

INQUIRY

THE NEWSLETTER OF THE INNOCENCE NETWORK UK

MARK NEWBY SPEECH TO INUK ANNUAL CONFERENCE 2013

This Special Issue of INQUIRY is the full text of the presentation given by Mark Newby, Quality Solicitors Jordans, Doncaster, presentation at the INUK Annual Conference 2013. Mark is a Solicitor Advocate specialising in appeals and applications to the Criminal Cases Review Commission (CCRC).



Investigating Miscarriage in the world according to Chris Grayling: The Challenges of the Next Ten Years

Thank you for inviting me to speak to the Innocence Network UK conference today. I am of course proud to support the Network and the great work that you do.

In the past I have addressed students on the issue of how to investigate miscarriages of justice and how to "think out of the box ". I address that because we need to understand how to identify miscarriages in order that we can appreciate the second issue that I want to address namely the current state of the Criminal Justice System and how changes being implemented will increase the burden on INUK innocence projects and miscarriage of justice lawyers.

Of course both the concept of 'justice' and indeed 'miscarriages of justice' are ones which are difficult to

grasp with and ones which remain constantly in a state of flux. The law on these definitions has developed in an ever increasingly complex way. For example, 3 days spent in the Divisional Court last year arguing about the test of innocence for miscarriage compensation demonstrates how complex these concepts have become.

For our applicants the issue is a simple one, however. For them, they have not had justice, often for a whole variety of reasons, and as a result consider themselves to have suffered a miscarriage of justice. Accordingly, we start all of our cases with a fundamental conflict between the approach of the Law and Courts to the concepts of Justice and Miscarriage compared to that which the ordinary man or woman perceives.

For those concerned about miscarriage this should be our starting perspective. For no matter how academically or legally interesting a case may be, in the final analysis it is about people and their lives. Whilst we may be inevitably drawn quickly to a legal analysis of whether the arguments advanced can ever satisfy our legal concept of miscarriage, the people that place their trust in us deserve a starting point that appreciates their concerns and definition of miscarriage .

Miscarriage of justice is a concept which should cause not only those of us here but Society as a whole a great sense of unease. It is an unease we have experienced countless times before and one, as we shall see, which is going to take more of our time as our justice system is pressured ever further as society is increasingly driven by costs, statistics and political spin.

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The fundamental changes that are now taking place and have taken place will have clear implications for innocence projects across the UK and for anyone interested in miscarriages of justice.

I know the conference was addressed yesterday by those who have experienced miscarriage, and, as I have said, that is where our consideration should always start. I was particularly saddened to hear of the sad loss of Susan May [who died a couple of days before the conference—Editor] who has consistently fought against her miscarriage, she was not the first and will not be the last who will not see the fruit of all their efforts .

Now, in order to discuss where I think we are now and where we may be heading to it is first necessary to understand when and how we can help those who say they are wrongfully convicted.

For us all, it starts with those letters from appellants and if in your individual innocence projects you have had access to those letters you may appreciate the difficult task that lies ahead.

How do you even start to consider whether someone's case should be given what are your finite resources.

Let's consider some examples, starting sadly with those typical complaints which invariably should never find their way to the Strand in London.

I only met my barrister once

the barrister was changed at the last minute

they sent a legal clerk to my trial

my barrister never asked the questions I wanted him to

the judge hardly said anything about my case

the judge was biased against me

the judge wouldn't let my barrister ask about the complainants boyfriends

the judge wouldn't let my witnesses give evidence

my barrister was in a conspiracy with the judge

I thought if I mentioned aliens that I would be pushing this analysis too far, but trust me I have had more than one of those letters.

If they are bad indications of when an appeal is unlikely to get off the ground let's consider where that first letter might give us a clear hint that something has gone astray.

I have fresh evidence to show I never committed the offence

the complainant has admitted lying

the forensic evidence is wrong

my legal team should have got an expert

my defence team failed to call a crucial witness

my barrister missed important questions to the witnesses

the legal clerk running my case never investigated key evidence

Of course, of their own none of these "flags" may come to anything. For example, the fresh evidence may not be fresh at all or the crucial witness may be completely uncrucial.

