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MISCARRIAGES OF JUSTICE: CRIMINAL APPEALS AND THE RULE OF LAW

BY BIBI SANGHA AND ROBERT MOLES

FOREWORD

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Dante Alighieri, writing of *Paradiso,* almost certainly imagined a special place in Heaven for those who remedy wrongful punishment of the innocent. If that place exists, the authors of this book have certainly earned a right, in due course, to have the keys.

For years, they have been expressing their concerns about the apparent injustices of particular criminal convictions in their home state of South Australia. They have made representations about the needs for investigations, enquiry and law reform. They have lobbied politicians; confronted inertia; and eventually secured action by the State Parliament. They have contributed to, and recorded, the operation of the enacted law. They have extended their advocacy to attempts to have the reform copied in other Australian states. Already, they have achieved a measure of success in Tasmania. More seems inevitable. They have acted upon the special obligation that rests on those who enjoy academic freedom to research, understand and advocate for remedies for injustice – individual and social.[1]

Not content with the reform that has been achieved, and the study of what is happening in other countries, the authors continue to advocate a more effective response. Now they have written this book to describe

[*] Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-96); Judge of the Federal Court of Australia (1983-84); Chairman of the Australian Law Reform Commission (1975-84).

[1] Cf. David Yamada cited in Nigel Stobbs "Academic Freedom and University Autonomy" in S. Varnham, D. Kamvounias and J. Squelch, *Higher Education & The Law*, (Federation, Sydney, 2015) 203 at p.214.

and explain the intellectual journey they have taken. It is a book of high principle. But it is also a practical book for legal practitioners: to guide them through the old and the new law on criminal appeals. Theirs is the kind of well-targeted passion that motivated William Wilberforce to found the Anti-Slavery Society and Caroline Chisolm to campaign for the protection of women immigrants to Australia. Practical individuals with conscience can sometimes help change the world. Occasionally, they are lawyers.

Sitting in their lonely cells,[2] the victims of apparent miscarriages of the criminal justice system witness the power of the law over their freedom. When they protest their innocence, they are reliant on the operation of a complex system of law and justice that provides checks at many levels against the nightmare of serious errors and wrongs. Yet, human justice is always prone to error and mistaken outcomes. The lawyer assigned to the case may have been incompetent, inexperienced, or overworked.[3] The trial judge may have made mistakes that misled the jury but which the appeal judges were willing to excuse as harmless or immaterial.[4] The appeal bench may have been so overwhelmed with cases that the judges did not have the time to notice a basic flaw in the evidence.[5] These facts may have made the judges over-dependent on lawyers who themselves lacked the time or imagination to consider the enormous detail about which the prisoner was endlessly protesting. The prisoner might have suffered from a mental illness, despair or emotional exhaustion. If he or she failed in the first level appeal, legal aid might have refused funding for counsel in the High Court of Australia: rendering the prosecution of a hearing for an application for special leave difficult or impossible.[6] In the High Court, the discovery of compelling fresh evidence may have been excluded from tender, supposedly for constitutional reasons.[7] Bereft of even a qualified right of appeal to the Judicial Branch, the prisoner might then have been entirely

[2] *Nudd v The Queen* (2006) 80 ALJR 614 at 637 [110]; 2006 HCA 9.
[3] *Nudd v The Queen* (2006) 80 ALJR 614 at 619-620[12]; [2006] HCA 9; cf *Tuckiar v The King* (1934) 52 CLR 335.
[4] *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81.
[5] *Mallard v The Queen* (2005) 224 CLR 125; [2005] HCA 68.
[6] *Muir v The Queen* (2004) 78 ALJR 780; [2004] HCA 21.
[7] *Eastman v The Queen* (2000) 203 CLR 1 at 93 [277]; [2000] HCA 29.

dependent on the mercy of the Executive Branch, with its uncertain remedies and unknowable procedures.[8]

For a prisoner, convicted after a trial complying with all the outward forms of criminal process, still to protest innocence despite all these hurdles might say something about the untrustworthiness of convicted criminals. Or it might say something about the unquenchable sense of injustice that occasionally keeps the flame of hope and determination alive. It is to differentiate between untrustworthiness and aggrieved innocence that a just system of criminal process will provide effective remedies and relief.

