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10TH COMMONWEALTH LAW CONFERENCE

NICOSIA, CYPRUS

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MISCARRIAGES OF JUSTICE IN THE COMMONWEALTH

When we were young, lawyers of the Commonwealth, things seemed simpler. Among the verities was British justice. To be sure, we knew its faults. In reality (as inspection drew closer) it was never as perfect as judges and lawyers tended to boast. But as youngsters at Law School we were thrilled with the assurance "better than a thousand guilty men go free than that one innocent be convicted".

It differed from one Commonwealth country to another. Under colonial régimes, there was always an element of oppression to uphold foreign rule. Those who struggled for freedom and self-determination were sometimes branded criminal terrorists. They were tried under emergency laws. But for all that, there were features of criminal justice which made our system seem less imperfect than most:

- * Civilian police, relatively few in number and controlled by strict laws; just sufficient to keep the peace and bring

suspects as quickly as possible to the independent judicial branch of government;

- * Generally, juries of common citizens sifting the facts to determine whether the prosecutor has proved its case beyond reasonable doubt so as to warrant the infliction of criminal punishment;
- * Judges, learned in the law, with functions to instruct the jury on the law and, more lately, to scrutinize the case on appeal. Noble assurances of the rectitude of the procedure and the safety of the conviction. Guardians against that most horrible thought: a wrongful conviction; an innocent dying at the gallows or more lately the slower death of years behind bars; and
- * The common law itself with "its strong emphasis on the rule of law and procedural safeguards secured through an independent judiciary".¹

These strong features of our system of criminal justice have, for the most part, survived the end of colonial rule. But in recent years serious concern has been expressed in a number of Commonwealth countries about the incidence of miscarriages of justice. Repeated cases have gained headlines. The prompt and lawful arrest of the guilty; the fair and careful trial of the accused; the patient sifting of appeals are not the stuff to fire the imagination, or earn the approbation, of our peoples. It is the notorious cases of clear or probable miscarriages which attract attention.

Nowhere has this been more so than in England itself. This year began with a hunger strike in prisons all over England by accused persons alleging that they were innocent "victims of the system". These protesters seek to join an unhappily long list of cases in which wrongful convictions were ultimately recognised and,

where not too late, redressed. Adolph Beck.² Timothy Evans and the murders at 10 Rillington Place.³ Virag and Dougherty.⁴ The Confait Case.⁵ The Maguire Case.⁶ The Tottenham Three.⁷ The Guilford Four.⁸ The Birmingham Six,⁹ each of them with 16½ years of wrongful imprisonment to complain about. The Armagh Four¹⁰ - and so the list goes on.

England is by no means alone in this problem. Every jurisdiction of the Commonwealth has similar controversial instances. In Australia, they include the Ratten Case.¹¹ The Peden Case.¹² The Ananda Marga Three.¹³ The MacDermott Case.¹⁴ The case of Edward Splatt.¹⁵ The Varley Case.¹⁶ The McLeod-Lindsay Case.¹⁷ There is also the case of Lindy Chamberlain, convicted by a jury. She contended that her infant daughter, Azaria, had been taken by a dingo at Ayers Rock in the centre of Australia.¹⁸ This was a case whose controversies divided families. A mountain of newsprint and endless video reels agitated the conscience of Australia. Now, a feature film, with Meryl Streep no less, has brought Lindy's story to countless millions. But is the point of the story that, by exceptional procedures of a Royal Commission, an anxious society ultimately vindicated justice? Or is it that the ordinary institutions of justice were shown to be fallible?

The self-same question is posed in London by cases in Canada. Now, the *Charter of Rights and Freedoms* empowers a court to exclude evidence obtained in a way that brings the administration of justice into disrepute.¹⁹ A result of notorious cases in Canada has been the introduction of audio-visual taping of police interviews with suspects.²⁰ There have been similar developments in New Zealand.²¹ And doubtless in other parts of the Commonwealth. The problem is a universal one. No jurisdiction has all the answers. We

can learn from each other.