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But, nonetheless, these are key flags which should certainly prod your interest. They are what I call “unlocking grounds” and allow you to investigate deeper.

Often you will be confronted with a case which on face value presents very little or the papers are so lacking that there appears little hope of a successful outcome.

These are the most dangerous miscarriage cases because without discovering the issue that makes the conviction wrongful that applicant could never find a route to successfully challenge their conviction.

Perhaps a couple of examples will help here.

I have talked in the past of the case of Anver Sheikh, a historic care home case from 2004 and then appealed again in 2006 following an unsuccessful re-trial.

Sheikh had been tried as part of a spate of historic care home cases during what I term “the last moral panic”, an issue I will return to later.

His papers probably ran to about 50 pages, a brief unused schedule and a defence proof of evidence, which wasn’t worth the paper it was written on.

As for Mr Sheikh, he couldn’t even remember when he worked at the school, thinking it was some period between 1979 to 1983.

His defence team’s approach was for him to simply deny it because everyone knows all you can do in those cases is say you didn’t do it.

He was convicted of 4 counts of buggery in less than 2 days.

So how was this case unlocked?

We started by using some basic information or clues

about the case. These came from what we knew about this care home enquiry. It could in another case simply have been a concern with an issue raised by an appellant, say in an historic, or come to think of it any kind of appeal.

What was our clue? Here several men after Sheikh had been prosecuted under Operation Courier and not one had been convicted. This raised a significant concern...what was so different about the case of Anver Sheikh? Why did this man get convicted when every other accused in the police Operation did not?

Action 1 – We made enquiries with the other teachers and asked to see their papers. In doing so we discovered the teachers had formed themselves into a support group – it was to prove invaluable.

What we discovered was startling – all the other teachers had a much more substantial schedule of unused material.

There was also a School Day book from later years, which showed how the residents were monitored and supervised .

Crucially, unlike our client the support group remembered that Anver Sheikh was only employed at the school for about a year.

Action 2 – Armed with that information we approached the governing school and asked if we could see their records for the time. They agreed.

Pausing here for a moment the CCRC will often advance that they cannot make such requests because the records do not belong to a public body [**Section 17 Criminal Appeal Act 1995**] absolutely correct...but there is no harm in asking is there, because often the answer might actually be yes.

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Action 3 – Former resident comes forward with evidence to support the appeal

We were lucky to have a resident come forward who claimed to have been part of a ring of complainants who made up false allegations for compensation. The original defence team had a letter from this individual but never did anything with it.

We got of our rear-end and went to see him and obtained a full proof, which in due course was deployed at the renewed hearing for permission to appeal.

As it happens, in the end that evidence was ultimately not used but it served as a useful tool to persuade the Court that there were sufficient grounds upon which to obtain leave.

Action 4 – Enquiries with the CPS

We raised a substantial amount of enquiries with the Crown Prosecution Service (CPS). They were, as you might expect, hostile to our approach and didn't want to give us any information prior to leave being granted.

This is not an unusual stance, but it is not one which we will accept – the Crown has a duty to assist with any appeal and no distinction is to be made whether that is pre or post leave.

On other cases, if we do not get an adequate response we write to the DPP and Registrar – that usually does the trick.

Action 5 - The Leave Hearing

The case was on a knife edge and it was by no means certain that leave would be granted, however the issues of potential non-disclosure, the fresh evidence and the start of uncertainty over the dates of employment was enough to persuade the Court to grant leave .

Action 6 - The School Records

A visit took place with Catholic Care who held the remaining school records, such as they were. These consisted of a series of school minutes prepared by the headmaster.

Within those minutes were two important entries. Firstly, there was an entry which showed that another teacher had left the school to do a diploma in September 1979 and that Anver Sheikh had been appointed.

Secondly, minutes recorded in September 1980 showed that Anver Sheikh was no longer employed by the school by that stage.

Action 7- The CPS Records

Armed with that information, an inspection took place at the CPS and we were given access to all of the Operation Courier material which had been held back in the past (well most of it I guess).

A further crucial piece of evidence fell into the jigsaw which was that DC Brooks, who ultimately gave evidence as part of the investigation team, had in an earlier life been a community police officer. In November 1980, he had attended the school in respect of a routine matter and recorded that Anver Sheikh had left the school.

