackles the CCRC to the Court of Appeal. The CCRC has to follow the 'real possibility test', which means it can only refer a case to the Court of Appeal if it thinks there is a real possibility that the Court of Appeal will overturn the conviction. This puts the CCRC in the role of second guessing the Court of Appeal, and this determines how the CCRC investigates cases.

The CCRC generally undertakes what can be

termed a 'desktop review' of the case to determine if the conviction is unsafe. It does not investigate applications to determine truth. An applicant must generally produce fresh evidence (s23 Criminal Appeal Act 1968) or state a reasonable explanation for not adducing the evidence at trial.



Dr Michael Naughton (above)

The issues around 'fresh' evidence can make it difficult for cases of alleged wrongful convictions to succeed. The working rule of lawyers is not to look into unused evidence since it was available at the time of trial and is believed to be an unlikely source of fresh evidence. This is despite the fact that evidence that could lead to exoneration can be found within the unused material but was not produced in court due to trial tactics or omission by defence lawyers.

The case of Neil Hurley demonstrates the difficulties faced by those trying to overturn convictions. Neil Hurley was convicted of the murder of Sharon Pritchard, his ex-partner and mother of his two children. Following his conviction, two witnesses stated that they had been coerced by the police into giving false testimonies. There were also other possible suspects, one of whom was seen covered in blood and mud on the morning following the murder. However, his clothes were not



## Other Highlights from the Conference

forensically tested and he eventually became a witness for the prosecution. There are also a number of exhibits that have been retained by the Forensic Science Service (FSS) that were never subjected to forensic testing. As the CCRC was not seeking to prove if Neil was innocent or not (but rather, only carried out a desktop assessment of the integrity of the evidence that led to his conviction), the possibility of DNA testing was never identified by the CCRC despite three previous applications. A fourth application was submitted to the CCRC by the University of Bristol Innocence Project almost 18 months ago requesting for DNA testing to be commissioned, but to date, the CCRC is yet to reveal the results of those tests.

Evidence of innocence is unlikely to emerge from the kind of desktop reviews carried out by the CCRC. Innocence Projects, established in response to the limitations of the CCRC, cannot be confined to the existing rules of the criminal justice system because they can fail the innocent. The work of INUK is as much about overturning cases through law as it is about trying to change the law to ensure that the innocent will not remain in prison due to their inability to surmount the legal hurdles.

## An Introduction to Investigating a Claim of Innocence

By **Gabe Tan**, Executive Director for the Innocence Network UK

The purpose of this session was to set out a broad methodology on how to investigate a claim of innocence, examining five key steps. Innocence projects are akin to public inquiries. Our aim is to undertake a thorough re-examination of a case and determine if the claim of innocence is genu-

ine. We must assess the strength of the evidence that led to the conviction and then consider new methods that could prove/disprove the claim. To undertake this examination one must go through five key steps:

### **Ensure the retention of evidence and casepapers.**

A large amount of documentation and exhibits are generated in the course of a police investigation, in effect providing a paper trail of the investiga-



tion. It is important that as much documentation is retained as possible; it may provide useful leads or further forensic analysis.

The police will generally have the original exhibits, log books and crime scene records. Forensic science providers might retain certain samples/exhibits that require special storage and will have forensic records. Defence solicitors may still have documentation, normally everything that was disclosed prior to the trial by the prosecution, which is conventionally held for 6 years. It is also worth considering what the client may have, they are often given everything in the defence's possession when the case closes.

## Other Highlights from the Conference

Having identified who has what, it is important to ensure that all documents and materials are retained. The police's retention policy states that for serious offences (more than a six-month sentence) exhibits are retained until the offender is released, the appeal determined or a decision by the CCRC has been reached. However, as there are no limits to the number of applications one can make to the CCRC we cannot be sure that the documents have been retained. It is best to write to the police and secure in writing that all documentation and exhibits are retained.