THE SIZE OF THE PROBLEM

Some proportion of cases are bound to miscarry. Wrongs will be done which cannot be righted. So much is admitted even by the most vocal critics of the present system.²² There must be finality in criminal, as in any other litigation. Cases cannot forever be relitigated. Nor should the jury system, where it survives, be undermined unnecessarily. Any human system of justice is bound to make a few mistakes. So much must be allowed.

But the point made by the critics of the present system is that the number of such miscarriages is far greater than those operating the system will acknowledge. And that the greatest injustice arises from the way in which operators of the present system at every level allow it to be manipulated, pre-trial, at trial and on appeal, with too much attention to rules and procedures and insufficient concern about the risk of injustice. It is lawyers' faults that we are accused of: attention to the familiar, comparatively simple rules and procedural requirements. Unconcerned about the substantive issues of injustice and innocence that lie behind.

Given that some component of error must be tolerated as an inescapable attribute of our humanness, how large is the problem of miscarriage of justice against which the critics rail with increasing vociferousness?²³ Ludovic Kennedy in 1956 estimated that between 200 and 300 innocent people are to be found in British goals at any one time.²⁴ E D Radin in 1964 suggested that there were 14,000 cases a year in the United States or a 5% error for people gaoled. A more recent study, involving some empirical research, by C R Huff and colleagues, concluded that there were one or two miscarriages for every 200 persons convicted of felonies, ie a margin of 1%. A higher

figure is supported by the notable research of Dr John Baldwin and Dr Michael McConville into cases before the Birmingham Crown Court in 1975-6. As a result of their research they concluded that at least 5% of defendants were convicted "in doubtful circumstances".²⁵ It is said that more up to date statistics are not available because further research by Baldwin and McConville was not permitted by the Lord Chancellor's Department in England.²⁶

There are, of course, various apologists for these figures. What do they say? Some of the persons convicted would in fact be guilty, though not properly proved to be such. Some would surely be guilty of other offences (an excuse sometimes given by police who "verbal" prisoners or "load them with presents" ie plant evidence on them). More thoughtful are the system's defenders who assert that a degree of error is virtually built into the peculiar institutions we have accepted:

- * The jury, which is an accident of history but which has constitutional and democratic attributes that outweigh the occasions on which it falls prey to emotion;²⁷
- * The accusatorial system of criminal trial, which disclaims a search for the truth and prefers, instead, to enhance liberty by imposing the duty on the Crown to prove its case beyond reasonable doubt.²⁸ This may lead to elements of artificiality in the contest. But it does so for the purpose, thought justifiable by many, of controlling and limiting the intrusions of the state in the life of the individual; and
- * Convictions which are recorded in an open trial and generally at the hands of a jury can only be set aside by a similarly open procedure on appeal. This rule not only diminishes the Executive Government's control over the criminal justice process.²⁹ It also maintains the openness and public

character of our criminal justice system. It defends us from the secret trials of other systems of law.³⁰

My topic is remedying miscarriages of justice. What can be done to reduce their inescapable incidence? The things to be done begin at the police station. They continue at the trial. They arise most urgently after conviction and on appeal. They continue while ever a wrongful conviction stands.

REFORM OF POLICE PROCEDURES

A sensible system will strive to avoid injustices occurring in the first place. This is why much attention has also been given of late to reform of police investigation of offences and pre-trial treatment of suspects.³¹

Upon one view, it is the contradictory and apparently unattainable obligations cast upon police and other investigators which has led them into bending and twisting rules with consequent risks to the safety of convictions which follow. Most frequently criticised is the denial of any right to arrest a person for interrogation³² and the obligation imposed by law to take a suspect, reasonably suspected of having committed an offence, as soon as practicable before a justice. In 1991 in Australia legislation was enacted which is partly derived from the Law Reform Commission's report.³³ Public criticism of this new measure claims that the law makers have caved in entirely to the police objections. Certainly, a number of old common law rules have been overthrown.