Action 8 - The Evidence of the complainant

Armed with strong evidence that Anver Sheikh was employed between September 1979 to September 1980, we turned to the issue of x and his evidence. We accessed a copy of the admission and discharge book for the pupils and noted that x was admitted to the school on 1st August 1980 and left in 1982. This meant that if we could show Sheikh had left by the time x had started we would prove this to be a false allegation.

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Action 9 - Enquiries with the Inland Revenue

We were left to make enquiries with the Inland Revenue and contribution agency to try to find any possible dates of employment. As it happened, the Crown did the same thing and they just beat us to it disclosing to us that Anver Sheikh was formally employed between 1st September 1979 and 31st August 1980.

Action 10 - The Conceded Appeal

The Crown conceded the appeal. The reason was that x in his evidence had alleged he was assaulted by Sheikh after an issue with another pupil y, but records indicated that y was at the school in 1981 not 1980. The complainants account was simply not true or possible.

And as a result, this conviction was quashed and was given much media attention on the day it was quashed highlighting the dangers of miscarriage in care home enquiries.

Action 11 - Not the end of the story

This was not the end of the story, however, and what happened next demonstrates the real danger of these cases.

Unbeknown to us, the police had told x exactly what was wrong with his evidence. In addition, they arranged for him to attend the appeal hearing without telling us or their own Queen's Counsel (QC).

As a result, x heard everything about the case and what was wrong with his evidence. The Court then ordered a re-trial and to ensure no further impropriety, required the complainants to be video interviewed – little did they know the damage had already been done.

Action 12 - The Re-Trial

X duly changed his whole account to try and avoid the

issue that had been highlighted in the original appeal, however he named other individuals that could never have been at the school at the same time.

In addition, because you should never let matters rest – we sought his original social service records.

Action 13 - The Deployment of the Social Service Records

We knew at the point of re-trial that we were left with a 4 week window to close. Sheikh and x could only possibly have been at the school together between 1st and 31st August 1980. It was also likely that if Sheikh was leaving he would have taken a block of leave at the end.

As luck would have it, and careful cross examination, we started to narrow down the opportunity. His records dealt with meetings and events at the school and by utilising them we were able to obtain a concession from him that if this happened at all it could only have happened on one weekend 29th and 30th August 1980

So there we are from an indictment alleging 1979 – 1983 to 2 days in 1980 all in 13 easy steps!

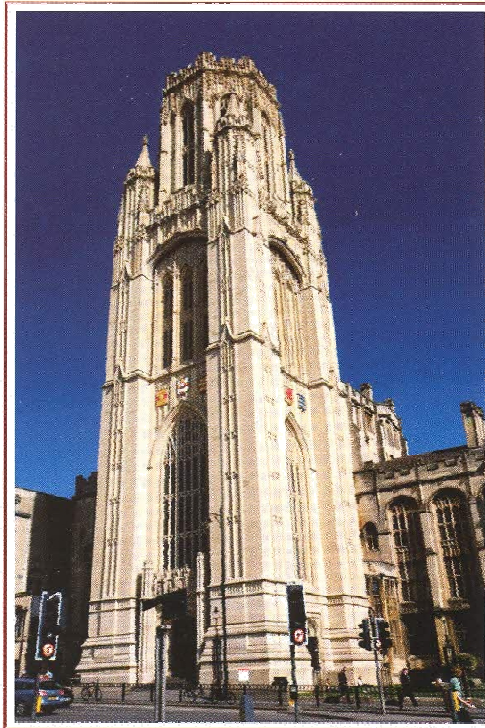
Of Course, despite this evidence the Judge declined to withdraw the case from the Jury despite our concern that the dangers were grave of a jury wrongfully convicting on prejudice. That is what happened and Mr Sheikh was convicted only to have his nightmare finally ended in the Court of Appeal for a Second time.

Here then are some other examples which led to the quashing of convictions.



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Defence Lawyer Inadequacies

Sometimes the clue lies in that which wasn't done .

So, in a 2010 historic domestic allegation case B – the applicant had suggested to his legal team 3 lines of enquiries which may help prove he couldn't have committed the offences.

