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WRONGFUL CONVICTION, LAWYER INCOMPETENCE AND ENGLISH LAW – SOME RECENT THEMES

Geoffrey Bennett*

I. THE CONTEMPORARY BACKGROUND

Viewed from a distance the outward appearances of the English Legal System might look reassuringly stable. In fact, nothing could be further from the case. During the last ten years almost every facet of the system, even the constitutional order, has been radically overhauled, or at least significantly modified. The whole system of civil procedure has been recast, after over a hundred years of relatively little major modification, in an attempt to simplify and expedite proceedings with a new emphasis on judicial case management.¹ Accepting a case on the basis of a contingency fee, once a reason for being professionally disciplined, has in the last four years become lawful and routine in certain types of cases. After some seven hundred years the powers of the House of Lords have been significantly curtailed.² Perhaps most important of all, the Human Rights Act 1998, which has been effective from October 2, 2000, requires courts to take account of the European Convention on Human Rights in reaching their decisions.³ It would be hard to overstate the importance of this all-pervasive measure. Although it had long been the object of criticism, the Act has almost certainly been a factor in the government's decision to abolish the office of Lord Chancellor, after some 1,400 years of existence, which is likely to require a major overhaul of many aspects of the legal system including, for example, the appointment of judges.⁴ The 1998 Act predictably has had,

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¹ Civil Procedure Act, 1997, c. 12 (Eng.); Civil Procedure Rules 1998. The legislation followed a report by Lord Woolf, *Access to Justice: Final Report*. A convenient summary can be found in LAW SOCIETY'S GAZETTE, Aug. 2 1996. The recommendations for more judicial intervention were influenced by perceptions of American practice.

² Hereditary Peers are no longer entitled to vote in the House of Lords, House of Lords Act 1999, c. 34, and there are proposals for an elected chamber. A recent and helpful account of developments can be found in DAWN OLIVER, CONSTITUTIONAL REFORM IN THE UK (2003).

³ Human Rights Act, 1998, c. 12 (Eng.).

⁴ The unexpected timing of the announcement, which had involved little prior consultation,

and continues to have, a major impact in the area of criminal procedure. One recent example is the decision of the House of Lords to strip the Home Secretary of his power to set the tariff for those sentenced to life imprisonment.⁵

This, in turn, seems to have increased tension between the legislature and the judiciary on the whole issue of sentencing.⁶ Most recently, the Proceeds of Crime Act 2002 extends the draconian confiscation provisions which were already in place for drug related offences to offences generally.⁷ This legislation introduces the entirely new concept of a 'criminal lifestyle' as part of the basis for confiscation and is almost certainly likely to be challenged under the Human Rights Act 1998. The climate is therefore one of pervasive change in many areas of law,⁸ and this includes criminal procedure to a very significant degree.⁹

Against this background of change it is striking that the movement towards codification of the criminal law, substantive and procedural, has made no ground at all, and shows no sign of doing so. A basic reform which ought to reduce the risk of lawyer incompetence, amongst other things, is to ensure that

out and will be the subject of further discussion. In the meantime, a new Lord Chancellor has been appointed to oversee the dismantling of the office. A large number of statutory provisions, reflecting the wide-ranging powers and responsibilities of the post, will need to be amended or recast to accommodate the new constitutional arrangements, whatever they turn out to be. See Richard Cornes, *The UK Supreme Court*, NEW L.J., July 4, 2002, at 1018-1019 (discussing the proposals for a new Supreme Court and reforming the appointment process for judges).

⁵ See *R. (on the application of Anderson) v. Sec'y of State for the Home Dep't* [2002] 3 W.L.R. 1800 (H.L.).

⁶ The consequences may be new legislation to restrict the discretion of judges, as is common in American jurisdictions. Lord Woolf, the current Lord Chief Justice, took the unusual step of publicly criticising this proposal in a debate in the House of Lords. He commented that sentencing, particularly in relation to murder, "should be removed from the political arena." "The present proposal will have the effect of increasing political involvement." Francis Gibb & Greg Hurst, *Woolf Attacks Political Interference in Courts*, THE TIMES OF LONDON, June 17 2003, at 2.

⁷ Proceeds of Crime Act, 2002, c. 29 Part 2 (Eng.).

⁸ The Lord Chancellor is even considering abandoning the wearing of wigs in court. See Francis Gibb, *Legal Bigwigs in Line for a Modern Makeover*, THE TIMES OF LONDON, May 9, 2003. It seems possible that they may be retained for criminal proceedings in the Crown Court. See *id.*

⁹ In two significant areas there is currently consideration of borrowing from the American Legal System. See *News*, NEW L.J., June 20, 2003. The Home Secretary has announced proposals to introduce public prosecutors as a way to ensure that the criminal justice system serves its local community. See *id.* David Blunkett stated that such prosecutors would "command the sort of standing they do in the US." *Id.* at 935. There is also a limited pilot scheme for public defenders, but this is not expected to lead to a report on the operation of the scheme until 2004.