This book describes the growing realisation of the failings of the system of criminal appeals instituted in England in 1907 and thereafter exported in common form to its colonies. The authors set out to test the century-old system of criminal appeals by reference to basic principles governing law and justice expounded by Sir Neil MacCormick, a leading writer on the theory of legal process. As well, the book invokes the recent development of universal human rights. Australia has subscribed to the *International Covenant on Civil and Political Rights*[9] and to the First Optional Protocol that affords those affected by a breach of the Covenant, the opportunity to communicate their complaint to the United Nations Human Rights Committee in Geneva.[10] By reference to these two modern sources of principle and reasoning, the authors identify what they see as the fundamental defects in the institutional means that have been provided in Australia for a hundred years to guard against the risks of criminal convictions of the innocent and other grave miscarriages of justice. By reference to a litany of deeply troubling cases, the authors explain the urgent need for fresh law reform. They examine the shape which that reform might take.

In my career in legal practice;[11] institutional law reform;[12] and judicial service, I have attempted, where I could, to uphold safeguards against

[8] *Varley v A-G (NSW)* (1987) 8 NSWLR 39 - 40; 24 ACrimR 413. See below p 84 [3.5.1].
[9] 999 UNTS 171 (1976).
[10] S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd Ed) (OUP, 2013, Oxford), 19(1.52).
[11] See e.g. *Ex parte Corbishley; re Locke* [1967] 2 NSWR 547 (CA).

wrongful convictions of the innocent and other miscarriages of justice. In many cases, as a judge, where I felt the law afforded me a choice, I favoured the exercise of that choice so as to diminish the intolerable risk that an innocent person might be punished in consequence of my judicial orders. I did so, for example, in interpreting provisions for reopening a suspect conviction;[13] elaborating the power under the *Constitution* or State legislation to allow fresh grounds of appeal to be decided;[14] or a second application to be made;[15] or by favouring the reopening of perfected court orders.[16] But in one case, I was brought face to face with the conclusion that my judicial order had resulted in an innocent person suffering a substantial miscarriage of justice and serving 12 years imprisonment because I had failed to perceive a fatal flaw in the prosecution case.

The decision in question involved Andrew Mallard, a prisoner in Western Australia.[17] At a trial in 1995, a jury found him guilty of murder. He was convicted and sentenced to life imprisonment. His appeal was unsuccessful. Special leave to appeal to the High Court of Australia was refused in 1997.[18] I participated in that refusal. In 2002, Mr Mallard petitioned for mercy. He claimed that he was innocent. Fortunately, the State Attorney-General referred his petition to the Court of Criminal Appeal of Western Australia.[19] However, that court unanimously dismissed his petition. He then sought special leave, once again, to appeal to the High Court. He complained that the Court of Criminal Appeal had failed to consider the whole of his case.

Having been rostered for Mr Mallard's appeal, upon reading the file and submissions, some elements appeared familiar. A check disclosed that I had participated in the earlier refusal of special leave. Scrutiny of the transcript of that application disclosed that it had been substantially addressed to a complaint concerning failure to admit into evidence a

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[12] Australian Law Reform Commission, *Criminal Investigation – Interim* (ALRC 2), 1975; *Sentencing of Federal Offenders* (ALRC 15), 1980.
[13] *Varley*, above n.8.
[14] *Eastman* above n.7; cf re *Sinanovic v The Queen* (1998) 72 ALJR 1050; 180 ALR 149.
[15] *Postiglione v The Queen* (1997) 189 CLR 295 at 333.
[16] *Burrell v The Queen* (2008) 238 CLR 218 at 248 [122]; [2008] HCA 34 (power to reopen perfected orders).
[17] Above n.5.
[18] *Mallard v The Queen*, SLR, unreported, P 52/1996, 24 October 1997: noted (1997) 191 CLR 646.
[19] Pursuant to *Sentencing Act* 1995 (WA), s 140(1)(A).

polygraph test suggesting Mr Mallard's innocence. A refusal to reopen that question would not have been unusual because of the resistance to such tests in Australian criminal procedure.

However, in the fresh application for special leave, the case was propounded by new and highly talented pro bono counsel (Mr M.J. McCusker QC and Mr J.J. Edelman). They took a completely different course. By fastidious analysis of the evidence produced at the trial they demonstrated convincingly that the prisoner could not have been at the murder scene at the time of the homocide consistently with other objective evidence of timing and sightings of him in Perth that day. Mr Mallard was a person suffering from mental disabilities. In addition to the basic flaw affecting the alleged proof of his guilt, there were many instances of non-disclosure or suppression of material evidence in the hands of the police, available to the prosecution. This demonstrated convincingly the injustice of his trial.[20] By the end of the appeal hearing, it was clear that, not only had Mr Mallard not received a fair trial. He was also, almost certainly, actually innocent.

Andrew Mallard's conviction was quashed. A subsequent judicial inquiry cleared him of involvement in the murder. The evidence implicated another prisoner who had not previously been regarded as a suspect. Mr Mallard was awarded $3.25 million in damages for his wrongful conviction and punishment. However, no sum of money could wipe away the suffering inflicted on him, his family and the community. Or the failure of the criminal justice system in his case.

