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WINTON CAPITAL MANAGEMENT

LONDON 1 OCTOBER 2015

WHERE DOES TRUTH LIE?

The Hon. Michael Kirby AC CMG

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I
THE PROBLEM

The year 2015, being the eight hundredth anniversary of bad King John's *Magna Carta*, a great number of books, articles and speeches have celebrated the event. They have varied from the adulatory¹ to the dismissive.²

A key promise extracted by the barons from the King was that:³

“No free man shall be seized or imprisoned, or stripped of his rights of possessions, or outlawed or exiled... nor will we proceed with force against him... except by the lawful judgment of his peers or by the law of the land.”

What were the barons referring to?

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** Justice of the High Court of Australia (1996-2009); Chair, United Nations Commission of Inquiry on the Democratic People's Republic of Korea (2013-2014).

¹ David Carpenter, *Magna Carta* (Penguin, London, 2015); A. Arlidge and I. Judge, *Magna Carta Uncovered* (Hart, London, 2015); J.C. Holt, *Magna Carta* (Cambridge); N. Vincent, *Magna Carta: The Foundations of Freedom 1215-2015* (Third Millennium, London, 2015).

² Lord Sumption, “Magna Carta – Then and Now”, address to the Friends of the British Library, London, 9 March 2015.

³ Derived from M. Arden, “Magna Carta and the Judges: Realising the Vision” in New South Wales, *Judicial Officers Bulletin*, Vol. 27 no.6, July 2015, 1. Originally published (2012) 10 *The Judicial Review* 419, citing clause 39 of the *Magna Carta* of 1215.

Even before the Norman Conquest of 1066, there had been moves to replace primitive systems of trial by ordeal or battle by more rational procedures to resolve the matter in contention.⁴ Thus emerged forms of trial by jury. Eventually, this form of decision-making evolved from participation by local people who had some knowledge of the matter to participation by disinterested persons who could reach a conclusion, based on testimony, acceptable to the community, thereby putting the dispute to rest.⁵

For the most part the verdicts of such juries were final. To guard against corruption and partiality of jurors, a system of review ('attaint') developed.⁶ So did procedures for the ordering of new trials.⁷ Only in the 19th century (in civil cases) and in the 20th century (in criminal cases) was a statutory "appeal" provided for.

A panel of jurors was viewed in England, and its settler colonies, as a guarantee against governmental oppression. Ordinarily, they could be trusted to reach sensible conclusions on the evidence, having been instructed in the law by the judge. Normally, juries gave no reasons for their decisions. Any reasons had to be inferred from the verdicts. Jury trial had the advantage in promoting finality of decision-making. The simplification of procedures for the elucidation of evidence was essential if the dispute was to be understood by a jury. On the other hand, unreasoned decisions sometimes gave rise to feelings of injustice. A small avenue for appeal was found where a verdict was classified as being "against the evidence and the weight of the evidence". A quest for

⁴ Theodore F.T. Plucknett, *A Concise History of the Common Law* (4th ed., Butterworths, London, 1948), 111-120.

⁵ *Ibid.*, 124.

⁶ *Ibid.*, 125.

⁷ *Id.*, 128.

more predictable trials and more reasoned justice led to the decline over the past 40 years in jury trial of civil (and even criminal) disputes. Once reasoned justice was adopted, it became more feasible to permit detailed scrutiny of the outcome of trials. Appeals gave some parties, discontented with the reasons of the primary decision-maker, the opportunity to attack the conduct of the trial and the reasons offered to sustain its outcome.

In the United States of America provisions in the written constitution protected jury trial from abolition or curtailment.⁸ In other places, constitutional protections have been read down almost to disappearance.⁹ Although some observers (mostly government officials) complained about so called “perverse” jury verdicts, an advantage of the system was that it allowed juries to do what was ‘right’ in the circumstances, not necessarily what the strict law required. Many convicts sent from England to Australia escaped hanging because a jury “perversely” (contrary to the evidence) found that the property stolen by the accused was worth less than £2: then the criterion for hanging. Logic and reason occasionally have their limits: especially where the law is unjust or out of date, as frequently it is. Logical judges may have little leeway. Sensible juries, on the other hand, could sometimes provide “corrective” verdicts.

The recent sharp decline in jury trials in most common law countries has increased the facility and utility of appeals. It has enhanced the examination of judicial reasons about factual conclusions, compared

⁸ *United States Constitution*, art III and *Bill of Rights*, amendment VI, VII and XIV. In the United States, jury trial has been held available where any non-juvenile criminal prosecution has a potential penalty of 6 months and in a federal civil case where more than \$20 is at issue. *Baldwin v New York*, 399 US 60 (1970).