the rules are at least as transparent and accessible as they can be made. Despite the fact that the Law Commission produced a draft criminal law code as far back as 1985 there seems no immediate likelihood that it will be implemented.¹⁰ Perhaps even more surprising, there is not even a draft code of evidence despite the difficulty of applying principles spread out amongst a bewildering array of common law rules and statutes, many of which go back to the nineteenth century. Such reform as has been carried out has been entirely piecemeal and there is nothing to compare with the Uniform or Federal Rules of Evidence.¹¹ It will come as no surprise that there does not appear to be any interest, outside academic circles, for a codification of criminal procedure. As one commentator has observed, not only would there be significant advantages to codification, it would also be eminently feasible.¹² Amongst the reasons for reform are the fragmented state of the rules of criminal procedure, the difficulty this poses for anyone trying to discover what the rules are, and the contradictions which flow from the haphazard way different sets of rules are created, usually as a piecemeal response to a particular problem.¹³ That

¹⁰ Law Commission, *Codification of the Criminal Law: a report to the Law Commission*, Law Com No. 143 (1985). There are numerous articles advocating its implementation. See, e.g., Glazebrook, *Still No Code! English Criminal Law 1894-1994*, in CITY UNIVERSITY CENTENARY LECTURES IN LAW I (1996); Lord Bingham of Cornhill, *A Criminal Code: Must We Wait for Ever?*, [1998] CRIM. L.R. 694 (1998) (At the time of publishing this article Lord Bingham was the Lord Chief Justice of England, effectively the senior criminal judge. He is currently the senior judge in the House of Lords).

¹¹ See, e.g., *Evidence And Ossification*, in CITY UNIVERSITY CENTENARY LECTURES IN LAW 47 (1996). The problem is perhaps more acute in the criminal field where the law of evidence tends to be more strictly applied. In *R v Kearley*, [1992] 2 W.L.R. 656 (H.L.), the House of Lords rejected as hearsay the evidence of 17 callers to a suspected drug dealer seeking to place orders for drugs. Lord Griffiths thought "as a matter of common sense it is difficult to think of much more convincing evidence of his activity as a drug dealer than customers constantly ringing his flat to buy drugs and a stream of customers beating a path to his door for the same purpose." *Id.* at 659. He went on to say: "I believe that most laymen if told that the criminal law of evidence forbade them even to consider such evidence as we are debating in this appeal would reply, 'then the Law is an ass.'" *Id.*

A different result would presumably have been reached under Federal Law. See *Zenni v United States*, 492 F. Supp. 464 (1980).

¹² See J.R. Spencer, *The Case for a Code of Criminal Procedure*, [2000] CRIM L.R. 519.

¹³ As Professor Spencer comments:

Because we never made the effort to set out all the rules of criminal procedure coherently between one set of covers, we never really see the system in the round. In consequence of this we never fully understand it, or appreciate what is happening to it – and the changes that we make are generally reactive ones, and sometimes ill thought out.

something better could be achieved might be indicated by the way criminal procedure was rationalised in Scotland over twenty-five years ago by the Criminal Procedure (Scotland) Act 1975.¹⁴ In 1995, a further Act consolidated subsequent legislation and still managed to be shorter than its predecessor.¹⁵ If codification has proved to be so uncontroversially feasible in Scotland, is there any compelling reason why England could not achieve as much?

Against this general background issues of incompetent representation and miscarriage of justice have posed a number of different problems recently and elicited at least one major reform of the procedural structure, the institution of a Criminal Cases Review Commission.¹⁶

II. INEFFECTIVE COUNSEL

Some of the most egregious cases in recent times of a defendant being effectively deprived of legal representation have reached English courts on appeal from former colonies. For example, in *Dunkley v. Regina*, in the midst of a trial involving armed robbery and murder, counsel for the defendant indicated that he wished to withdraw from the case.¹⁷ The judge said he could do as he pleased and told the defendant, "you are on your own. You will have to defend yourself," and continued the trial without even an adjournment.¹⁸ The defendant was ultimately found guilty of what was a capital offence and his appeal eventually reached the Privy Council in London as, at that date, the final court of appeal from Jamaica.¹⁹ It is perhaps not entirely surprising that the defendant's appeal was allowed. Where a defendant on a capital charge was left unrepresented through no fault of his own there should, it was said, normally be an adjournment to enable him to try and secure alternative representation. Even before that stage, a trial judge should seek to persuade counsel to remain or consider adjourning for a cooling-off period.

A less extreme and more difficult problem was posed in *Sankar v. The State of Trinidad*.²⁰ The defendant was charged with murder, his defence

Id. at 526.

¹⁴ Criminal Procedure (Scotland) Act, 1975, c.21 (Sct.).

¹⁵ Criminal Procedure (Scotland) Act, 1995, c.46 (Sct.).

¹⁶ Set up by the Criminal Appeal Act, 1995, c.35 (Eng.)(discussed further below).

¹⁷ [1994] 3 W.L.R. 1124, 1128 (PC (Jam.)).