What those enquiries were doesn't really matter for my purposes here as much as the fact that they were not done.

We looked at those enquiries, assessed they were worthwhile and completed them. The further enquiries that flowed from them established fundamental inconsistencies in the account given at trial. The conviction was quashed.

Failures over Experts

Sometimes it's an omission. For instance, the well reported case of Ian Lawless in 2009 in which Mr Lawless's murder conviction was quashed. He was convicted solely on evidence of his confession to acting as lookout when the deceased's flat was purposefully burnt down.

Every prosecution witness described Lawless as a "walter mitty" character, that made things up and was often prone to severe exaggeration when drunk. His case cried out at trial for a psychiatric / psychological assessment – none was obtained.

The case was referred by the CCRC who agreed to commission the leading expert on false confessions the Gisli Gudjonsson. He confirmed that Mr Lawless suffered from an attention syndrome mixed with alcohol problems and his confessions were entirely linked to that syndrome. His conviction was quashed.

Failures of Counsel

Or the case of France in 2009, where a man in a sexual abuse allegation had a well-documented genital deformity – perone disease. He told his barrister, but his barrister completely failed to ask the crucial question to the witness of whether he noticed such a clear condition. The failure to ask it was inexplicable and rendered the conviction unsafe .

Fresh Evidence

Finally, cases in 2012 on sexual abuse where fresh evidence was introduced to confirm original gynecological examinations were conducted in a way in which they did not apply relevant good practice and state of understanding of how such examinations should be conducted .

The result was to make erroneous diagnosis of signs of sexual abuse when there were none. The convictions were quashed .

So what have we here – evidence of real outcomes in relation to failure to investigate, defence failings to obtain experts or understand the essentials of a case and the evidence which should have been introduced.

Add to that, other classic examples of appeals where there was non disclosure or where other fresh evidence comes to light, which demonstrates that the conviction is unsafe. Time doesn't permit today a full examination of the whole history of appeals by type.

So your starting point as you review these cases is to look for those flags and unlocking grounds.

And, do not forget the trial process itself and judicial error. Appeals are quashed on the basis of misdirections. Of course, the bench book has never been fuller or more comprehensive, but the fact remains that un-

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Naturally, your concern will not be misdirection cases in general terms because you are seeking an innocence outcome, but it would be wrong to ignore those.

This brings us to an assessment of where we are now in the criminal justice system and how the system itself is contributing to miscarriage.

It is worth examining in terms of some of the examples we have seen where we are before considering how bad things could become.

The prospects for anyone facing criminal allegations before the court, especially in sexual offences have been decidedly shaky for a number of years now and, to be fair to the conservatives, started well before they came to power.

We saw, following the election of the Blair government, a direction of travel in which the motivation was to secure convictions and the importance of victims became paramount.

This was, of course, based on a traditional agenda of being seen to be tough on crime. We shouldn't, of course, assume that all that followed was bad. Nor would it be right not to conclude that genuine victims had been let down by the criminal justice system at the time.

For example, in the context of sexual offences a modernisation of the offences were long overdue and, on balance, the Sexual Offences Act 2003 has proved to be a worthy piece of legislation. The Criminal Justice Act 2003 has proved more problematic and I'll return to that shortly. What also followed was a sustained series of reforms of legal aid and successive cuts of the fee regimes which led to a sizeable reduction in the fees paid for work and, ultimately, to the introduction of a litigator's fee scheme in the Crown Court accompanied

by an advocates fee scheme.

This, for us as appeal lawyers, brought its own consequences. We still currently rely on the professionalism of our advocates and solicitors to deliver representation at the highest standards at ever reducing cost.

The reality is that whilst there remain very strong pockets of sound representation across the country, there is also a pattern of poor representation, poorly prepared cases with the basics of cases which are presented not dealt with at all.

The difficulty was that once we started to pay solicitors a fixed fee for Crown Court work we disincentivised those lawyers who were motivated by fees alone to undertake a robust job because they get paid the same fee regardless.

Great Crown Court solicitors are the unsung heroes of the system. They are the ones who run cases where every aspect of the case is investigated and explored. They contribute fully to the work of the advocate and are an effective part of the team.