The retention policy of the Forensic Science Service (FSS) is governed by a Memorandum of Understanding (MOU) with the Association of Chief Police Officers (ACPO). Typically, most exhibits are returned to the police following analysis except for samples requiring special storage. These will normally be retained by the FSS for up to 30 years in murder and other serious offences. However, we must be aware that the MOU is not legally binding and it is recommended that a written request is made to ensure retention of evidence.

### **Understand how and why the person was convicted**

We should consider the prosecution's case; its version of events and any evidence adduced to support its version. This may include physical evidence (DNA, fingerprints), pathology reports, witness statements, CCTV, forensic experts or (cell) confessions. We should then consider the defence's case. Typical forms of defence by the alleged victim of a wrongful conviction include contesting his/her presence at the crime scene; how the crime happened; or, the occurrence of the

crime, e.g. in claims of false allegations where the defendant claimed that the alleged offence did not occur. We should examine what evidence was put forward by the defence; alibis, defence experts, the defendant's evidence in the dock or cross-examination of prosecution witnesses.

Sometimes the applicant's claim of innocence does not always reflect what happened at the trial. Often, they state that the defence did not use a piece of crucial evidence due to omission or tactical reasons. We should be aware that the applicant's interpretation can be very different to what we find in the prosecution and defence case files, so it is important to understand exactly how and why they were convicted.

### **Go beyond trial documents**

Having understood the reasons for the conviction we should now go beyond the official story. It is here that we begin examining any unused material and how the investigation was carried out. The key documents to consider here include unused witness statements, police actions, house-to-house enquiry records, scene of crime records, interview transcripts and forensic files. In the case of Neil Hurley for example, house to house enquiries showed that over 200 houses were visited by the police but less than half had statements taken - why were others not taken? Could those other enquiries hold some useful information? To obtain these additional documents we can either go through the client's solicitor or try using the Freedom of Information Act or Data Protection Act. However, these legal routes are often limited. Information relating to crime investigations is often exempted from the Freedom of Information Act, which also only applies to public bodies. Sometimes, it is more fruitful to simply make a



## Other Highlights from the Conference

friendly request, which might produce a broad range of documentation.

### Investigating evidence that led to conviction

It is important to research the evidence that led to the conviction to determine its reliability: we should go through all material with a fine-tooth comb, tracking the chain of custody of any exhibits and constructing timelines. This can help identify anomalies, for example in Simon Hall's case there were repeated instances where samples were recorded as being received by forensic scientists before being collected from the crime scene. Having identified any exhibits we should consider forensic files and untested samples. It is possible to consult with experts and receive preliminary reports on a pro bono basis, which can lead to legal aid funding for full examination. We should also undertake fieldwork investigations and use the opportunity to interview new witnesses or re-interview witnesses who gave evidence. Crime scene reconstructions are very useful too; we can identify whether it is possible for the events to happen as witnesses claim. Fieldwork investigations also provide the opportunity to utilise local knowledge, which may create new leads.

### Proving innocence through DNA

We need to confirm whether exhibits were tested, we cannot assume they have been. We should also consider whether more advanced methods of DNA testing are now available, for example, SGM+ is now available which produces a more accurate profile than SGM. Low copy number DNA is available, but be aware that this is often highly susceptible to contamination. Mitochondrial testing which is used when testing hair or bones where SGM+ cannot yield results is also worth



consideration. We should explore all possibilities of DNA testing, listing all exhibits and confirming whether they still exist. Do not give up if the police or the Forensic Science Service says they have probably been destroyed. Ask for a copy of the destruction record to confirm that exhibits no longer exist.

In the case of Sean Hodgson, samples that were apparently lost were found 11 years later. Having identified the retained exhibits, consult with an expert on the possibility of DNA testing. DNA testing can be commissioned through the CCRC. The advantage of this is that there will be no cost involved. However, this will require a new application to the CCRC and can often result in delays and being kept out of the loop of the progress of the testing. Alternatively you can seek funding from the Legal Services Commission, get a laboratory to do the testing on a pro bono basis or fund the testing privately.

