

---

# Post-conviction reviews in Australia — “A degree of intellectual isolation”

*Bibi Sangha* FLINDERS UNIVERSITY and *Bob Moles* NETWORKED KNOWLEDGE

In 1999, the Hon JJ Spigelman, Chief Justice of NSW expressed some views about the growing influence of rights-based jurisprudence in the legal systems of the USA, Canada, Britain and New Zealand. He said that, “[w]ithin a decade it is quite likely that in substantial areas of the law, British cases will be ... incomprehensible to Australian lawyers.”<sup>1</sup>

His conclusion was that:

[n]ow, both Canada and England, and to a lesser extent New Zealand, may progressively be removed as sources of influence and inspiration. Australian common law is threatened with a degree of intellectual isolation that many would find disturbing.<sup>2</sup>

As those 10 years have now passed it might be a suitable time to reflect upon whether the concerns of the Chief Justice have come to pass.

In this discussion we identify some of the British cases which, we suggest, are striking in their approach when compared to some current Australian practices.

Whilst the provisions of the European Convention on Human Rights are not often explicitly articulated as part of the reasoning in such cases, one cannot exclude the possibility that the growing awareness of its provisions comprises part of the background to them.

At the same time, we must be mindful that another very significant influence was the development of the Criminal Cases Review Commission (CCRC) which commenced operating in 1997.<sup>3</sup> Since its establishment, some 320 convictions have been overturned which otherwise had exhausted all avenues of appeal.<sup>4</sup>

Clearly the British Court of Criminal Appeal has been kept busy working through the principles which are to be applied when considering appeals. In 1995, as part of the reforms to establish the CCRC, the basis on which an appeal could be allowed was redefined. The amended provision stated that the Court of Appeal “shall allow an appeal against conviction if they think that the conviction is unsafe.”<sup>5</sup> The Australian provisions (similar to those which were in the UK Criminal Appeal Act 1907) state that the court shall allow an appeal if:

- It is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence; or
- the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law; or
- on any other ground whatsoever there was a miscarriage of justice.<sup>6</sup>

We do not think that the differences in approach between Britain and Australia can be explained by differences in the wording of the enabling provisions. We take the view that the differences are more attitudinal and now reflect distinct differences between “process” and “outcomes” based analyses.

As has been pointed out elsewhere, the legislative and common law principles involved in this area of law are tolerably similar, with the British courts being more considerate to what they describe as the “lurking doubt” cases.<sup>7</sup>

## The British approach

### *R v Maynard, Dudley, Bailey and Clarke (2002)*

In one of the more challenging cases, the accused were variously convicted in 1977 of murder and conspiring to cause grievous bodily harm.<sup>8</sup> The body and various body parts of someone known to them were washed up at separate locations on the Thames foreshore in Essex. There was no doubt that this was a ghastly crime by any account. As the court stated on the appeal:

A later post-mortem revealed that he had been tied up and tortured before being killed by severe violence to the head; and that his body had been dismembered when he was either dead or (possibly) unconscious.<sup>9</sup>

Equally, there was no doubt that the accused were not fallen angels. As the court said:

It would not be unfair to observe that most of the principal personalities ... concerned in the events which gave rise to the charges were either convicted criminals, or members of the families or friends of convicted criminals.<sup>10</sup>

The trial had been “the longest murder trial, we were told, ever to have taken place in this country”, lasting for some seven months.<sup>11</sup> There had been an unsuccessful

appeal and a number of other “representations, petitions and complaints” before the matter was again referred to the Court of Appeal by the CCRC.

In the appeal in 2002 there was new evidence to the effect that a statement said to have been taken by the police could not have been written within the times stated. It was said to have commenced at 4.28 pm and concluded at 5.18 pm. The statement was handwritten. However, an independent document examiner stated that studies had shown that the number of characters written in the statement could not have all been handwritten in 50 minutes.

The prosecutor submitted that it was obvious that either the commencement time of the interview or the finishing time must have been noted down incorrectly and that the jury would have appreciated that point. The court said that whilst it accepted that such an explanation could well have been a possibility, it also appreciated that there could have been other, less innocent, explanations.