¹⁸ *Id.*

¹⁹ *Id.* at 1126.

²⁰ [1995] 1 W.L.R. 194 (PC (Trin.)); See also the general discussion of this case in the context of the effect of an accused's failure to testify in All E.R. Rev 1995 pp 237-245.

apparently being self-defence, provocation or accident.²¹ Obviously establishing such a line of defence makes it almost inevitable that the defendant will have to give evidence. Towards the end of the prosecution's case a conversation took place between the defendant and his counsel in which "something" was said which caused counsel, as a matter of professional duty, to advise the appellant to remain silent.²² As a result, defence counsel told the court that he would not be presenting a defence and that if the jury accepted the prosecution's case they should find him guilty.²³ The defendant was convicted and sentenced to death. His main contention on appeal was that counsel's decision not to call him had deprived him of a fair trial.²⁴

The Privy Council again agreed and allowed the appeal.²⁵ Where defence counsel was told something by his client which embarrassed his further conduct of the trial he should investigate the matter fully, explain the options and if necessary seek an adjournment for that purpose. Counsel here had not fulfilled his duty to explain how important it was in such a case for the defendant to give evidence. In reality the defendant had been deprived of the opportunity to decide whether or not he should give evidence or at least make a statement from the dock.²⁶ Had he decided to do so it was almost certain that the various defences would have been left to the jury with the possibility that the jury would have acquitted him.

²¹ There are obvious difficulties in such a comprehensive combination of defences. A rare discussion of the problem in English Law is Richard Gooderson, *Defences in Double Harness*, in *RESHAPING THE CRIMINAL LAW* 138 (Glazebrook ed. 1978). In addition, Sir Patrick Hastings in his *Autobiography* notes:

If ever it had been my lot to take a lady for a stray week-end, and at the conclusion of the entertainment I had decided to cut her into small pieces and place her in an unwanted suitcase ... I should unhesitatingly have placed my future in Norman's hands, [Lord Norman Burkett was a well-known and distinguished advocate] relying confidently upon his ability to satisfy a county jury (a) that I was not here, (b) that I had not cut up the lady, (c) and that if I had she thoroughly deserved it.

SIR PATRICK HASTINGS, *THE AUTOBIOGRAPHY OF SIR PATRICK HASTINGS* 130 (William Heineman LTD 1948).

²² *Sankar*, [1995] 1 W.L.R. at 196.

²³ *Id.* at 197.

²⁴ *Id.*

²⁵ *Id.* at 194.

²⁶ A statement from the dock is an unsworn statement made by the defendant from the dock, not subject to cross-examination. It was abolished in England in but survives in some Commonwealth jurisdictions.

In fact, allegations of lawyer incompetence in the course of the trial seem to have been comparatively rare in England. Compared to the United States, with its Sixth Amendment protection, English Law seems to contain relatively few cases where the competence of counsel has received exhaustive consideration at the appellate level. There is nothing to compare with the detailed analysis of the problem by the U.S. Supreme Court in for example, *Strickland v. Washington*²⁷ and *United States v. Cronin*.²⁸ Those cases, it might be thought, effectively suggested that there was a strong presumption that the challenged conduct by counsel might have been sound trial strategy and the defendant needed to make a colourable showing of innocence. The English case of *Regina v. Ensor* certainly pointed in that direction in so far as it suggests that it is a plea where the defendant has a considerable burden to discharge to have any prospects of success.²⁹ The basis for the claim in this case arose from the fact that the defendant faced two charges of rape based upon different incidents with different victims.³⁰ It seems that the defendant made known his wish that the counts be severed and it seems likely that such an application might have been granted. The Court of Appeal was also willing to assume, for the sake of argument, that if the indictment had been severed the defendant's chances of acquittal would have been improved.³¹ Nevertheless, apparently after considering the matter carefully, defence counsel declined to make such an application.³² He had formed the view that the delay in complaint being made in the first charge of rape might well dispose the jury to acquit on that count.³³ Since the evidence on the second count was, if anything, weaker they might well go on to acquit on both charges. Lord Lane, giving the judgment of the court, cited with approval a statement of Justice Taylor that "it should clearly be understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground for appeal."³⁴

That statement was said to be subject to the qualification that the conviction should be quashed if the court had any lurking doubt that the appellant had

²⁷ 466 U.S. 668, 674 (1984).

²⁸ 466 U.S. 648, 657 (1984).

²⁹ [1989] 1 W.L.R. 497 (CA (Crim. Div.)).

