

Forensic Investigations and
Miscarriages of Justice –
The Rhetoric Meets the
Reality

By Bibi Sahgha, Kent Roach, Julie Goulding and Robert N. Moles

FOREWORD
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FORENSIC INVESTIGATIONS AND MISCARRIAGES OF JUSTICE – THE RHETORIC MEETS THE REALITY

**BY BIBI SAHGHA, KENT ROACH, JULIE GOULDING AND ROBERT
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FOREWORD

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Mistakes sometimes occur. Even in a criminal justice system dedicated to fair trial within an accusatorial methodology and with a facility for appellate review.

Not long before I retired from the High Court of Australia, I had this truth brought home to me in a very personal way. In 2006, a bundle of appeal papers landed on the desk of my chambers in Canberra. They related to an appeal by a Western Australian prisoner, Andrew Mallard. He was challenging orders of the Court of Appeal of his State which had rejected his petition for the exercise of the royal prerogative of mercy in respect of his conviction of murder more than a decade earlier.

The written submissions in the case were extremely thorough. As I read them, features of the matter seemed familiar. I then noticed that the case had been before the High Court ten years earlier. Mr. Mallard had then unsuccessfully sought to obtain special leave to appeal from the appellate decision that had originally confirmed his initial conviction. Discreetly, the record and the submissions did not reveal the names of the Justices who had participated in the earlier refusal of leave.

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I consulted the published schedules in the *Commonwealth Law Reports*. I found that I had been one of the judges who had so decided. The parties raised no objection to my participating in the second appeal.

Mr. Mallard had always protested his innocence. He gathered up support from his family and from a number of political, community and media interests. This led to a petition for a review of the case by the Executive. That petition, which followed a statutory procedure common throughout Australia, was referred to the highest appeal court of the State. It was when it was rejected, that Mr. Mallard returned to the High Court. On this occasion, he was successful. Unanimously, the High Court found a miscarriage of justice and set aside his conviction¹. Soon after, he was released from prison. A judicial enquiry has since exonerated him of the murder of which he had been convicted. It is now accepted that Mr. Mallard was innocent. Just as he had earlier continuously protested.

To cope with the stresses of each day, professionals such as surgeons and trial lawyers, have to inure themselves against excessive introspection. They need to sleep at night. They cannot continuously speculate on the possibility that they have been party to great mistakes and to wrongs to innocent people. So it was for me. When one case was finished, I moved to the next. I knew that I had given my all, as a lawyer or a judge, to contribute to lawful and just outcomes. I could not tarry in the past.

But when it is objectively demonstrated, and repeatedly affirmed, that an earlier trial has miscarried which one had the power and responsibility to review, it is natural that those involved should be haunted by the discovery. It is, as Justice Cory of the Supreme Court of Canada said in conducting a commission of enquiry into a suggested wrongful conviction, “the nightmare of all free people” to impose imprisonment wrongfully on an innocent person. Let alone capital punishment which

¹ *Mallard v. The Queen* (2005) 224 CLR 125.

is now happily repealed in Australia as in most civilised countries. As Justice Cory declared: "It cannot be accepted or tolerated".

The authors of the book have examined the responses that have been adopted to the problem of miscarriages of justice in the United Kingdom, Canada and Australia. There are a number of models that have been enacted, partly because of the discovery (sometimes in old capital cases) that innocent people have been convicted, and even executed, leaving a burden of guilt on those involved and on society. That burden can only be expiated partly by the adoption of techniques and institutions that will reduce the risk.

As the authors explain, the responses to miscarriages in criminal convictions include:

- The ordinary facility of appeal against the conviction;
- The opportunity to petition the Minister or the Governor (as Mr. Mallard did), normally with the result of a reference of the case back for *ab initio* review by the judiciary;
- The creation of ad hoc enquiries or royal commissions to revisit the circumstances of the case and the conviction and to derive any lessons that should be drawn to improve the system of justice itself; and
- The establishment of a new and specialised institution, independent of the Executive and of the courts, with power to receive complaints of alleged miscarriages and to reach conclusions and to make recommendations. The foremost models of this last kind are the Criminal Cases Review Commissions in the United Kingdom, one based in Birmingham which deals with references from England, Wales and Northern Ireland, and the other in Edinburgh which deals with Scottish references.