Bear in mind that DNA is not the only route to exoneration. The possibilities will depend on the evidence in each case and fieldwork investigations could result in new witnesses, alibis that could help to undermine that case against the prisoner and even lead to exoneration.

## Other Highlights from the Conference

### Undertaking Fieldwork Investigations

By **Dr Eamonn O'Neill**, Investigative Journalist, Director of University of Strathclyde Innocence Project



Dr Eamonn O'Neill (above)

The purpose of this session was to look at the importance of going beyond the case papers by undertaking fieldwork investigations, and providing practical advice and tips on how to conduct such investigations.

Fieldwork investigations are crucial as they help put the paperwork into action, you can go to the crime scene and see the discrepancies between the actual location and what a witness describes. We have to be aware that when reading case papers we are reading through a filter of what has been written by a police officer, going out into the field lets us see this for ourselves. The main benefit of such investigations is that it sheds light on so-called accurate records of events, forcing us to re-interpret the case and consider what happened and what was missed.

By attending the crime scene we can make sense

of all the material we have read, and create a fresh and relative narrative of the events. To be able to find fresh evidence and to be able to pick the events apart, it is important that we fully understand what happened; going to the crime scene can give us this important context. In the Jo Yeates murder trial, for instance, the judge sent the jury to the victim's house because he thought it important for them to see what the crime scene was like and understand how it happened.

When going to the crime scene we must be prepared, knowing exactly where we are going and why we are going. In addition to knowing the area we should also be prepared with documentation, bring the key statements and transcripts along so they can be directly compared to the location.

An investigator's 'grab bag' should include maps, a camera, a notebook, sample bags, digital recorder, measuring tape, ID, torch (for returning at different times) and local authority information regarding any recent rebuilding or changes. For instance, when Eamonn talked to a witness about how he could see what happened, the witness said that the street light made visible what he claimed to have seen. However, local authority information showed that the street light was not there at the time the crime occurred. It is important to have as much information as possible, as well as all appropriate equipment to record what new information/evidence we gather. If we speak to anyone we must ensure that it is recorded as a legally viable record.

Following the visit to the crime scene you should have an initial de-briefing at the scene, then again in a couple of hours and then a final de-briefing within 72 hours. This is to make sure everything found is adequately discussed, it is impor-

### Other Highlights from the Conference

tant to do it early to prevent anyone forgetting any key points that arose in the field. It is always important to reference fieldwork investigations in any notes, giving factual context to the narrative. It is also worth returning to the client to ask questions based on your visit. This additional context may help to stir their memory.

Finally, when making a submission to the CCRC it must be emphasised that fieldwork was done using strict protocols. It is important that it does not look like it was simply a casual visit, but a purposeful investigative visit.

In summary, fieldwork investigations are very useful; they can be the start of a process of obtaining new evidence. It is important to use transparent and systematic methods of evidence gathering as this evidence could end up in court if the CCRC makes a referral. You must get out and about and go beyond case papers, as ultimately we cannot criticise the CCRC for a desktop review and then do the same ourselves.

### **The Limitations of the Criminal Cases Review Commission**

#### ***John Cooper QC, 25 Bedford Row***

The aim of this session was to consider how the CCRC is failing the innocent and how it is increasingly unhelpful to those seeking to overturn wrongful convictions.

Controversy has been growing around the CCRC with many people asking whether it is performing the role it was designed to fill. Innocence Projects have been doing amazing work in protecting the rights and liberty of those who should not be in prison, but the CCRC was hoped to do the same. Calls have now been raised for the objectives of the CCRC to be reassessed and enlarged.



John Cooper  
QC (Left)

Prior to 1995, when the CCRC was set up, the Home Office was responsible for reviewing cases. The Home Office had a wide, ill-defined brief to refer cases they thought fit. This resulted in a lot of dissatisfaction over its apparent failings. The failings of the Home Office and the issue of its independence was the impetus for the establishment of the CCRC which followed the recommendation of the Royal Commission on Criminal Justice (RCCJ). The apparent implementation of the recommendations in the RCCJ led to a great deal of hope and expectation, with organisations such as JUSTICE and Liberty stopping its work, thinking that the problem of wrongful convictions has been resolved with the CCRC. However, it is increasingly apparent that this is not the case.