⁹ *Australian Constitution*, s.80. See the *Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 599; *Re Colina; Ex parte Torney* (1999) 200 CLR 386.

with the recorded evidence. It has therefore turned the minds of judges and other decision-makers to the close examination of the processes of reasoning and testimony to reach the ultimate conclusion. It has also presented a number of quandaries as to:

- * The way judges themselves should resolve conflicts in evidence at trial;
- * The way appellate judges should solve such conflicts in an appeal from the trial decision; and
- * The techniques that need to be observed by decision-makers to allow for cultural phenomena affecting witness testimony¹⁰ and the increasing scrutiny of what is meant by well-worn legal phrases directed to the moment of decision: such as the need for a “comfortable satisfaction”.¹¹ Or, in criminal cases, “proof beyond reasonable doubt?”¹²

Judges sitting in courts of trial and appeal are not the only public officials who have obligations to reach factual conclusions in an acceptable way. Many of the strictures imposed by law on judges apply equally to members of the independent tribunals that now proliferate or statutory bodies (such as university councils) that are sometimes obliged to act in a judicial manner. Even beyond such bodies official enquiries, set up under statute, which have duties to reach conclusions and make recommendations, enjoy a wide discretion in how they should proceed. Nevertheless, even they can now occasionally be pulled up when they

¹⁰ E. Kyrou, “Judging in a Multicultural Society” *Law Society Journal* (NSW), April 2015, 20 at 22.

¹¹ Hayley Bennett and G.A. Broe, “The Neurobiology of Achieving a Comfortable Satisfaction” (2014) 26 *NSW Judicial Officers’ Bulletin*, no.8 (September 2014), 65.

¹² The usual standard of proof required in criminal trials. Explaining this expression to criminal juries is permitted in some jurisdictions (Canada) but forbidden in others (Australia) on the basis that juries have been applying it for centuries and know what it means.

have acted outside their legal remit or conducted themselves in a fashion that offends due process or rational decision-making.¹³

In the case of international commissions of inquiry, attention is normally paid to the standard of proof necessary to establish facts that will give rise to serious conclusions. Such as that breaches of international law have been proved.¹⁴ In practical terms, the sanction for improper, illogical, unpersuasive decision-making at this level is usually political. Complaints and criticism are fought out in international meetings, in the media and in learned journals. They can have large political consequences.

I intend to examine three cases in which I have been involved: two as a judge and one as chairman of a United Nations commission of inquiry (COI). The judicial instances will include one civil appeal and one criminal appeal. In each instance, there were acute differences about the evidence, making it difficult (perhaps ultimately impossible) to be absolutely certain as to what happened in critical circumstances, from which legal and other consequences flowed. By reference to these three cases, I will explain how the ultimate conclusions were reached; the differences that arose on the journey to those conclusions; and the aftermath, with a critique of the outcome.

By providing concrete illustrations of the three controversies, and examining the explanations afforded for their resolution, I hope to throw some light on the general process of formal decision-making, including

¹³ *R. v Winneke; Ex parte Australian Building Construction Employees and Builders Labourers' Federation* (1982) 152 CLR 25; *Victoria v ABCEBLF* (1982) 152 CLR 25; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

¹⁴ See e.g. United Nations, Commission of Inquiry on Democratic People's Republic of Korea (COI on DPRK), *Report of the Commission*, A/HRC/25/CRP.1 at 16[67]-[68].

its inherent disputability. The practical dynamics of formal proceedings demand a conclusion. If possible, it should be one that will convince (or at least be understood by) those affected and those who have an interest.

II

DECIDING BETWEEN CONTRADICTIONARY EVIDENCE

The first case is unremarkable.¹⁵ It arose in an appeal in which I participated in the High Court of Australia in 2003. Because that Court is the highest constitutional and appellate court of Australia, the case was not only important to the parties. It was also important as laying down principles to guide trial judges throughout Australia on the processes of decision-making and appellate judges below the highest court, called upon to resolve an argument that the trial judge had erred in the way the decision was approached or the conclusion finally reached.

Ms Barbara Fox was injured in 1992 when a horse she was riding came into collision on a public road with a van driven by Ms Megan Percy. Ms Fox claimed damages for negligence in respect of Ms Percy's driving of her motor vehicle. The factual contest at the trial, in the appeal court and then in the highest court, was who had been on the wrong side of the road in a sharp bend at the critical moments prior to the collision. If it was the van, Ms Fox was entitled to recover money damages for her injuries. If it was the horse ridden by Ms Fox, the van driver was not negligent and recovery by Ms Fox would be denied. The trial judge in the District Court of New South Wales found against the van driver. The Court of Appeal of New South Wales reversed that decision. The matter

¹⁵ *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22.

came to the High Court, when two Justices granted special leave to bring the matter to the third level of judicial decision.

