Flinders University Learning and Teaching Week 2018

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Hosted by Associate Professor Bibi Sangha & Dr Robert Moles

Law Lecturers Changing the Law

Dr Robert Moles and Associate Professor Bibi Sangha literally wrote the book on right of appeal in Australia, and were responsible for changing the laws surrounding the right of appeal in South Australia. Now, they are passing that social responsibility onto their students through a unique miscarriages of justice intensive course. The content and structure of the topic is as flexible and adaptive as the disciplinary landscape in which it sits, with the material provided as relevant and up-to-date as it could be, thanks to Robert and Bibi's continuous involvement in the Flinders University Miscarriages of Justice (FUMOJ) project. Students are collaborators in unravelling the complexities of cases, and are able to follow their progress through regular meet-ups after the topic has ended- retaining their engagement long after the final assessment is submitted.

Come and hear how Robert and Bibi have created a topic where core content is delivered via educational and 'interest-based' streams, peer education is encouraged and social empowerment is the take-home message.

Bibi Sangha:

Good afternoon. We began our work on miscarriages of justice in the year 2000. We published our initial findings on the ABC 4 Corners Program in October 2001. We had identified a number of cases which we thought to be serious miscarriages of justice. We also identified some very serious structural and systemic errors in the administration of justice going back at least until the late 1960s. We rather naively thought that when we brought these concerns to the attention of the relevant officials, they would take remedial action and we could get back to our day job. That was not to be.

For the next 10 years we drafted legal submissions and attempted every way we knew how to get the most serious cases back to the courts for review. We also engaged in a sustained media campaign to educate the wider community about these issues.

It is important to appreciate that serious criminal convictions usually occur where some appalling crime appears to have been committed. Those involved - and the community at large - are usually relieved when a perpetrator is identified and convicted. Those who want to

claim that some serious error has occurred in that process must be prepared to face some stubborn resistance from those who are content with the answers which have already been "locked in".

By 2012 we had published a number of books and had been involved in some 60 television and radio programs so we were beginning to get some traction in the public arena. We thought the time was right to establish a course on miscarriages of justice at Flinders University.

Our initial intake was around 30 students. We had published the book *Forensic Investigations and Miscarriages of Justice* which was an international comparative study on the law and miscarriage cases which had occurred in Australia, Britain and Canada. Our joint author was Professor Kent Roach of Toronto University who was Canada's leading expert in this field. A year or two earlier he had retained us to provide an expert report to a Canadian Judicial Inquiry into a series of baby deaths there. He had learned of the work we had done on some baby death cases in South Australia.

We quickly learned about how the "principle of proximity" works in these cases. It is easy for Australians to accept that there are cases of wrongful convictions in Canada and the UK, a bit more difficult to admit to them occurring in Australia, generally speaking, but very hard to accept that there have been serious errors in cases in South Australia. We understand the psychology involved - which is why we usually approach our teaching in this way.

As the course is taught every second year, our next session was in 2014. By that time, we had identified serious structural errors in the criminal appeal system in all states and territories in Australia. By 2013 we had persuaded the Australian Human Rights Commission that this amounted to a serious breach of Australia's human rights obligations and in that year the parliament of South Australia legislated to create a new statutory right of appeal. This was the first significant change to the criminal appeal system in Australia in over 100 years. By the time we came to teach the course in 2014, the appeal in the case of Henry Keogh was well underway although we did not know then what the outcome was to be.

Keogh had been convicted of the murder of his fiancée by drowning her in the bath at their home in 1994. He had spent some 20 years in prison. We had used this as our test case over the previous years as we tried to find some means by which to get such cases back to the courts. We had been involved in countless court and tribunal hearings, each being reported in the media and faithfully recorded on our web site. Everyone, it seemed knew about the

Keogh case, and it and the changes to the law were included that year as part of the course materials.

By the time we came to teach the course again in 2016, we then knew that the Keogh conviction had been overturned – that the Court of Appeal had recognised there had been serious errors in the expert evidence given at his trial, just as we said it had been all those years ago, and that the prosecution had decided not to proceed with a retrial. By this time, the student enrolment for this course had increased from around 30 students to around 60. A doubling of student numbers clearly indicated a growing interest.