The desirability of clearly stating the rules governing police cannot be disputed. We make great demands upon police many of whom (at least until the recent past) were chosen for physical size and strength rather than for the skills really needed in an uncorrupt, modern, technological police service.

Before it joined the graveyard of other reports on criminal procedure, the Australian Law Reform Commission report joined the others in urging the greater use of technology to enhance control over critical police decisions by the independent judicial branch of Government (as by search warrant and arrest warrant granted by telecommunications).³⁴ It also laid down, as one security for a new facility of time for police interrogation, the obligation to require sound recording of the interrogation.³⁵ It was this proposal especially that attracted calumny from the police. From the other side, civil libertarians criticized the provision for a four hour detention.

There is a clear and urgent necessity to reform the law of criminal investigation. It is here that unlawful and oppressive practices flourish; corruption and cynicism breed and miscarriages of justice inevitably result later in courtrooms.

Judges for a century have voiced their suspicion about unconfirmed confessions by suspects to police, later disputed by the suspect.³⁶ This dangerous feature of criminal investigation had been addressed on earlier in India later copied in other countries of the Empire. Something very effective was done to deal with the problem. The admission into evidence of confessions to police was prohibited unless made before an independent magistrate.³⁷ That rule still obtains in many parts of the Commonwealth of Nations.³⁸ Questions are now asked as to why a rule, suitable for the colonies, was not good enough for England and other Commonwealth jurisdictions.

In Australia, the demands for sound and later video recording began to be heard with increasing insistence after 1962, such was the judicial disquiet.³⁹ In the face of police opposition and legislative inertia, the courts of Australia resorted to a

strengthened rule for the exclusion of evidence unlawfully or unfairly obtained.⁴⁰ In England at about the same time, an enhanced power for the exclusion of such evidence by judges was afforded by the *Police and Criminal Evidence Act*.⁴¹ In some parts of Australia sound and video recording of confessions to police has now been introduced pursuant to statute.⁴² In other parts, the suggestion is still under study, thirty years and many injustices after it was first proposed. As I shall show, the point was reached in March 1991 when the High Court of Australia felt obliged to act firmly.

REFORMS OF THE TRIAL

Identification evidence: One of the chief reforms that can be adopted at the trial of a person accused of a criminal offence to reduce the risk of miscarriage is the strengthening of judicial warnings about the dangers that may attend conviction upon contested prosecution evidence.

Some of the most shocking cases of miscarriage of justice have occurred as a result of mistaken identity. This was a complaint of the Birmingham Six.⁴³ Unless procedures for identification are carried out with impeccable fairness, there is a significant risk of wrongful identification. All of this was reaffirmed in Lord Devlin's report of 1976.⁴⁴ The judgment of the Court of Appeal of England in *Turnbull* in 1977 required judicial warnings to be given.⁴⁵ This judgment has proved highly influential, beyond England. It has been applied in Australia and elsewhere in the Commonwealth.⁴⁶ Lately, still more rigorous and detailed standards have been insisted upon.⁴⁷ But by adopting its guidelines, the Court of Appeal pre-empted legislation. This did not pass without criticism by Lord Devlin.⁴⁸

Disputed confessions: Judicial warnings about confessional

evidence have come much more slowly and this despite the repeated warnings of the dangers of miscarriages of justice.

In Australia, the High Court expressly recognised in 1977 that an unsigned police record of interview might be fabricated.⁴⁹ The practical and forensic difficulties of challenging such statements were reiterated in 1988.⁵⁰ In March 1991 the Court took a firm stand in *McKinney v The Queen*.⁵¹ By majority⁵² the Court laid down "for the future" a new and rigorous requirement of judicial warning to juries about the danger of convicting on disputed and uncorroborated confessions to police.⁵³ They referred to the facility of audio-visual recording. Unusually for Australia, they declared that this new "rule of practice" would apply in the future only.