The authors strongly support the creation of such a Review Commission or Commissions in Canada and in Australia. They point to many defects in the current

institutional arrangements in each of those countries. They explain the advantages which a permanent body, such as a Commission, would bring.

As one who has participated in many criminal appeals in a State Court of Criminal Appeal in Australia, I can attest to the serious-minded devotion of the judges in such reviews and to their shared appreciation of the solemn responsibility that the task involves. However, there are weaknesses in the appellate system, at least standing by itself. Mr. Mallard's earlier appeals are testimony of this. A lot depends on the talent and discernment of the advocates propounding the challenge. There is a natural resistance to re-opening a jury verdict, given that the jury is the constitutional tribunal of fact-finding and a traditional defender of the liberties of accused persons. As well, the growing jurisprudence of the High Court of Australia on the 'proviso' will sometimes effectively deprive the accused of a lawful trial by jury and substitute a trial on the facts by appellate judges². Candour requires me to acknowledge that a busy day of criminal appeals, involving sometimes three, four or more appeals against convictions, puts great pressure on the appeal bench. It virtually forces the sharing of responsibilities so that the three judges are dependent on the industry, perceptions, knowledge and sensitivity of one of their colleagues, at least to some extent.

A particular problem for appellate review in Australia, described in these pages, is that the High Court of Australia has held that an intermediate court which has reached final, 'perfected' orders cannot re-open them without express statutory authority. This is so no matter how plain and egregious are the mistakes called to notice³. Moreover, the High Court itself cannot receive fresh evidence in an appeal, no matter how compelling that evidence may be. This is so because of the character of the strict "appeal" envisaged by the Constitution⁴. There are other problems with the appellate process. But enough is shown in this book to indicate why, in particular cases like that of Mr. Mallard, there is a need for something more. That need has

² *Weiss v. The Queen* (2005) 224 CLR 300; *Nudd v. The Queen* (2006) 80 ALJR 614.

³ *Burrell v. The Queen* (2008) 82 ALJR 1221 applying *Grierson v. The King* (1938) 60 CLR 431.

⁴ *Eastman v. The Queen* (2000) 203 CLR 1 applying *Mickelberg v. The Queen* (1989) 167 CLR 259. Cf. *Eastman v. The Queen* (2008) 184 A Crim R 1.

appeared most startlingly in recent times as a result of compelling forensic (usually DNA) evidence which tends to show that a wrongful conviction of an innocent person has occurred⁵. There are new and special problems in scientific forensic evidence⁶. There are potential benefits to safeguard against unjust convictions. But there are also dangers that need to be allowed for.

The centrepiece of this book is the examination of the non-curial solutions that have been devised to address the nightmare of wrongful convictions, especially those resulting in prolonged imprisonment of an arguably innocent person. The dangers of petitions to the Executive and ad hoc enquiries are well explained, although sometimes these can vindicate the assertion of innocence. Experienced observers quickly realise that assertions of innocence cannot always be accepted at face value. In any hotly contested criminal trial, resulting in a verdict of guilty and a conviction, it will normally be the case that the accused will continue to protest his or her innocence. Something more is needed to give rise to a well-founded concern that the protest may be justified and warrant redress.

In Australia, the Australian Law Reform Commission was charged to consider possible alternatives to Royal Commissions and ad hoc commissions of enquiry. Naturally this would direct attention to the models adopted in the United Kingdom, following community concern about the outcome of the appellate process in a number of Irish cases. As the authors point out, the Royal Commission in the New South Wales Police Services, conducted by Justice James Wood, reported in 1997 that the current system provided a “substantial opportunity for any applicant armed with fresh evidence” to have their convictions reviewed on the merits⁷. A report of the Australian Law Reform Commission in 2003 recommended in favour of the establishment of a national process to review post-conviction applications based on

⁵ See e.g. *R. v. Button* [2001] QCA 133 at [20] per Williams JA.