At the beginning of 2018 we were invited to offer the course as a one week intensive. It would obviously present a challenge to re-cast the course materials to suit that format, but we thought it would be an exciting challenge. We were surprised to see that the student numbers had increased to around 100. We thought it would be interesting to enable students doing Justice Studies, Criminology and Socio-Legal studies to join in with law students on the course, but felt that we should offer them learning paths which they could adapt to their interests. It also provided an opportunity for students with different disciplinary backgrounds to learn from each other.

In teaching for several hours on consecutive days we appreciated that there is only so much talk students can listen to before sleep or unconsciousness intervenes. We took the opportunity to introduce the various cases we discussed with a clip from one of our programs – a virtual introduction as it were to the people involved. It is all very sad to know that Mr Mullins-Johnson spent 12 years in prison in Canada for the rape and murder of his 4-year-old niece, when she had been neither raped or murdered. But once you hear him speak of his pain – and his fear or being killed in prison – it is hard to forget his face or those words. I think it was also interesting for the students to see their lecturers on national news and current affairs programs being interviewed by well known TV personalities. I think it brought credibility and interest to the issues – and to us as well.

By this time we had also published a further book which was more focussed on the technical aspects of legal appeals and how we had reformed them. It seemed to us that the cases and materials on those issues might be better suited to the law students - the earlier book comparing miscarriages of justice in Australia, Britain and Canada might be better suited to the non-law students. We drew up a reading list with separate readings each week for each ‘stream’.

In addition, our website over the years had developed to become a leading database of materials on wrongful convictions. These included all of the legal submissions which we had prepared for each of our cases, hundreds of summaries of law report cases, together with links to the media reports and our now quickly growing list of radio and television programs. For two of our cases, we commissioned books to be written to provide a clearer narrative of the background to the complexities in the case – the full text of those books can be found on the Edward Splatt and the David Szach web pages.

The website enabled us to introduce additional elements of flexibility to the student learning experience. So long as the students had a sufficient understanding of the core elements of how the appeal system worked and the responsibilities of the key players, such as prosecutors, expert witnesses, defence lawyers and judges – they could then select particular cases to study which fitted with their background knowledge or interests – the psychology of false confessions or the misuse of DNA or other technical aspects of expert evidence.

In addition, there are many points of common ground and significant differences in the way in which wrongful convictions are dealt with across the various jurisdictions – in Canada, the police developed elaborate schemes to 'trick' people into making confessions whereas in Britain they seemed to prefer techniques described in some of the cases as 'torture'. Canada seemed to prefer 'judicial inquiries' to resolve problem cases, Britain had established a Criminal Review Commission and Australia preferred to stick with outright denials.

The main strategy which underlined our approach was to view the students as fellow-researchers. Our website contained all of our research materials - or nearly all of them. There will always be some legal submission on current cases which we might not wish, for strategic reasons, to have publicly available.

There are also, at any time, a large number of important but unresolved issues. We think it is important to enable the students to engage with these issues and to work out their own ideas about how they should be resolved.

Was the Attorney-General, the Coroner or the prosecutor correct in not disclosing certain material, or was it a breach of duty to the accused warranting the conviction being set aside?

Did the Court of Appeal judges make a correct call in rejecting an appeal or do we need to take it to the High Court to see if they will take a different view?

If the overturning of a conviction will bring the legal system, or senior officials within the system, into disrepute, would we be tempted to turn a blind eye to it on the basis that the person is probably guilty anyway, and why ruin the reputation of such a respected person?

These are the issues which arise in all legal systems. However, there are some very special and challenging features of the South Australian legal system which should make us a leader in this field of research.

Bob Moles

I think it is important for students to appreciate that this is more than just a "course". It is intended to assist the student to develop an attitude of integrity to their work – not just for now but also into the future. It has therefore been my practice to continue to meet with students after the course has finished to enable them to continue with their interest in this area, and also to follow the continuing progress of these cases. We have taken the opportunity, where possible to invite people who have been affected by these issues to come and talk to the students about them. People such as Henry Keogh and Gordon Wood who had his wrongful conviction for murder overturned in NSW some years ago.

Having spoke about our programs I thought we should perhaps enable you to experience something of them. We mentioned the baby death cases we had worked on – it was that issue which became the starting point for the
No 1 - ABC 4 Corners program "Expert Witness" which we referred to:

I should also refer you to the Mullins-Johnson program.

No 41 - and introduce you to Kent Roach from Canada

No 79 Henry Keogh Free at Last Channel 9.

3 September Report to Parliament of South Australia.

No 57 5 June 2011 - 60 Minutes – from 9:00