It is clear from a reading of this Australian decision, that a majority of the highest court in Australia had come to a conclusion that the time for general words of caution and judicial appeals for legislation or to the exclusionary rule had passed. Such was the perceived dimension of the problem and the risk of serious miscarriages of justice, that the Court felt obliged to take the stand it did. That stand is now the common law of Australia. It is a judicial stand designed to diminish the risks of miscarriage of justice based upon uncorroborated disputed confessions to police.

This Australian decision is not the first time that the judges have taken a bold stand to assert control over the detail of police conduct by the weapon which judges have in court to exclude, or warn against the use of, the product of police actions. The *Judges' Rules* in 1912 and 1918 did more than this. Whatever may be the criticism of the departure from precedent the nett result is surely an advance for the constant struggle against miscarriages caused by police "verbals" and unreliable confessions.⁵⁴ The new rule

will certainly expedite the installation and use in Australia of videotaping of confessions to police. Had such a rule been part of the law of England when the *Birmingham Six* were tried, it is quite possible that most of the Six would have been acquitted by the jury given the absence of satisfactory evidence against some of them, save for the confessions now said to have been extracted from them by oppression and force.⁵⁵

Scientific evidence: The third area where particular care is needed relates to forensic scientific evidence. Two of the *Birmingham Six* were convicted upon scientific evidence now conceded to have been unreliable. Partisan expert evidence can do terrible wrongs in the forensic setting. A litany of cases now teach us the lesson that expert testimony will only be as reliable as the honesty and integrity of the experts; the soundness of the procedures they use and the accuracy of the knowledge they apply. Such warnings are voiced in the *Confait Report*, the report of the *Royal Commission into the Conviction of Mrs Chamberlain* and now by the release of the *Birmingham Six*. They direct our attention to the need for safeguards against wrongful conviction based upon the unreliable testimony of experts. Various options have been proposed to deal with this problem.⁵⁶ One proposal put to the English Royal Commission on Criminal Procedure is for a body of lay people and experts, subsidiary to the Court of Appeal, to review evidence including new evidence.⁵⁷

Trial representation: Many other reforms are doubtless needed at the trial. The variable quality of legal representation is often mentioned as a significant source of wrongful convictions. Courts are now much more willing to set aside a conviction where the accused was incompetently represented by an inexperienced advocate.⁵⁸ They should resolutely do so if the transcript shows

that the prisoner did not have a fair trial according to law because of incompetent representation.

A jury trial largely depends for its success upon a contest between two roughly equal and experienced combatants. In such circumstances, the notion that an accused has no common law right to legal counsel for a defence against a serious charge is one which the judges should reject as wholly contrary to modern notions of basic rights and due process.⁵⁹ In Australia, in December 1992, the High Court, overturning its own earlier authority, held that the fair trial of an accused may, on some occasions, require legal representation. If the accused cannot afford it and the State legal aid bodies fail to provide it, the judge may adjourn the case to prevent the court's becoming an instrument of injustice.⁶⁰

REFORMS ON APPEAL

The appellate system has borne the brunt of the criticism about miscarriages of justice in Britain and Australia. It has been blamed for a "catastrophic decline in public confidence".⁶¹ The repeated charge against the appellate judges is nothing less than of a cynical unconcern with innocence and an overriding imperative to defend the public confidence in the institutions in their charge at the tolerable cost of an occasional sacrifice. "I sit in this cell" writes a prisoner, "not because of evidence against me but because of the legal establishment's pretensions to infallibility".⁶²

In a sense, these angry denunciations represent something of a back-handed compliment to the judiciary. Of the senior judges of our tradition, much is expected. According to media stereotypes, if the judges are not just vain, proud, remote Establishment figures insensitive to injustice, they are loveable old men now "helplessly, inescapably, tragically" out of their depth.⁶³

An easy response to this calumny would be blame the media. But it should be acknowledged that, in too many recent cases, it has been the media rather than the institutions of justice or the Judges, which have been vindicated. It was a band of loyal supporters who never lost faith in the prisoners, and a few discerning journalists who supported them, rather than the judicial institutions which actually led to the termination of that injustice. Rightly, the public want to know what can be done to ensure against repetition of such cases where there is no band of supporters, where there are no interested journalists and where the prisoner sits in a silent cell the victim of an exquisite system which has made a mistake.