The court said that it was not for it to determine which scenario was correct. Once it had determined that there had been a defect in the evidence, not disclosed at trial, and that defect *might* have affected the decision of the jury, then the court was obliged to overturn the verdict.<sup>12</sup> Indeed, the court determined that the defect in one statement could have led the jury to look at other pieces of evidence, against the other co-accused, differently. As a result, they overturned all four convictions, even though the statements which the others had given appeared to be without such defects. The court said the suggestion that the jury concluded that the police made a mistake, would require the appeal court to look into the minds of the jury and to speculate as to their reasoning in a way that is clearly forbidden.<sup>13</sup>

In *R v Pendleton*, the Supreme Court had made it clear that:

The Court of Appeal is a court of review, not a court of trial. It may not usurp the role of the jury as the body charged by law to resolve issues of fact and determine guilt.<sup>14</sup>

It went on to say:

It is not permissible for appellate judges, who have not heard any of the rest of the evidence, to make their own decision on the significance or credibility of the fresh evidence.<sup>15</sup>

Despite the appalling nature of the crime, the fact that the accused had clearly been involved in serious crime, the great length of the trial, the fact that the new evidence was not necessarily inconsistent with their guilt and only related directly to one of those accused — the court set aside all four verdicts.

### *R v David James (1998)*

In this case, James was a veterinarian whose wife had died by ingesting a toxic substance used in the treatment of animals.<sup>16</sup> The question was whether she had taken it (suicide) or whether he had given it to her (murder). He had been convicted of her murder. Some time after, when clearing out a cupboard at his home, a note was found in a magazine. It was in his wife’s handwriting and consisted of just two sentences. It could not be determined when it was written, or indeed, if the thoughts were of a suicidal nature. As the Court of Appeal said, more than one interpretation is capable of being placed upon the note in the circumstances, but none is conclusive and one is undoubtedly consistent with an intention to commit suicide. It held that the jury’s verdict given in ignorance of the note must be regarded as unsafe and it therefore quashed the conviction on that single ground.

### *R v George Davis (2011)*

In March 1975 George Davis had been convicted of participating in an armed wages robbery, in the course of which two guns were carried and a pursuing policeman was shot in the leg.<sup>17</sup> As the Court of Appeal pointed out, Davis’s case had been referred to the court by the CCRC after there had been successive refusals to refer by Home Secretaries, when the decision was theirs, and subsequently by the CCRC itself in 2005.

The court accepted that there were serious difficulties when asking witnesses to recall what happened some 35 years ago. Importantly, the court added, “[w]e should however make it clear that when this court decides whether a conviction is or is not safe it is not deciding whether or not the defendant is guilty.”<sup>18</sup>

It was necessary to emphasise this point in this case, because there was other extrinsic evidence which indicated that the accused most probably was guilty.

As the court explained, in 1976, because of concerns about the conviction, the Home Secretary had remitted his sentence on the present robbery. Whilst released, just over a year later, Davis committed a similar armed robbery at another bank. He was caught in the act and in due course pleaded guilty and was sentenced to a period of imprisonment.

His reputation is, clearly, that of an armed robber whatever the result of this reference.<sup>19</sup>

However, the court went on to say that none of that affects the duty of the court on the appeal before it. It said that once the appeal is before the court, its duty is to examine the conviction and to decide whether or not it is securely based, that is to say, safe.

If it is unsafe, the fact that Davis was a serious active criminal cannot justify it remaining in existence.<sup>20</sup>

Whilst the court accepted that a number of grounds of objection were not satisfactory, it was persuaded that the identification evidence was unreliable and the conviction was quashed.

## *R v Smith, Taylor, Nicholson and Johnson (1999)*

In this case the appeal court reviewed the response to the submission at trial of “no case to answer”.<sup>21</sup> The charges in question involved conspiracy to rob and having offensive weapons. As the court said, there may well have been evidence to suggest that those involved were engaged in questionable activities or that “a dispassionate observer might have thought it all looked a bit fishy”.<sup>22</sup> It added, “[b]ut this at best would be speculative and at worst fanciful”. But, adding another twist to the story, the court went on to ask what the situation would be if after the wrongful rejection of the submission on “no case”, “the defendant is cross-examined into admitting his guilt?”

In that situation, the court held that the conviction should still be set aside as being unsafe, because, “[t]o allow the trial to continue beyond the end of the prosecution case would be an abuse of process and fundamentally unfair.”