In the days of my youth, when cases of this kind were normally decided by civil juries, it was extremely difficult (and rare) for the decision at trial to be appealed. But because a trial judge, sitting without a jury, is obliged to explain the reasons for the decision, this necessarily exposes the line of reasoning. That reasoning was attacked in the court of Appeal by the lawyers for Ms Percy. Because motor vehicles in Australia must carry insurance against the risk of negligently harming others, the real party at risk was an insurer. However, the proceedings followed the fiction that this was immaterial. The spotlight at all levels of the litigation was cast upon the conduct of the two women a few minutes before their lives intersected unexpectedly on a country road when it presented an almost blind left hand turn to the van, travelling down-hill, obliged to keep to the left side of the road.

The horse bearing Ms Fox was proceeding uphill. Speed was not a material consideration in the collision.¹⁶ The impact brought the van to a sudden halt. An ambulance and the police were immediately summoned. On arrival, the police officer noticed, and recorded in his notebook, a sketch of the scene. It showed that the van had come to rest on its correct side of the road. There was a ten metre line of skid marks behind the van also on the correct side of the centre of the road. This caused the constable to conclude that the vehicle had at all material times been on its correct side of the road. He said to Ms Fox, before

¹⁶ Ibid, 120 [3].

she was taken to hospital by ambulance: “It looks like you were in the wrong”¹⁷

The policeman noticed, and recorded, the apparent presence of alcohol in Ms Fox; that she “refused to cooperate with police in enquiries”; and that she had a body tattoo. A blood sample later taken at the hospital revealed that Ms Fox had 0.122 grams of alcohol per 100ml of blood. The trial judge accepted that this “would have affected her” in handling her horse. However, on the basis of the impression of truthfulness on Ms Fox’s part in giving her evidence, and a conclusion that the police officer had been hostile towards Ms Fox, the judge accepted an expert traffic engineer’s opinion that Ms Percy had, on the probabilities, driven onto incorrect side of the road causing the collision. He awarded Ms Fox judgment of substantial damages.

When the appeal from this verdict was taken to the Court of Appeal of New South Wales, that court was obliged by its statute to conduct the appeal “by way of rehearing”.¹⁸ It was entitled to draw inferences and make findings of fact.¹⁹ However, appeal courts normally (and in this case) hear no further evidence. They perform their duties on the basis of the transcript taken at the trial. They therefore do not ordinarily have available to them, directly, any impression that may be given by witnesses as to the truthfulness or otherwise of what they are saying. This is why, for more than a century, appeal courts in England, Australia and elsewhere have repeatedly insisted on a rule of deference on the part of appeal courts in favour of the conclusion of trial judges who enjoy advantages appeal judges they do not.

¹⁷ Id, 212 [5].

¹⁸ *Supreme Court Act* 1970 (NSW), s.75A (5).

¹⁹ *Ibid*, s.75A (6(b))

Where a judge explains the reasoning to conclusion by reference to impression of witnesses, this has, in the past, usually been fatal to those who challenge trial conclusions based on such evidence. In a series of cases before the decision in Ms Fox's case, the High Court of Australia was insistent on this rule demanding that appeal courts show severe restraint because of the "advantages" that trial judges enjoy from seeing witnesses and assessing their credibility. The judicial authority on this point had even gone beyond the principles stated earlier in English cases. It had suggested that there were "subtle influences of demeanour" which experienced judges would call upon to differentiate truthfulness from falsehood. Obviously, appellate judges would ordinarily lack access to these indicia.

Over time, a measure of scepticism came to be expressed by certain judges in relation to this supposed special judicial capacity to differentiate truth from falsehood on the basis of impressions of demeanour:²⁰

- * Some great judges in appellate courts began to urge that "an ounce of intrinsic merit or demerit in the evidence, that is to say the value of the comparison of evidence with known facts, is worth pounds of demeanour";²¹

²⁰ *Jones v Hyde* (1989) 63 ALJ 349 at 351; *Avalos v Australian Postal Commission* (1990) 171 CLR 167 at 179; *Devries v ANR Commission* (1993) 177 CLR 472 at 479, 482-483.

²¹ *Société d'avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co. ("The Palitana")* (1924) 20 Lloyds L Rep 140 at 152 per Atkin LJ. Quoted in *Fox v Percy* (2003) 214 CLR 118 at 129 [20].