It is a consistent pattern to see Crown Court departments run these days by a solicitor in name only and effectively managed by a clerk or legal executive.

It is very much the exception to have a solicitor present during Crown Court trials and counsel will be lucky if they have a rep to take notes.

The effect of this is to have seen a fall in the standard of Crown Court work. The answer proposed by the MOJ is to suggest there will be a change to the standards required of litigators in the Crown Court. But, how can it be conceivably suggested that litigators will accept increased obligations when the fees they are prepared to pay are to be further squeezed?

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Returning to the Criminal Justice Act 2003, this has proved to be an example of the worst possible drafting and all should be conversant with the problems introduced, for example with the original IPP sentences.

We have also occupied a substantial amount of Court of Appeal time in dealing with the consistent problem of bad character applications. For some considerable time, much like the provisions over IPP sentences, there was a considerable lack of understanding of these provisions and how they should be applied in the lower courts.

There has, for example, remained a lazy attitude to the use of the bad character provisions and the correct gateways adopting a get the bad character in at all costs approach.

This has required, and continues to require, intervention by the Court of Appeal far too often.

This brings me to an area of particular concern, the way in which we deal with sexual offences. It is an area I have spoken and written about many times.

In the field of historical offences, and in particular care home cases, we did see a genre of miscarriage as the Home Affairs Select Committee correctly identified in 2002.

These cases bring with them grave dangers of miscarriage and a terrible task for any court to determine genuine allegations from false allegations.

In those years post 2002, we were able to do considerable work with the Court, however, to develop a sound approach to testing safety.

in cases such as **Sheikh 2004 and 2006 , Burke [2005], Joynton [2008] , Mackreth [2009]** to name but a few. This was brought together in the guidance in the case of **F [2011]** from the then Lord Chief

Justice.

The court will say, of course, that these cases are illustrations of approach not a change in principle and **AG reference Case** stands as soundly today as when it was first delivered.

The fact remains that we are now all more adept at carefully assessing historical sexual allegations and considering, for example, whether the accused actually had the opportunity to commit an offence and, if so, whether missing documents prevented a fair trial, comparing that to a situation where documents might only help build a defence.

In these cases, we have also carefully addressed the dangers of innocent contamination, some of the dangers of police investigations and how we can take a balanced approach to such cases, which often carry the hallmark of multiple complainants.

That progress cannot and must not be dented by the current panic in the aftermath of the Savile case.

I spoke at a conference in North Wales immediately following the first revelations over Jimmy Savile and predicted that we would be facing considerable issues going forward.

Whatever the rights or wrongs of this, there is no doubt that we are now in a media frenzy – effectively we are now in a new moral panic.

This has not only forced politicians into the public arena but also others, and we have seen the former DPP forced into issuing new guidance to help shore up a tough stance on such cases.

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The new guidance is a recipe for more wrongful convictions and this, accompanied with the massive explosion in sexual offending reporting, will in the long term, ensure that innocence projects together with all the bodies who deal with miscarriage will be facing an increased burden of sexual offences .

It was recently reported that there is a five year low in rape case reporting to the CPS compared with a 30% increase in cases reported to the police. We have had an explosion of reporting, but the institutions are ill equipped to deal with them. This resource issue brings with it the danger of even more miscarriages.

Consider the current situation with the machinery of justice as well. The Court of Appeal is consistently under pressure and the CCRC is now currently reporting that after some considerable effort to reduce investigation time it will be increased considerably.

What will we face in terms of investigating these sexual offences coming our way?

We will in the future be faced with the prospect of all cross examination of witnesses having been concluded long before the trial.

There will be considerable disclosure issues and the new national protocol is likely to lead to many trials descending into the mire.

The number of assumptions which are currently applied against defendants in judicial directions will be increasing and prosecutors will be pushing for more.

Ever increasing difficulty in gaining access to exhibits and proper forensic work with the reduction in expert fees further curtailing the availability of good work.

Continued pressure from the government to deliver swift justice at the expense of good justice.

More unrepresented Defendants in the Crown Court unable to afford representation.

All of these factors are likely to narrow the availability of material available to innocence projects to investigate cases.