³⁰ *Id.*

³¹ *Id.* at 500.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 502 (citations omitted).

suffered some injustice as a result of, “flagrantly incompetent” representation by his advocate.³⁵ The problem with this test was that the standard was both vague and intended to be highly restrictive.³⁶

In *Regina v. Clinton*,³⁷ it was again made clear that the circumstances when a verdict will be overturned based wholly or substantially on the conduct of defence counsel are likely to be extremely rare. An example given of such a case might be where a decision not to call the defendant was taken in defiance of, or without, proper instructions. The case did, however, represent a development from *Ensor* in that, it was stated, the focus of the court’s attention should always be, in the last resort, was the verdict safe or unsatisfactory.³⁸

The latest case to consider the issue, *Regina v. Nangle*,³⁹ predictably shows the influence of the Human Rights Act 1998 on criminal procedure.⁴⁰ The Court of Appeal was clearly of the view that the conduct of the case both by solicitors and counsel was in certain respects deficient, but without amounting to flagrant incompetence. The conviction was upheld but the importance of the case is that it appears firmly to shift the inquiry from asking whether there has been flagrant incompetence to a consideration of the effect of counsel’s behaviour on the overall fairness of the trial.⁴¹

³⁵ *Id.*

³⁶ It was criticised in the standard criminal practitioner’s work, JOHN F. ARCHBOLD, *CRIMINAL PLEADING, EVIDENCE AND PRACTICE* § 7-82 (P.J. Richardson et. al. eds., Sweet & Maxwell 2000) (1822), on the grounds that “there is no magic in any particular label. The issue for the Court of Appeal is whether or not the conviction is safe, not whether counsel was competent, incompetent or flagrantly incompetent.” The current law on incompetent counsel in *Archbold* 2003 is set out in one page at 7-82, in a volume containing 2,718 pages.

³⁷ [1993] 1 W.L.R. 1181 (CA (Crim. Div.)).

³⁸ By virtue of the Criminal Appeal Act 1995 the test is now simply “safety.” The “or unsatisfactory” clause was deleted, although it seems there was no intention to alter the law by this change. See J.C. Smith, *The Criminal Appeal Act 1995: (1) Appeals Against Conviction* [1995] CRIM.L.R. 920 (1995).

³⁹ [2001] CRIM.L.R. 506 (2001).

⁴⁰ The case was one of many decided after the Human Rights Act, 1998, c. 42 (Eng.), had been passed but before it came into force. In an unusual, if not unique, occurrence in English law the appellate courts in criminal cases often behaved as if the Act was in force. No doubt this was in part designed to prevent the matter being relitigated after the Act came into force on the ground that the court had not previously taken account of the European Convention on Human Rights, as the 1998 Act requires.

⁴¹ Article 6 of the European Convention requires that a defendant be afforded a ‘fair trial’ with effective legal assistance.

This seems an advance on the earlier cases, but the statements by the court are clearly dicta and it is curious how undeveloped English law appears to be in this area compared to American law. It seems probable that the case law currently being generated from Strasbourg will in future be the best place to seek guidance on how English courts are likely to deal with this issue. A recent case, which also seems to suggest that the “flagrant incompetence” test is too demanding, is *Daud v. Portugal*.⁴² Here a defence lawyer had only three days to prepare for a complex fraud trial which resulted in the defendant receiving a nine-year prison sentence.⁴³ This was said to violate the applicant’s right under Article 6(3) of the European Convention.⁴⁴

III. INCOMPETENCE OUTSIDE THE TRIAL

All of what has been said so far might, however, give a misleading and partial picture of lawyer incompetence and its effect on the English criminal justice system. In particular, a number of recent and controversial changes have shifted back the point where legal advice becomes crucial. The investigative stage at the police station is now a point where a suspect may have to make crucial decisions which will have a major impact on the trial. The Court of Appeal has recently observed that, “the police interview and the trial are to be seen as part of a continuous process in which the suspect is engaged from the beginning.”⁴⁵ There is scant recent empirical evidence, but it may be at this

⁴² 4 BHRC 522 (1998).

⁴³ *Id* at para. 21.

⁴⁴ The court stated:

The court notes that the first officially assigned lawyer, before reporting sick, had not taken any steps as counsel for Mr Daud, who tried unsuccessfully to conduct his own defence. As to the second lawyer, whose appointment the applicant learned of only three days before the beginning of the trial at the Criminal Court, the court considers that she did not have the time she needed to study the file, visit her client in prison if necessary and prepare his defence. The time between notification of the replacement of the lawyer (23 January...) and the hearing (26 January...) was too short for a serious, complex case in which there had been no judicial investigation and which led to a heavy sentence.

Id. at para 39.

⁴⁵ In *Regina v. Howell* [2003] EWCA Crim 1, para 23 (CA (Crim. Div.)). This was described in the case as a “benign continuum”. *Id.* at para. 24. See the discussion in, *The Revised PACE Codes of Practice: A Further Step Towards Inquisitorialism*, [2003] CRIM. L.R. 355.

point that the indigent defendant is likely to be most prejudiced by incompetence, often perhaps in a way that will not come immediately to light, if at all.