The fundamental criticism of the CCRC is that its procedure is too narrow and too tightly defined; with the CCRC only able to refer a case back to the Court of Appeal if it fulfils the 'real possibility test'. Furthermore the CCRC has no duty to exercise the wide powers it has, such as the power to obtain disclosure of materials from public bodies. The Criminal Appeal Act 1995 was intended by Parliament as a liberalisation within the Court of Appeal, increasing their ability to overturn convic-

### Other Highlights from the Conference

tions but this is not representative of the current situation. The Court of Appeal's focus is on quashing convictions if it feels that the conviction is unsafe. The CCRC is tied to this by the requirement that applications it refers to the Court of Appeal must have a 'real possibility' of being quashed. In *R v CCRC ex parte Pearson*, 'real possibility' was defined as more than an outside chance that the conviction would be deemed unsafe and overturned. This is quite a high test to fulfil and certainly reduces the notion of liberalisation.

The work of the CCRC is seen through a telescope of what the Court of Appeal would be prepared to do and as the Court of Appeal concerns itself with the safety of convictions (as opposed to innocence or guilt) so does the CCRC. The notion of safety is too narrow, failing to consider whether the person is in fact innocent. The CCRC is also unduly deferential to the Court of Appeal's requirement for fresh evidence not available at the time of trial. The CCRC appears to be happy to be working within the narrow confines of the Court of Appeal. Innocence Projects are the ones who are trying to push these boundaries, but the CCRC should be doing this. The attitude of the CCRC and its willingness to stay within the straitjacket is not pushing the jurisprudence any further.

Another issue of the CCRC is with historic cases. An example is the CCRC's recent decision not to investigate the conviction of Dr Hawley Crippen who was executed in 1910 for the murder of his wife. This is despite new evidence showing that human remains found at his house thought to be those of his wife were of a man, not a woman! The CCRC rejected the case on the basis that it is too old and that the relationship between Crippen and his descendants trying to clear his name was too 'distant'. The problem here is that miscarriages of justice do not and should not have a sell

by date, and wrongful executions of those who are factually innocent should be put right regardless of age.

The issues discussed above show how it is now time to reassess, refocus and reform the system of appeals and referrals. The relationship between the CCRC and the Court of Appeal needs to be addressed, with considerations of factual innocence being more acceptable. Furthermore, the recommendations by the RCCJ must be interpreted the way they were intended; focusing on liberalisation of the appeals system. The CCRC needs to make better use of their powers and fulfil the role intended for them. Innocence Projects will continue to play a vital role in investigating claims of innocence and maintaining pressure on the CCRC. I



Photograph from the trial of Dr Hawley Crippen



## News

### Communications

INUK issued a Public Statement on the 15 December 2011 detailing the key failings of the Criminal Cases Review Commission and its recommendations for reforms. The aim of this public statement is to enhance public awareness of the limitations of the Criminal Cases Review Commission and the need for urgent reforms to ensure that it can better assist the innocent. Funded by the Joseph Rowntree Reform Trust (JRRT), this initiative is part of a wider project to reform the Criminal Appeal Act 1995 which governs the operations of the Criminal Cases Review Commission. (The Public Statement is available on the INUK website.) **I**

INUK has revamped its website. The newly launched website is brighter, fresher and helps to make INUK's range of online materials more easily accessible. INUK would like to thank Isabelle Kosciusko (Isabelle K Limited) for her *pro bono* assistance in designing and launching the new website. **I**



"Educating to overturn and prevent the wrongful conviction of innocent people"

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#### Welcome

The Innocence Network UK (INUK) is a practical response to the needs of alleged victims of wrongful conviction that have been identified in academic research. INUK was established:

- 1) To facilitate casework on alleged wrongful convictions by Innocence projects
- 2) To communicate on issues relating to the probers of wrongful convictions.