It is worth mentioning here the issue of access to Exhibits and the Nunn case. [See article on the outcome of the Nunn case and the positive implications for innocence projects and solicitors at: <http://www.bristol.ac.uk/law/news/2014/443.html>—*Editor*]

As those who are familiar with the case will know this is a case where following a judicial review the court refused to grant relief to Mr. Nunn's application to force access to exhibits from his original trial for the purposes of testing.

This has given rise to a bad precedent and you will, no doubt, have discovered access to exhibits now being blocked and the CPS declining access as a policy. This is a dangerous moment for miscarriage investigations because if Nunn stands as it currently is then the prospect of gaining access to exhibits will be seriously curtailed. On the other hand, I do not suggest the Supreme Court should possibly go as far as allowing exhibits to be accessed in every single case.

For example, I have lost count of the number of sexual consent cases I have had where an appellant wants DNA tests done. It can never help him and the tests would simply be a waste of public money. There has to be a genuine concern or reason why the exhibits should be tested.

The answer probably lies in a CCRC referral of Victor Nealon now due for imminent hearing by the Court.

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I do not intend to go through the detail of this case as it is now for the Court of Appeal to determine but the central agreed point is directly relevant to this issue. [Victor Nealon overturned his conviction in December 2013—*Editor*]

In Mr Nealon's case we accessed the exhibits precisely because we had considerable concerns over whether the exhibits had been properly assessed and this had been raised consistently by Nealon over 17 years. It was not a speculative attempt to find evidence, rather an effort to seek a proper answer to concerns that had always been raised.

The answer was to discover the exhibits had not been tested, that they did have DNA in intimate areas, but they related to an unknown male and not Victor Nealon.

The Court will now wrestle with any possible explanations for this and how this leaves the safety of a conviction as a whole. But this referral demonstrates the clear and present dangers in over restricting access to exhibits.

So we can see a real pattern emerging now which although illustrated here by sexual cases can equally apply to murder cases or any other kind of case INUK looks at.

A shift in public attitudes following the Savile case or any other scandal

Directions which skew a case against an accused before the case begins

Guidance on Prosecution which swings the pendulum to far

Lack of resources to investigate miscarriage

Restriction of access to exhibits

Resource issues

This is the situation we are in before Chris Grayling's latest proposals start to bite.

Many more cases will be coming your way with the risk that resources such as INUK will be swamped due to the gap left following the draconian effect of these reforms.

The amount of experienced appeal lawyers which has been reducing for some time will be diminishing even further.

Consider, for example, that an appeal lawyer currently only receives £300 to review an appeal case which Chris Grayling will now reduce to £251. No reasonable review can be undertaken at that rate and no appeal lawyer can run a business on that rate, which starts any review at a loss before it even starts.

We are already required to undertake all work we effectively do at the Court of Appeal for free unless we are lucky enough to get a limited registrars brief.

The reality is, therefore, that if these proposals are adopted then INUK will be even shorter of legal assistance.

Defendants at the Police Station, and in their cases going forward, will be badly represented by larger organisations that have neither the skills nor interest to defend their cases.

The Junior Bar will have been decimated and the way in which cases are run will be changed forever. The unwritten work undertaken in the Crown Courts day and night will no longer be done in the same way. Trials will be affected and convictions will wrongfully follow.

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The Court of Appeal will be swamped and faced like its Civil Colleagues with increasing numbers of unrepresented applicants. The CCRC will simply, without a major injection of resources, be unable to cope.

It is a bleak future and one we should all prepare for.

But even if it may look bleak we must continue to fight. We must continue to review miscarriage and leave no stone unturned. We owe the wrongfully convicted nothing less.

There will be many disappointments ahead for Innocence Projects but these disappointments need to be embraced and used to build the strength of INUK. Appeals will not proceed, the CCRC will regularly refuse to refer, occasionally appellants let you down and sometimes you can even get a hard time in the Court of Appeal!

But never ever give up. Just pick yourself up and keep going.

I would remind you what Dr Martin Luther King jr said about Justice almost 50 years ago :

"Human progress is neither automatic nor inevitable... every step toward the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals "

Please continue to use your dedication to help those who need your help the most – the wrongfully accused.

Mark Newby

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