⁶ M.D. Kirby “The Urgent Need for Forensic Excellence” (2008) 32 Criminal LJ 205 at 210.

⁷ See Ch.1 referring to the *Royal Commission into the NSW Police Service* (Justice J. Wood) (1997), final report, 447-450.

DNA evidence⁸. The limitation to DNA exculpation was understandable, given the context of a report dealing with genetic data. However, it raises difficulties given that sometimes non genetic evidence can convincingly establish a likelihood of innocence, as it did in Mr. Mallard's case. Presumably, this is why the Commission has now been asked to consider the problem in a wider context.

This book, and the opinions of the authors, will be of great value to the Law Reform Commission in developing its proposals. A particular problem exists in Australia, namely that administration of the criminal law is still substantially the responsibility of States and Territories. Creation of a national statutory agency that would have authority to act in each sub-national jurisdiction, would present well-known jurisdictional difficulties.

In the United Kingdom, the permanent Commissions have received an average of a thousand applications each year. Since created in 1997, they have completed a review of over 10,000 cases. Of these, to 2008, they have referred to fewer than 400 cases for re-determination by the courts. In the result, the courts have quashed nearly 70% of the convictions referred. It is not a high number, but it is high enough, especially for those involved, their families and friends.

In olden times, judges and lawyers would acknowledge the risk that cases like that of Mr. Mallard would arise but shrug their shoulders. They would declare that we must accept a small number of wrongful convictions because of the inherent infallibility of any human institution.

In the current age, we are less inclined to adopt this attitude of resignation. In part, this may be because judges and lawyers are less formalistic than they were in the past. In part, it is probably because of shocking and repeated reports demonstrating

⁸ Australian Law Reform Commission, *Essentially Yours, The Protection of Human Genetic Information in Australia* ((2003); ALRC 96), 19 (Rec.42-2).

the wrongful conviction and punishment of innocent people. In part, it may have come about because media and academic scrutiny are less deferential today to institutions than once they were. And, in part, the changing view may have arisen because of the pervasive notion of fundamental human rights which instils and reinforces in the legal system a scrupulous attempt to repair arguable injustice wherever it can be demonstrated.

This book collects hundreds of cases across a number of jurisdictions where innocence has been protested and where “the system” has grappled with the challenge, sometimes convincingly and on other occasions, less so. Having viewed the scrutiny of challenged criminal convictions, as it is conducted by the purple curtain, I acknowledge the earnest attempts on the part of many players to correct miscarriages of justice. But I must also accept the imperfections of the courts and of the present ad hoc arrangements to redress arguable injustice where it can be demonstrated.

In the end, the choice before society may be as brutal as this: do we care about the cases like Mr. Mallard’s enough to draw the inference that there may be other such cases that never had a chance of similar repeated scrutiny? Where the prisoner was odd and could not convince anyone to support a protest? Where funds could not be procured to attract sufficient legal interest? Where the over-worked pro bono schemes of the legal profession could not be engaged? Where the talent and/or commitment of the prisoner’s supporters waned with the passing of time and a realisation of the difficulty of storming this particular stable citadel? Where the over-worked appeal judges missed factual inconsistencies or mistook the governing law? Where the High Court, emphasising once again that it is not a general court of criminal appeal, declines special leave? Where the Executive could not be persuaded to institute a post-conviction enquiry? Where the government, in the midst of another law and order electoral campaign, declined to create an ad hoc enquiry or Royal Commission?

Do we care enough to create a permanent, expert agency with the patience, determination and skill to review contested convictions? In the United Kingdom, the answer to that question was in the affirmative. The result has not been an intolerable flood exhausting the resources of the new Commissions. It has been the correction of a number of wrongs. The authors make a compelling case for the establishment of such a body in Australia. It would re-affirm the commitment of our society to the highest standards of justice and law in all serious criminal proceedings. If, from the study of individual cases requiring action, systemic improvements of the criminal justice system can be identified and achieved, the result in the end may be an enhancement of justice beyond the sum of the cases like Mr. Mallard which our institutions can correct. Affording real protections from serious miscarriages of criminal justice is a true test for the civilization of a society, such as ours. But will we fact and meet that test?

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