To some extent the explanation, in England at least, is found in the narrow powers conferred on the Court of Appeal and its predecessor. But almost certainly the powers of the Court of Appeal were narrowed by the Judges in a way that Parliament never intended.⁶⁴ Later attempts to revise that limited understanding of the function of the Court in England have defied curial revision. Courts have ignored thoughtful commentary and criticism.⁶⁵ In England, they have resisted the manifest need for a wider review charter.

The result has been a kind of appellate retrial, but one "at a disadvantage"⁶⁶ The disadvantage is that the appellate judges will rarely, if ever, have the time or the opportunity fully to appreciate the whole of the evidence, mood and atmosphere of the trial. A more rigorous rule was adopted for criminal appeals in Canada⁶⁷ and in Australia.⁶⁸ Specifically, in Australia, the examination of evidence said to show a miscarriage has not been confined, as in England, to evidence which would have been admissible in the trial.⁶⁹ The proper issue is one of preventing the perpetuation of a miscarriage not upholding the integrity of trials.

It is natural that appellate judges will approach a challenge to a primary decision - particularly a jury's verdict, even on the basis of fresh evidence, with a degree of distaste. However, there has been a sufficient number of demonstrated cases of miscarriage to require a more resolute attitude. Who knows how many miscarriages have not come to notice? We should all be concerned.

To supplement appellate review there is a need for a system of fresh inquiry. In New South Wales a particularly useful procedure of judicial inquiry and report, frequently utilised, is provided under the *Crimes Act*, s 475. In practice, such investigations are usually initiated by a petition to the Supreme Court. A judge of the Supreme Court is appointed to conduct the inquiry if, administratively, the Court considers that course justified.

The controversy posed by recent experience in several Commonwealth countries relates to the institutional arrangements which should replace or supplement and assist by a court of appeal, whether on the appeal of the prisoner or reference of the relevant Minister. The suggestions put forward include the enhancement of the procedures of the appellate court; the creation of a new appellate court; or the creation of an entirely different tribunal to include persons other than judges.⁷⁰

Whilst I understand those who defend the constitutional propriety of review by courts, honesty requires me to say that the strongest argument for a separate tribunal is the extreme difficulty which appellate judges face in finding the time to reconsider all, and I mean all, of the evidence at the trial in order to decide whether a conviction should safely stand or must be set aside and a new trial ordered. A more vigilant appeal court with stringent rules and a supplementary procedure for extra curial but investigation seem to be needed. But other, bolder proposals are now coming

forward. Doubtless the English Royal Commission will present and evaluate them all.

CONCLUSIONS

Highly publicized cases of miscarriages of justice lead to community demands for improvement of legal procedures. Commonwealth lawyers should not be resistant to these demands - least of all Commonwealth judges. Informed criticism is healthy. Questioning even fundamental institutions, rules and procedures is appropriate to free people. There are some critics who would abandon the present system - adopt an inquisitorial procedure, abolish the right to silence, replace appellate review by judges. Serious though they are, it is doubtful that the number of miscarriages of justice warrant such radical changes. Furthermore, there are countervailing social reasons for maintaining the best features of the accusatory system of criminal procedure and trial. Overall, it tends to enhance liberty and to keep the agents of the State in check. This is where we, the Commonwealth lawyers, come in. We must remind our fellow citizens about fundamentals whilst ourselves remaining open to improvements and to self-criticism. Most of us went into law in a belief that it is a high calling to contribute to justice under law. The lesson of the cases of miscarriages in recent years has been that we should be more vigilant for justice and more open to reform of the law.