A recent analysis of many similar cases in Australia and overseas, offered by his counsel, now the Honourable Malcolm McCusker AC, CVO, QC, demonstrates convincingly that the Mallard case was far from a one off instance.[21] When even conscientious judges, provided with inadequate support by advocates and working under pressure with inadequate time for self-initiated speculation, fail to perceive crucial flaws, it is clear that there is an institutional weakness that needs to be

[20] (2005) 224 CLR 125 at 145 [55]-[57]; [2005] HCA 68. See below p.243 [8.5].
[21] M. McCusker, "Miscarriages of Justice", unpublished address to the Anglo-Australasian Lawyers' Society (WA), Perth, 24 June 2015.

addressed. It is to that weakness, and the repairs essential to cure it, that the authors of this book have directed their energies.

The institutional solutions for the defects appearing in the century-old criminal appeal template emerged initially in the United Kingdom. They followed the investigation of a substantial number of convictions (many involving persons convicted as Irish terrorists). The investigation resulted in the establishment of a Criminal Cases Review Commission. After that Commission was established in the United Kingdom, the number of quashed convictions rose from four or five a year to between 20 and 30. Approximately 96% of all applications to the Commission were investigated; but rejected. However, of the 4% referred by the Commission to the Court of Appeal, approximately 70% have succeeded in having the convictions quashed.[22]

So far, no such commission has been created in Australia, although in 2011, the Attorney-General for Western Australia was reported as favouring such a body. Meantime, in South Australia, an additional right of appeal, permitting a second or subsequent appeal where there was 'fresh and compelling' evidence, was adopted by amendment of the *Criminal Law Consolidation Act* 1935 (SA).[23] This effectively transfers the filter mechanism from the Executive Government to the Judicial Branch. With the pressures already existing on the judges of the highest court in a State of Australia, one can see immediately the potential for the new remedial scheme to run into the problems that already existed in the old system. However, the objective of the South Australian Government was to replace the petition to the Executive Government (with its lack of transparency) by a process initiated for the prisoner before the independent Judicial Branch of Government.

Far from proving to be a toothless tiger, the utility of the new provision in South Australia has already been demonstrated by the fact that the first two appeals, heard under it, resulted in orders allowing the appeal;

[22] Ibid, 25. See below p.97 [3.7.3].
[23] See below p.177 [6.5].

quashing the conviction; and affording immediate relief to the prisoner.[24] By detailed examination of further cases in South Australia and in other Australian jurisdictions, the authors of this book powerfully demonstrate the need for remedies of this kind everywhere that the template criminal appeal provisions still operate. A statutory remedy to similar effect has been foreshadowed in Tasmania. Meanwhile, in Victoria, a Practice Direction has been made by the Judges of the Supreme Court to address the significant and special problems that have arisen in the case of convictions based on expert testimony, including DNA evidence. Such evidence can sometimes be powerful and exculpatory.[25] It can prevent the conviction of an innocent accused and save miscarriages of justice. But it can also occasionally lend itself to error, distortions and injustices, against which the criminal process must be on special guard.

One departs from the reading of this book, and the many sobering cases reviewed in it, convinced that the steps towards legal reform, begun in South Australia, are the minimum that is needed. The authors realise this. They have pointed in the direction that the Australian legal system should take. The Australian constitutional system affords the advantage of a facility for legal experimentation, adaptation and variation. In earlier decades, South Australia led the nation in reforms of criminal laws against homosexuals; consumer protection laws; and environmental law reform. Now, thanks to political initiatives originally conceived by persistent legal academics, stimulated by civil society organisations and picked up by bold and caring parliamentarians, South Australia once again has offered the lead.

The forces of formalism, the siren song of cost restraint and the suggested merit of 'finality' need to be resisted in this struggle. There is no *merit* in the finality of the conviction of the innocent or legal indifference to their plight. Protecting the innocent is a badge of a civilised society that upholds universal human rights. The authors of this book will not rest until the challenge expressed in these pages is adequately answered in Australia. As citizens, we should give them our

[24] *R v Keogh* [No.2] (2014) 121 SASR 307; [2014] SASCFC 136 and *R v Drummond* [No.2] [2015] SASCFC 82. See below p. 169 [6.1]. Mr Keogh was set free after serving 20 years imprisonment. Mr Drummond had already been released.
[25] *R. v Button* [2001] QCA 46 at [71].

support. We should lift our voices to defend the innocent from wrongful convictions. And especially if we are lawyers.

Sydney,
1 October 2015