## Conclusion

In each of these cases, the court was faced with evidence, not by any means unambiguous, yet one interpretation of which was possibly inconsistent with the guilt of the accused. It didn’t prove by any means that the people involved were innocent. Indeed, there may have been very good reason in each case to accept that the accused were in fact guilty. However, the courts were concerned with both outcome and process. The effect of these decisions is that they make it clear that one not only has to have the correct conclusion, but one also has to arrive at it by a correct procedure. After all, this is presumably what is meant by “due process” “natural justice” and “the rule of law”.<sup>23</sup>

## The Australian approach

### *R v Catt (now Beckett) (2005)*

In 1991 Roseanne Catt was convicted of a number of serious offences including malicious wounding, assault and solicitation of murder.<sup>24</sup> In 2001, the Attorney-General referred the matter to the Court of Appeal to be heard as an appeal. It referred the matter to a single judge to determine various factual matters, and in 2005 the appeal court issued its judgment based upon those facts.

Ms Catt’s complaint was that she was a victim of a conspiracy which had been perpetrated by the investigating officer in conjunction with her former husband.

On the appeal, the court accepted that the investigating officer had at various times made complaints about her which were “entirely baseless”.<sup>25</sup>

The appeal court referred to the fact that the judge on remitter had referred to the fact that the investigating officer had a “propensity to improperly use his office to damage Ms Catt irrespective of the risk of gratuitous collateral damage to others” and that “it indicates a lack of objectivity having descended into malice and abuse of power.”<sup>26</sup>

It accepted that there were “serious questions” as to the propensity of the investigating officer to “pressure witnesses to provide false evidence” and that he may well have committed perjury.<sup>27</sup>

The appeal court said that it accepted that the likely false evidence of a particular witness “had seriously adverse repercussions to the case presented on behalf of Ms Catt on all contested issues at her trial.”<sup>28</sup>

Despite all of this, the Court of Appeal determined that only six of the eight convictions would be set aside and that convictions for malicious wounding and actual bodily harm would stand.

Unlike the British court in *R v Maynard et al*, where a relatively minor error in respect of one accused had a “knock-on” effect in respect of the other accused; in Ms Catt’s case, even the most egregious errors in relation to some of her convictions were not regarded as undermining the court’s confidence in other convictions obtained during the same proceedings.

In doing so, the court in *R v Catt* failed to refer to a number of important decisions of the High Court of Australia including the important statement in *M v R*:

If the evidence, upon the record itself, contains *discrepancies*, displays *inadequacies*, is *tainted* or otherwise *lacks probative force* in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is *bound* to act and to set aside a verdict based upon that evidence.<sup>29</sup>

*Grey v R* involved circumstances which seemed particularly applicable to those of the *R v Catt* case:

[the witness] was presented by the Crown as a reliable witness and, by implication, a witness whose involvement, if any, in the events in respect of which the appellant was charged was non-existent or entirely innocent. This was a disingenuous basis upon which to present [the witness].<sup>30</sup>

... It is not difficult to imagine a fertile area of cross-examination that could have been tilled by the appellant on the basis of this.<sup>31</sup>

The West Australian Court of Appeal had recognised as important, principles laid down by the High Court in its judgment in *R v Beamish*, but again, those High Court principles were not referred to by the appeal court in *R v Catt*:

Those authorities establish that where there has been a departure from the requirements of a properly conducted trial, it cannot be said that there has been no substantial miscarriage of justice if the applicant has thereby lost “a chance which was fairly open to him of being acquitted” to use the phrase of Fullagar J in *Mraz v R* or “a real chance of acquittal” to use the phrase of Barwick CJ in *R v Storey*.<sup>32</sup>

In an interesting sequel to this decision, Ms Catt (now Beckett) instituted proceedings for compensation for wrongful conviction by way of an action for malicious prosecution.<sup>33</sup> In relation to the convictions which had been set aside by the Court of Appeal, and in respect of which the prosecution determined that they would not proceed to a retrial, the court determined that as a condition of proceeding with her civil action Ms Beckett would need to establish that she was in fact innocent of the charges.

The interesting comparison here is with the case of Derek Treadaway in Britain who claimed to have been seriously assaulted by the police during their inquiries. Mr Treadaway was awarded £50,000 by way of damages (£2,500), aggravated damages (£7,500) and exemplary damages (£40,000) on 28 July 1994. His convictions were not overturned until 18 November 1996.<sup>34</sup>



**Bibi Sangha,**  
Senior Lecturer,  
Flinders University,  
South Australia.  
Email: [bibi.sangha@flinders.edu.au](mailto:bibi.sangha@flinders.edu.au)



**Dr Bob Moles,**  
Co-developer and legal researcher,  
Networked Knowledge.  
Email: [bobmoles@iprimus.com.au](mailto:bobmoles@iprimus.com.au)