FOOTNOTES

- * Based, in part, on a public lecture given in London, 4 June 1992 (The Child & Co Lecture 1992); "Miscarriages of Justice - Our Lamentable Failure?" (1991) 17 *Cwth L Bulletin* 1037. The paper has been revised and updated.

1. Commonwealth Human Rights Initiative, Advisory Group, *Put Our World to Rights*, London, 1991, 3.
2. The report of the Committee of Inquiry into the case of Mr Adolph Beck, Cd 2315 (HMSO) 1905.
3. L Kennedy, 10 Rillington Place, Granada, London, 1971; R Brandon and C Davies, *Wrongful Imprisonment, Mistaken Convictions and Their Consequences*, Geo Allen and Unwin, London, 1973.
4. Report to the Secretary of State for the Home Department of the Departmental Committee on *Evidence of Identification in Criminal Cases* (Chairman, Lord Devlin) HMSO, London, 1976.
5. Report of an Inquiry by the Hon Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait, *Report*, London, HMSO, 1977.
6. B Woffinden, *Miscarriages of Justice*, Hodder and Stoughton, 1989, 457.
7. See *The Times*, 19 March 1991, 3.
8. Woffinden, 345; *Law Society Gazette* 88/3, 23 January 1991, p 2.
9. Woffinden, 441ff. See also B Hilliard, "Blessed with Hindsight" (1991) 141 *New LJ* 393.
10. See M O O'Connell, "The case of the Armagh Four" (1991) 141 *New LJ* 429.
11. See *Ratten v The Queen* (1974) 131 CLR 510 (HCA); T Molomby, *Ratten The Webb of Circumstance*, Outback, Melbourne, 1978.
12. T Molomby, *Who Killed Hannah Jane?* Potoroo, Sydney, 1981.
13. Report of the Inquiry into the convictions of Timothy Edward Anderson, Paul Sean Alister and Ross Anthony Dunn (Wood J),

- Sydney, 1985 (3 vols) (*Ananda Marga Inquiry*). Cf *Alister v The Queen* (1984) 154 CLR 404 (HCA) and now see *R v Anderson* (1991) 53 A Crim R 421 (NSWCCA) and "Presumed Guilty", (1992) *Law Inst J* (Vic) 1076.
14. T Molomby, *The Shearer's Tale*, Potoroo, Sydney, 1987.
 15. Report of the Royal Commission of Inquiry into the Conviction of Edward Charles Splatt, Adelaide, 1984.
 16. *Varley v Attorney General for NSW* (1987) 8 NSWLR 30, 40 (NSWCA).
 17. See K Carrington et al, *Travesty! - Miscarriages of Justice*, Academics for Justice, 1991, contains commentary on a number of English and Australian cases.
 18. See *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 (HCA). See also Australia, Royal Commission of Inquiry into the Chamberlain Convictions (Morling J), *Report of the Royal Commission NTGP 1987*; N H Young, *Innocence Regained: The Fight to Free Lindy Chamberlain*, Federation, Sydney, 1989.
 19. *Charter*, s 24(2).
 20. See Law Reform Commission of Canada, WP 32, *Questioning Suspects*, Ottawa, 1984, 58.
 21. J. Rowan, "Electronic recording of police interviews in New Zealand" [1992] NZLJ 400.
 22. Woffinden, 485. See also T Molomby, "Miscarriages of Justice in Britain" in K Carrington et al (above), ch 2. Molomby says (*loc cit*) that "there could be one miscarriage of justice a year involving serious criminal cases in the whole of Australia".
 23. *Loc cit*.
 24. L Kennedy in N Fellows, *Killing Time*, Sydney, Lion, 1986, 3. See also P R Wilson, "When Justice Fails: A Preliminary