#### LATEST NEWS

INUK issues a Public Statement on how the criminal justice system is still failing innocent victims of wrongful conviction despite the establishment of the Criminal Cases Review Commission (CCRC).

See News for further details.

### Talks

Dr Michael Naughton, INUK Founder & Director gave a talk to the British Criminology Society (Wales Branch) on the 7 December 2011 at the University of Cardiff. Dr Naughton's talk was based on a recent article published in the Irish Journal of Legal Studies entitled 'How the Presumption of Innocence Renders the Innocent Vulnerable to Wrongful Convictions'. **I**

### Casework News



Ryan Jendoubi and Mark Allum

Mark Allum, Ryan Jendoubi, Dr Michael Naughton, Gabe Tan of the University of Bristol Innocence Project (UoBIP) met with Gerard Sinclair (Chief Executive) and Gordon Newall (Senior Legal Officer) of the Scottish Criminal Cases Review Commission (SCCRC) on the 17 October 2011.

The purpose of the meeting was to discuss the innocence project's submissions on behalf of William McKenna Beck who is seeking to overturn his conviction for an armed robbery that took place more than 30 years ago. Following the meeting, a further submission was made by the UoBIP in response to the SCCRC's thoughts on the merits of previous submission. (See article by Mark Allum in the next edition of INQUIRY,)

The case is currently under consideration by the SCCRC and a decision on whether to refer Mr Beck's conviction back to the High Court of Justiciary is likely to arrive next year. **I**

Mr William McKenna Beck (Right)





## News

### Case Statistics

As of December 2011, 102 cases are currently under investigation by INUK member innocence projects. An additional 97 cases deemed eligible by INUK are currently on the waiting list pending referral to an innocence project for full investigation. **I**

### Events

The 6<sup>th</sup> INUK Annual National Conference for Innocence Projects was hosted by Norton Rose LLP on the 25-26 November 2011. The conference was attended by over 200 staff and students from INUK's member innocence projects. **I**



INUK is pleased to announce that the next Spring Conference will be hosted by Cleary Gottlieb Steen & Hamilton LLP (CGSH) on the 27 April 2011. We are grateful to CGSH for their continuing support for INUK by hosting this event for the third year running. **I**



The 2012 Innocence Network (International) conference will be held in Kansas City from the 30-31 March 2012. For more details, see: [www.innocencenetwork.org/conference](http://www.innocencenetwork.org/conference) **I**

### Visits

Staff and students from the Joseph Loudy Human Rights Project, Roosevelt University, Chicago, visited INUK on the 22 November 2011, where they learnt about the causes of wrongful conviction in England and Wales and the workings of INUK and its member innocence projects. **I**

Representatives from the University of Buckingham and the University of Derby visited INUK on the 12 December 2011 to learn about how to set up and run an innocence project. **I**

## SPONSORSHIP

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## CALL FOR SUBMISSIONS

**INQUIRY welcomes submissions for any of the following categories:**

- 1) Feature Articles on any issue relating to wrongful convictions and/or innocence project work (no more than 2,000 words).
- 2) Reviews of books, articles or films on the subject of wrongful convictions and/or innocence projects (no more than 1,000 words).
- 3) Innocence Project News from Members (no more than 250 words)
- 4) Research Updates (no more than 250 words)
- 5) Student articles on any issue relating to wrongful convictions and/or innocence project work (no more than 1,000 words).

*Please note: all submissions from students must be from member innocence projects and must be vetted and sent via their staff director.*

### DEADLINES & SCHEDULES FOR 2012

#### Next Issue

The deadline for the submissions for all of the above categories is MONDAY, 30 January 2012.

#### INSTRUCTIONS

All submissions and expressions of interest should be sent by e-mail with INQUIRY in the subject line to:

[innocence-network@bristol.ac.uk](mailto:innocence-network@bristol.ac.uk)

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