The most important factor in this process is arguably the Conservative government's enactment of section 34 of the Criminal Justice and Public Order Act 1994.⁴⁶ This was passed as part of a number of measures designed to restrict the common law right to silence and enables adverse inferences to be drawn from an accused's failure to mention when questioned any fact later relied upon in his defence.⁴⁷ There are also provisions in sections 35-37 which similarly permit the drawing of adverse inferences from a defendant's failure to give evidence at trial, his failure to account for objects, substances or marks, or his failure to account for his presence at a particular place.⁴⁸

Section 34 was a controversial measure then and now. Two Royal Commissions had rejected the government's proposals and there was opposition to them by the Bar Council, the Law Society and the Criminal Bar Association.⁴⁹ The then government nevertheless pressed ahead with the reforms which, as has happened in the past with criminal measures, had been previously enacted in Northern Ireland.⁵⁰ The obvious dilemma the provision poses for a suspect and their legal adviser is that a tightrope has to be walked

⁴⁶ Criminal Justice and Public Order Act, 1994, c.33 (Eng.).

⁴⁷ Section 34 states:

- (1) Where in any proceedings against a person for an offence, evidence is given that the accused --
 - (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in those proceedings; or
 - (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, . . .
- (2)(d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.

Id. at § 34.

⁴⁸ *Id.* at § 35-37.

⁴⁹ In an entirely different context, it seems reminiscent of the support given to rules 413-415 of the Federal Rules of Evidence at about the same time. *See* FED. R. EVID. 413-415.

⁵⁰ Where the climate, both political and legal, is somewhat different from the mainland. A significant legal difference is the existence of so-called Diplock Courts where terrorist offences can be tried without a jury. There is no right otherwise in English law to request a bench trial, rather than trial by jury, for serious offences.

between saying nothing, which might be the subject of adverse inferences, and saying too much, which may be incriminating or turn out to be embarrassing later. A very recent example of the difficulties posed for the courts in trying to resolve the difficulties posed by this provision is *Regina v. Howell*.⁵¹ The suspect gave a “no comment” interview, apparently on the advice of his solicitor who was concerned that there was no written statement from the injured party.⁵² The trial judge nevertheless gave a direction under section 34 of the 1994 Act that adverse inferences could be drawn.⁵³ The Court of Appeal affirmed the conviction. As they put it, “there must always be soundly based objective reasons for silence, sufficiently cogent and telling to weigh in the balance against the clear public interest in an account being given by the suspect to the police.”⁵⁴ A defence solicitor’s predictably cautious advice in waiting until a clearer picture had emerged of the alleged events was, at least on this occasion, not enough to protect his client from the clutches of section 34. An accused may have access to legal advice but can still be harmed if he fails correctly to second-guess the advice of his or her lawyer. At least where the suspect is genuinely relying on that advice, and not merely taking advantage of a self-serving excuse, difficult though it may sometimes be to draw that line, the present law is surely capable of putting an interviewee in an intolerable position.

Not surprisingly, in the brief time that it has been in force the section has generated a large amount of other highly technical case law, the general effect of which is to interpret narrowly, in favour of the defendant, provisions towards

⁵¹ [2003] EWCA Crim 1 (CA (Crim Div)). A helpful summary and criticism of the case can also be found in Tom Rees & D.J. Birch, *Evidence: Criminal Justice and Public Order Act 1994 S.34 – Silence of Defendant at Interview*, [2003] CRIM. L.R. 405, 405-408 (2003).

⁵² *Howell*, [2003] EWCA Crim 1 at para. 5. The difficulties of giving effective and appropriate advice when there is no signed statement from the complainant are set out in R. Brown, *The Benign Continuum?*, ARCBOLD NEWS, Feb. 3 2003, at 7-8. The author, inter alia, makes the point that, “Experience has shown that a witness’s first, formal, signed statement may be quite different in content from the allegation first made orally or in draft to the police. Solicitors are likely to encounter genuine difficulties if they are required to give constructive advice about s. 34 to clients in the absence of any evidence and having to rely on inadequate information of the allegation.”

⁵³ *Id.* at para. 9.

⁵⁴ *Id.* at para. 24. The effect of the present law is summarized in A. Keogh, *The right to silence - revisited again*, NEW LAW JOURNAL, Vol. 153, at 1352-1353 (2003). The decision has been criticized as “mischievous,” A. Choo & A. Jennings, *Silence on legal advice revisited: R v. Howell*, INTERNATIONAL JOURNAL OF EVIDENCE & PROOF, Vol. 7, No.3, at 185-190, (2003), but its correctness appears to have been recently affirmed by the dicta of Laws L.J. in *R v Knight* [2003] Crim. L. R. 799.

which a significant number of the judiciary seem deeply unsympathetic.⁵⁵ The sophistication of this case law now means that an evaluation of a lawyer's performance can become the subject of expert testimony, particularly since trial judges may have limited knowledge and experience of interrogation at a police station.⁵⁶ It has led to a body of cases which, for example, has excluded prosecution evidence on the grounds that it was obtained following incompetent legal advice. Examples of incompetence from the cases include failure to obtain adequate discovery from the police, failure to keep proper records and errors as to the law. Indeed, given that arguments from principle seem to have cut little ice in the debate over this provision, the most cogent reason for repealing section 34 may be that it is simply no longer cost-effective.⁵⁷ Ironically, a measure passed to increase conviction rates of the supposedly guilty has now become such a legal minefield, capable of generating hyper technical appeals, that it may now be having little or no effect in furthering the policy of the 1994 Act.