- Examination of Serious Criminal Cases in Australia" (1989) 24 *Aust J of Soc Issues*, 3.
25. J Baldwin and M McConville, *Jury Trials*, OUP, Clarendon Press, 1979. See also Wilson, n 24, 4.
 26. Woffinden, 485.
 27. P Devlin, *The Judge*, 1979, OUP, Oxford, 117.
 28. Questioned by Lord Scarman, *The Times*, 5 March 1991, 10.
 29. See Confait Report, above n 5, 24-5.
 30. There has been a widespread call for a search for "the truth" rather than "the winner". But contrast R D'Sa "Reforming the Right of Silence in Criminal Trials: A Commonwealth Perspective" (1990) 2 *Revue Africaine de Droit International et Compare* 604 (in English) and J Mongahan, "Sanctioning Injustice" (1991) 141 *New LJ* 679 (a review of the Delmas-Marty report on reform of criminal procedure in France).
 31. See Justice, (British Section of the International Commission of Jurists), *Miscarriages of Justice*, London, 1989, 33 and M D Kirby, "Controls Over Investigation of Offences and Pre-trial Treatment of Suspects; Criminal Investigation and the Rule of Law" (1979) 53 *Aust LJ* 626, 627.
 32. *Williams v The Queen* (1986) 161 CLR 278 (HCA); *Dallison v Caffery* [1965] 1 QB 348, 367 (CA). See also Australian Law Reform Commission *Criminal Investigation* (ALRC 2) (Interim) AGPS Canberra, 1975, 10ff; New South Wales Law Reform Commission, *Police Powers of Detention and Investigation After Arrest* (LRC 66), Sydney, 1990, 3ff.
 33. *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991* (Cth). Cf S Odgers, "Police Interrogation and the right to Silence" (1985) 59 *Aust LJ* 78.
 34. ALRC 2, above, n 32, 39, 95.

35. ALRC 2, 71f.
36. See eg Cave J in *The Queen v Thompson* [1893] 2 QB 12, 18.
37. *Indian Evidence Act, 1872*, the Ceylon equivalent was considered. in *Reg v Ramasamy* [1965] AC 1 (PC) 14-15 and *Thambiah v The Queen* [1966] AC 37 (PC). For the history see J Stephen, *A History of the Criminal Law of England*, MacMillan & Co, 1883, 332ff and discussion ALRC 2, 73.
38. See eg T Akinola Agunda, *Law and Practice Relating to Evidence in Nigeria*, London, Sweet & Maxwell, 1980, 72f, 91ff.
39. *R v Governor of Metropolitan Gaols; Ex Parte Molinari* [1962] VR 156, 169; (SCV).
40. See eg *Bunning v Cross* (1978) 141 CLR 54, (HCA); *Cleland v The Queen* (1982) 151 CLR 1, 5 (HCA); *Van der Meer v The Queen* (1988) 35 A Crim R 232, 248 (HCA).
41. 1964 (Eng). See eg *Reg v Delaney* (1988) 88 Cr App R 338, 341 (CA).
42. See eg *Crimes Act 1958 (Vic)*, s 464H noted in *McKinney v The Queen* (1991) 171 CLR 468 at 497.
43. See M Tregilgas-Davey "Miscarriages of Justice within the English legal system" (1991) 141 New LJ 715, 716.
44. See Justice, n 31, 26. See also Lord Devlin's report n 4 above.
45. [1977] QB 224 (CA).
46. See *Alexander v The Queen* (1980) 145 CLR 395, 402 (HCA); *Allen v R* (1984) 16 A Crim R 441, 445; *Finn v R* (1988) 34 A Crim R 425 (NSWCA). See also *Reid (Junior) v The Queen* [1989] 3 WLR 771 (PC).
47. See esp *Finn* (above) and *Domican v The Queen (No 3)* (1990) 46 A Crim R 428 (NSW CCA) and *Domican v The Queen*