## Footnotes

1. Spigelman JJ, “Rule of Law — Human Rights Protection” (1999) 18 Aust Bar Rev 29 at 31.
2. Above.
3. For a detailed discussion of the role and function of the CCRC see Sangha B, Roach K and Moles B, *Forensic Investigations and Miscarriages of Justice* (2010) Irwin Law, Toronto, and Federation Press Australia Ch 10 (*Forensic Investigations*).
4. Statistics are available at [www.ccr.gov.uk](http://www.ccr.gov.uk).
5. Criminal Appeal Act 1968 s 2(1).
6. Criminal Law Consolidation Act 1935 (SA) s 353; Criminal Appeal Act 1912 (NSW) s 6; Crimes Act 1958 (Vic) s 568; Criminal Code Act 1899 (Qld) s 668E; Criminal Code (NT) s 411; Criminal Code Act Compilation Act 1913 (WA) s 689; Criminal Code Act 1924 (Tas) s 404(1).
7. An overview of the principles involved in these cases is set out in *Forensic Investigations*. The British principles are in Ch 3 and the Australian principles in Ch 5. It is noted that in 300 appeals heard in Britain in 2002, this issue was raised in only seven of the appeals and successful in just one of them (at p 62).
8. This discussion is taken from the Court of Appeal judgment in *R v Maynard, Dudley, Bailey and Clarke* [2002] EWCA Crim 1942 per Mantell LJ.
9. Above at [18].
10. Above at [11].
11. Above at [31].
12. *R v Maynard, Dudley, Bailey and Clarke* [2002] EWCA Crim 1942 at [50].
13. Here the court referred to *R v Pendleton* [2001] UKHL 66.
14. Above at [12].
15. Above.
16. *R v David James* [1998] EWCA Crim 2521 per Evans LJ.
17. *R v George Davis* [2011] EWCA Crim 1258 per Hughes LJ.
18. Above at [5].
19. Above at [6].
20. Above at [7].
21. *R v Smith, Taylor, Nicholson, Johnson* [1999] EWCA Crim 1525 per Mantell LJ.
22. This and the following citations are from the judgment of Mantell LJ. The judgment does not contain para numbering.
23. As to these issues see the discussion in Sangha B and Moles B “The right to a fair trial in the context of international human rights obligations” (2011) 8(10) *Direct Link* 112.
24. *Regina v Catt* [2005] NSWCCA 279; BC200506065 per McClellan AJA.
25. Above at [79].
26. Above at [80].
27. Above at [105].
28. Above at [128] (emphasis added).
29. *M v R* (1994) 181 CLR 487; 126 ALR 325; 76 A Crim R 213; BC9404665 at [9] (emphasis added).
30. *Grey v R* (2001) 184 ALR 593; 75 ALJR 1708; [2001] HCA 65; BC200107041 at [16].
31. Above at [18]. Other cases not mentioned in the Court of Appeal in *R v Catt* were *Gipp v R* (1998) 194 CLR 106; 155 ALR 15; [1998] HCA 21; BC9802404; *Ah Yick v Lehmert* (1905) 2 CLR 593; 11 ALR 306; BC0500046; *KBT v R* (1997) 191 CLR 417; 149 ALR 693; 72 ALJR 116; BC9706507; *Hayes v R* (1973) 47 ALJR 603; *Chamberlain v R No 2* (1984) 153 CLR 521; 51 ALR 225; 58 ALJR 133; BC8400536; *Osland v R* (1998) 197 CLR 316; 159 ALR 170; [1998] HCA 75; BC9806597; *Cooley v Western Australia* (2005) 155 A Crim R 528; [2005] WASCA 160; BC200506047. *Cooley* is a case which we discussed in some detail in the context of non-probative evidence given at trial and relates particularly to

# Direct Link

NSW District and Local Courts Practice Newsletter

issues of witness credibility; see Sangha B and Moles B “The law on non-disclosure in Australia: All rights — no remedies?” (2011) 8(8) *Direct Link* 86.

32. *R v Beamish* [2005] WASCA 62; BC200501670 at [319] citing *Mraz v R* (1955) 93 CLR 493; [1955] ALR 929; (1955) 29 ALJR 617; BC5500200 and *R v Storey* (1978) 140 CLR 364; 22 ALR 47; 52 ALJR 737; BC7800075.
33. *Beckett v New South Wales (No 1)* [2011] NSWSC 818; BC201105835.
34. The civil action was *Treadaway v Chief Const of Police for the West Midlands* 1994 QBD (unreported); the details of which are set out in the criminal appeal in *R v Derek Treadaway* [1996] EWCA Crim 1457.