The evidence of whether suspects are receiving the often sophisticated legal advice now required is currently very incomplete. In the 1990's the Royal Commission on Criminal Justice found the standard of police station advice "disturbing".⁵⁸ Since then various initiatives have been taken by the Law Society and by the revision of the Codes of Practice for interrogation under the Police and Criminal Evidence Act 1984.⁵⁹ It therefore seems probable that standards have been rising in this area but the flurry of research activity promoted by the last Royal Commission has not been maintained. Certainly a number of troubling cases have reached the courts in recent times⁶⁰ which gives cause for concern. The lack of cases, moreover, as often, may conceal a larger problem. In many comparatively minor cases the advice will not even be given by a solicitor, but by a legal executive, and it may be that this exemplifies the way in which a high profile figure able to command large legal resources is a significant advantage in the English system over the indigent defendant. There

⁵⁵ A strong argument for the current comparative ineffectiveness of Section 34 is to be found in Ian Dennis, *Silence in the Police Station: the Marginalisation of Section 34*, [2002] CRIM.L.R. 25 (2002).

⁵⁶ See Ed Cape, *Incompetent Police Advice and the Exclusion of Evidence*, [2002] CRIM.L.R. 471, 483 (2002).

⁵⁷ The argument is compellingly presented in Diane J. Birch, *Suffering in Silence: A Cost-Benefit Analysis of Section 34 of the Criminal Justice and Public Order Act 1994*, [1999] CRIM.L.R. 769 (1999).

⁵⁸ See, Cape, *supra* note 56, at 471 n. 2-4.

⁵⁹ See Police and Criminal Evidence Act, 1984, c. 60 (Eng.)

⁶⁰ See Cape, *supra* note 56.

is a case for some further empirical research to measure the effect, if any, of developments in the law and procedure over the last five years.

IV. APPEALS AND REVIEWS

The standard and scope of appellate review is another area where there is continuing change and development, deeply influenced both by the Human Rights Act 1998 and the establishment of the Criminal Cases Review Commission. In 1995 the criterion for review of a conviction was changed from 'unsafe and unsatisfactory' to merely "unsafe."⁶¹ Although not intended to alter existing practice it was probably an ill-advised reform in that the concept of safety, without further definition or elucidation, was almost bound to cause difficulties. Soon afterwards the effect of the Human Rights Act 1998 was felt and again has influenced the policy of the court. What the recent cases do illustrate is a tension, which may not have been finally resolved, between what one might call the crime control and due process models of criminal procedure.

In *Regina v. Chalkley*⁶² the defendants had been charged with conspiracy to rob. The defence made an application to exclude the evidence of tape recordings which the police had obtained by placing a listening device in the home of one of the defendants, but the judge rejected this application.⁶³ The defendants thereupon formed the view that any defence had been rendered hopeless and changed their pleas to guilty.⁶⁴ One of the issues raised was whether a defendant could appeal at all under these circumstances.⁶⁵ The court held that this was not a plea "founded upon" a ruling of the judge.⁶⁶ Even an erroneous ruling of law as to the admissibility of evidence did not necessarily mean that the conviction was not "safe."⁶⁷ The court also noted that the absence from the new test of the words "or unsatisfactory," and "material irregularity" meant that: "The court has no power under the substituted section 2(1) to allow an appeal if it does not think the conviction is unsafe but is dissatisfied in some other way with what went on at the trial."⁶⁸ The court

⁶¹ See Smith, *supra* note 38.

⁶² [1998] 3 W.L.R. 146 (CA (Crim. Div.)).

⁶³ *Id.* at 149.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 157.

⁶⁷ *Id.*

⁶⁸ *Id.* at 163.

clearly appreciated that this was a significant change in the way the court had previously interpreted its powers.⁶⁹ The result seemed to be that if a defendant pleaded guilty because of an incorrect ruling of law, which meant that an essential element of the offence was not proved, an appeal was possible. It might be otherwise if a plea amounts to an admission of the material facts but the plea has been made as a consequence of a wrong ruling as to admissibility of evidence. An appellate court, on this approach, might still have considered the conviction 'safe.' As was noted at the time, "It is illogical that trial courts should be required to exclude evidence, the admission of which would have no effect on the validity of any conviction which might result."⁷⁰

The obvious problem with this approach is that it was, even at the time, difficult to reconcile with Article 6 of the European Convention which guarantees the right to a "fair" trial.⁷¹ If evidence is wrongly admitted, how can a resulting conviction really be termed "fair"? The court's view that "...procedural unfairness not resulting in unsafety of a conviction may be marked in some manner other than by quashing the conviction"⁷² was ominous.