- (1992) 66 ALJR 286 (HCA).
48. Devlin, above n 27, 175f; 186ff. See also Justice, above n 31, 27.
 49. *Burns v The Queen* (1975) 132 CLR 258, 265 (HCA);
Driscoll v The Queen (1977) 137 CLR 517, 542 (HCA);
Wright v The Queen (1977) 15 ALR 305 (HCA).
 50. *Carr v The Queen* (1988) 165 CLR 314 (HCA).
 51. (1991) 171 CLR 468; 65 ALJR 241 (HCA).
 52. Mason CJ, Deane, Gaudron and McHugh JJ; Brennan, Dawson and Toohey JJ dissenting.
 53. *Ibid*, 473; 242.
 54. See M Brabazon and S Flood, "If Walls Could Talk: The McKinney Direction on Disputed Confessions" (1992) 9 *Aust Bar Rev* 146. But cf L Connolly, "Videos alone won't stop police verbals" in *Framed* (CEFTAA), May 1992, 8 and "In video veritas?" (1991) 141 *New LJ* 1094.
 55. *McIlkenny v Chief Constable of the West Midlands and Another* [1980] 1 QB 283 (CA). For criticism, see eg T Molomby (above) n 22.
 56. V D Plueckhahn and S M Cordner, *Ethics, Legal Medicine and Forensic Pathology* (2nd ed), 1991. See also note (1986) 60 *Aust LJ* 543.
 57. See "Calls for reforms to suspects' rights" (1992) 18 *Cwlth L Bulletin* 779 at 780 (submission of the Crown Prosecution Service in England).
 58. See Brennan J in *Jones v Barnes* 77 L Ed 2d 987, 463 US 745 1000 (USSC); B S Ledewitz, "Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence" 24 *Crim L Bulletin* 379, 416 (1988). As to Australian law see *Giannarelli & Ors v Wraith* (1988) 156

CLR 212; 35 A Crim R 1, (HCA). Cf *R v Ensor* [1989] 1 WLR 497 (CA).

59. Contrast *McInnis v The Queen* (1979) 143 CLR 575 (HCA) and *Gideon v Wainwright* 372 US 335 (1963) (USSC). See also *R v Howes* [1964] 2 QB 459, 466 (CA).
60. See *Dietrich v The queen*, High Court of Australia, unreported, 13 November 1992.
61. *The Times*, 19 March 1991 (Editorial).
62. Quoted Woffinden, *ibid*, 489f.
63. B Levin, "In Contempt and with Reason", *The [London] Times*, 7 February 1991, 10.
64. P Devlin, above, n 27, 157. See *Stafford v Director of Public Prosecutions* [1974] AC 878 (HL).
65. See eg Justice, n 31 and materials there cited.
66. Noted by Lord Dilhorne in *Stafford* [1974] AC 878 at 894 (HL).
67. See *Yebeest v The Queen* (1988) LRC Crim 260 (SCC). There the Court held that a Court of Appeal's function under s 613(a)(i) of the *Criminal Code RSC 1970 (C-34)* went beyond merely establishing whether or not there was evidence to support a conviction. The correct test was for it to determine, by re-examining and to some extent reweighing and considering the effect of the whole evidence, direct or circumstantial, whether the verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered. See also *Corbett v The Queen* [1975] 2 SCR 275, 282 (SCC).
68. See eg *The Queen v Storey* (1978) 140 CLR 364 (HCA), 376; *Morris v The Queen* (1987) 163 CLR 544, 561; *Pollitt v The Queen* (1992) 66 ALJR 613 (HCA) at 637.

69. Contrast *R v Dallas* [1971] Crim LR 90 (Eng) with *R v Sales*, unreported, CCA (NSW) 16 March 1992.
70. See proposals noted (1988) 14 *Cwlth L Bulletin* 1400, 1404f and (1992) 18 *Cwlth L Bulletin* 779 (abolition of the right of silence). See also Note, P O'Connor: "The Court of Appeal: Re-trials and Tribulations" [1990] *Crim LR* 615, 625; "Appeals System Criticised" (1990) 5 *Constitutional Reform No 3*, p 2.