The subsequent case law has arguably shown a gradual retreat from this position. The problem of the relationship between the accuracy of a conviction and the fairness of the trial is strikingly illustrated by *Regina v. Smith*.⁷³ At the end of the prosecution's case the judge wrongly rejected a defence submission of no case to answer.⁷⁴ Perhaps rather unusually, the defendants nevertheless went on to be convicted. The issue, therefore, arose of whether the court should quash the conviction, or consider the evidence received after the wrongful rejection of a submission of no case. Although it is not completely clear if this is what happened in the case, the court poses the extreme instance of a submission being wrongly rejected but the defendant then being cross-examined into admitting his guilt.⁷⁵ What should the Court of Appeal then do? The answer given was that the appellate court should judge the position at the

⁶⁹ It may be noteworthy that, at the date of the trial, the terms of the then Human Rights Bill had been widely publicised and discussed. The subsequent case of *Regina v. Kennedy* also reflects this approach. See [1998] CRM.L.R. 739 (CA (Crim. Div.)).

⁷⁰ *Id.* at 741.

⁷¹ Although at the date of the case the Convention was still technically an international treaty, not part of any domestically binding statute.

⁷² [1998] 2 All E.R. 155, 173b (CA (Crim. Div.)).

⁷³ [2000] 1 All E.R. 263 (CA (Crim. Div.)).

⁷⁴ *Id.* at 265.

⁷⁵ *Id.* at 266.

time when the submission was made.⁷⁶ Accordingly, the conviction is to be regarded as “unsafe” since the defendant was entitled in law to be acquitted at the halfway stage. To allow the trial to continue was said to be an abuse of process and fundamentally unfair.

What is also striking about the decision, apart from its confident brevity, is that it arguably departs from earlier authority⁷⁷ and betrays an approach much more in sympathy with respect for due process. Other cases confirmed this movement⁷⁸ but it still seems that not all convictions obtained where there has been some irregularity which would amount to unfairness under Article 6 of the European Convention are necessarily “unsafe” within the meaning of the Criminal Appeal Act 1968. The problem for the courts will be to decide what are the criteria for deciding when “unfairness” fatally compromises “safety.” At least in *Smith* it is quite clear that, had the material irregularity not occurred, the jury could not possibly have returned a guilty verdict. The issue would simply never have been left to them.

The most recent significant contribution to this area, *Regina v. Togher*, takes a further step away from the approach taken in *Chalkley*, where the “safety” of the conviction seemed to have been considered irrespective of the trial process which procured it.⁷⁹ As Lord Woolf puts it, “Applying the broader approach... we consider that if a defendant has been denied a fair trial it will almost be inevitable that the conviction will be regarded as unsafe.”⁸⁰ The problem remains of what sort of “unfairness” will be regarded as fatal to the safety of a conviction? It seems probable that, under the influence of the Human Rights Act 1998, some convictions which would previously have been upheld may now be quashed as “unfair.”⁸¹ In the somewhat later case of *Regina v. Doubtfire*, Lord Woolf adds that where a conviction resulted from a trial that was unfair under Article 6 of the European Convention, it would, “almost be inevitable” that it would qualify as “unsafe” under the Criminal Appeal Act 1968 the Court of Appeal appears to have applied Lord Woolf’s dictum.⁸²

⁷⁶ *Id.*

⁷⁷ Which might well have justified upholding the conviction in these circumstances. See Victor Tunkel, *When safe convictions are unsafely quashed*, 149 NEW L.J. 1089 (1999).

⁷⁸ See *Regina v. Davis* [2000] CRIM.L.R. 1012 (CA (Crim. Div.)).

⁷⁹ [2001] 3 All E.R. 463 (CA (Crim. Div.)).

⁸⁰ *Id.* at 473.

⁸¹ This seems to be the view of Professor Smith in his commentary on *R. v. Doubtfire*, [2001] CRIM.L.R. 813, 815.

⁸² *Id.* at 813.

Clearly there is certain to be further case law in this area and there is considerable scope for elucidation of what, in concrete terms, constitutes unfairness in the course of a criminal trial. In some ways the law has arguably returned to a position close to that which existed before section 2(1) of the 1968 Act was allegedly simplified. It is doubtful, however, if this adequately accounts for what is happening. In large measure it is arguably the pervasive effect of incorporation of the European Convention which is a vital determinant of how English courts now approach problems in the criminal process.

V. REVIEW AFTER APPEAL

One of the most significant developments in the criminal process has been the decision to set up a Criminal Cases Review Commission following the recommendations of the Royal Commission on Criminal Justice of 1993. Prior to this the Home Secretary did have a power to refer cases back to the Court of Appeal,⁸³ and indeed it was under this power that the convictions of the so-called Birmingham Six were reviewed. There was, however, a perception that various Home Secretaries were too reluctant to use this power and also perhaps that the whole procedure was insufficiently independent since the decision was made within the government bureaucracy of the Home Office. Accordingly the new Commission was set up. It has not less than eleven members, independent of government although appointed by the Crown. One third must be lawyers but part of the policy behind the new arrangements is that some are lay members,⁸⁴ albeit they are likely to have experience of the criminal justice system. Part of the reason for basing it in Birmingham is to mark its separation from and independence of central government.

Under section 9 of the Criminal Appeal Act 1995 The Commission has a broad power to refer any conviction to the Court of Appeal if they consider, "there is a real possibility that the conviction, verdict, finding or sentence would not be upheld."⁸⁵ It is not the intention in this article to consider and evaluate the detailed operation of this review mechanism, although it is generally regarded as having been a success.⁸⁶ It is tempting to think that an

⁸³ Criminal Appeal Act, 1968, s.17 (Eng.).

⁸⁴ Criminal Appeal Act 1995 s.8 (Eng.).

⁸⁵ *Id* at s. 9.

⁸⁶ A study which helps to provide the background to the need for such a body is, CLIVE WALKER & KEIR STARMER EDs., *MISCARRIAGES OF JUSTICE, A REVIEW OF JUSTICE IN ERROR* (1999). It is now, however, slightly out of date. An analysis of the Commission's performance in its early years can be found in A. James et al., *The Criminal Cases Review Commission*,

independent commission is likely to be much more willing to examine a claim of wrongful conviction than the executive or judiciary, both of whom may have a vested interest in maintaining the status quo. This might particularly be the case if lawyer incompetence is a strand in the case and/or that the conviction is not recent and for a serious offence.

Just one recent aspect of their work has raised new issues which may be worth noting because they involve consideration of controversial areas which loom large in the American literature, namely the death penalty and DNA evidence. A whole generation has grown up in the UK in belief that the execution of James Hanratty in 1962 for murder represented one of the last notorious miscarriages of justice before the abolition of the death penalty in 1965. Indeed, the aftermath of the case may well have accelerated that result. Part of the reason for the subsequent doubt was that it involved a violent murder and sexual assault by someone known previously only as a petty criminal. The crucial identification evidence was provided by the surviving female victim who had been shot.⁸⁷ The case was referred to the Court of Appeal by the Commission⁸⁸ some forty years after the event. In a detailed judgment the court demolished all 17 grounds of appeal and finally dismissed the appeal.⁸⁹ In particular they declared: "The DNA evidence made what was a strong case even stronger."⁹⁰ This was therefore a case where the new technique of DNA evidence served to confirm the correctness of a conviction. One of the legal issues nevertheless raised is what standard to apply to appellate review in such a case. Undoubtedly the overall trend has been to increase the procedural safeguards for the defendant so that convictions which might not even have been challenged in the past might today be reversed. This is not an entirely novel difficulty as the court had to deal with this issue in *Regina v. Bentley* where the trial had taken place in 1952.⁹¹ In *Regina v. Hanratty* the court asserts that current standards of fairness should be applied regardless of when the trial took place but that non-compliance with rules which were not current at the time may need to be treated differently from the breach of rules which were in force at the date of the trial.⁹² It also said that the question of whether a trial is so seriously flawed as to render the conviction unsafe because

[2000] Crim. L.R. 140. The Commission has a website which publishes their annual reports. See www.ccrc.gov.uk (last visited Oct. 7, 2003).

⁸⁷ See *Regina v. Hanratty*, [2002] 3 All E.R. 534 (CA (Crim. Div.)).

⁸⁸ *Id.*

⁸⁹ *Id.* at 534-535.

⁹⁰ *Id.* at 550.

⁹¹ [1999] Crim.L.R.330 (CA (Crim. Div.)).

⁹² [2002] 3 All E.R. at 543

it fails today's minimum standards must be approached "in the round," taking account of all relevant circumstances.⁹³

Quite what this standard means in its practical application to older cases is not entirely easy to divine. However, before totally discounting this supposed standard it is worth looking at how the court viewed this case. By contemporary standards there were procedural imperfections, in particular some material which would now have been made available to the defence was not. It seems probable that, had the conviction followed a trial held today, the appeal would have been allowed. Nevertheless in *Hanratty* the court was clearly of the view that any procedural shortcomings of that time fell far short of what would be required to render the conviction unsafe.⁹⁴

What is encouraging about this reference is that the independent Commission was willing to have a capital case reconsidered in a way that might well have been politically difficult to secure when, as in the past, the decision lay essentially with a branch of central government. But it also raises issues on how old cases are to be viewed that had not been previously fully addressed. It does at least, however, provide a way in which arguments about a capital case can be finally resolved, or at least as finally as the law can resolve anything. It may also show, as this case surely does, that not all claims relating to notorious miscarriages of justice turn out as people had expected. For obvious reasons, particularly the existence of the death penalty, it is understandable that debate in the United States is often cast in terms of wrongful conviction. In the United Kingdom the lack of such a penalty has perhaps helped encourage the approach in the literature to embrace not just issues of wrongful conviction but also a more general concern for inaccurate verdicts. The conviction of the guilty is also an important element in any rational scheme of criminal procedure.

⁹³ *Id.*

⁹⁴ *See id.*