- * Scientific evidence began to cast doubt on the suggested magical powers of trial judges which countless experiments showed were not enjoyed by other mortals;²² and
- * Concern was increasingly raised that the extreme rule of deference led to grave injustices, lazy judging and a failure to conduct a real “rehearing”, as required by Parliament in expressing the mandate of the appellate court.²³

This was the importance of *Fox v Percy*.²⁴ It afforded an opportunity for the High Court of Australia to revisit the principles that should be applied in courts below. Repeatedly, in a number of cases, I had expressed serious reservations about the extreme deference rule.²⁵ The case of the collision of the van with the horse afforded the opportunity to recalibrate the approach not only to be applied in that appeal but in all such appeals depending on evidentiary conclusions (of which there were many).

In the end, the High Court of Australia was unanimous in upholding the decision of the Court of Appeal and rejecting the appeal by Ms Fox.

Relevant to the reasoning of the court on this point were the following considerations:

- * There was incontrovertible evidence, in a contemporary document, that verified the police testimony as to the position of the van after

²² *Fox v Percy* (2003) 214 CLR 118 at 129 [31]. Citing evidence collected by Samuels JA in *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 348.

²³ *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 330 [89]-[91]. Citing *Lend Lease Developments Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 209-210.

²⁴ The principal reasons in *Fox v Percy* were written by Gleeson CJ, Gummow J and myself. The other Justices participating, McHugh J and Callinan J, reached the same ultimate conclusion.

²⁵ See e.g. *State Rail Authority* (1999) 73 ALJR 306 at 330 [89]-[90].

and immediately before collision and the exact markings on the road of its skid marks. These skid marks were never satisfactorily explained by the trial judge to reconcile them with his conclusion;

- * Reasoning from the objective facts, it was more likely that Ms Fox's horse might stray to the incorrect side of the road, if not properly controlled, because this would involve no more than its cutting the corner without attention to the centre markings visible to, and understood by, humans but not by horses. Moreover, the van would normally hug the left hand side of the road in descending the decline and the skid marks strongly suggested that this is what it had done; and
- * The high level of alcohol confirmed by the blood test taken soon after the collision was at least consistent with a possibility that Ms Fox, exercised inadequate control over her horse to direct it to the outside left side of the road around the bend, thereby avoiding oncoming vehicles such as the van. The constable's notation of the smell of alcohol and the tattoo were not necessarily evidence of hostility to Ms Fox. He was obliged by police regulations to make such notations of personal features and possibly material features. His immediate confrontation of Ms Fox with his intuitive conclusion fulfilled a due process requirement, rather than indicating an attitude of hostility.

It is my belief that, as a result of this decision of the High Court of Australia, including in the joint reasons, in which I joined with Chief Justice Gleeson and Justice Gummow,²⁶ a change has occurred both in reasoning by judges at trials and in intermediate appellate courts. Now deference to the impression of witnesses is a last consideration, after

²⁶ *Fox v Percy* (2003) 214 CLR 118 at 130 [34].

exhausting any relevant contemporaneous evidence and analysis of the inherent logic of the proved facts. Technology is coming to the aid of the law and the courts. The endless stream of emails, phone location records and other incontestable testimony makes it much less usual for judges and decision-makers now to rest their conclusions on the fragile foundation of human assessment of truthfulness, based on witness appearances. The law has moved to a more reliable foundation for reasoning to conclusions. This has provided a preferable discriminant for selecting between contradictory evidence where the decision-maker must select the evidence that is preferred and explain why it is preferred over the competing testimony.

III

DECIDING UPON CIRCUMSTANTIAL EVIDENCE

The second case²⁷ involves a criminal appeal brought after the conviction of an accused person (Jean Eric Gassy), a resident of Sydney, against his conviction of the murder in Adelaide of Dr Margaret Tobin, the Director of Mental Health for South Australia. Here the conflict was not between contradictory evidence about the same facts so much as the assessment of circumstantial evidence and whether it proved the guilt of Mr Gassy to be requisite standard of proof and whether he had received a fair trial of the issues presented for decision.

²⁷ *Gassy v The Queen* (2008) 236 CLR 293; [2008] HCA 18.

Unusually, Mr Gassy represented himself in the High Court of Australia and, by majority,²⁸ he enjoyed an exceptional victory.

Dr Tobin had played a role in events leading to the de-registration of Mr Gassy as a medical practitioner (psychiatrist) in New South Wales. In 1993 she had expressed concerns to the authorities in that State about his mental condition. Her death came about years later when she was shot 4 times when leaving an elevator on the 8th floor of a building in Adelaide housing her office. She had moved to Adelaide but Mr Gassy had continued to live in Sydney.

The Crown case at the trial was that Mr Gassy had driven rapidly to Adelaide; returned immediately to Sydney; and left a trail of evidence linking him to the murder. However, there was no satisfactory CCTV or other identification evidence to establish his guilt directly. Nor did Dr Tobin, who survived the attack for a short time, identify her attacker or mention Mr Gassy's name before she expired. To find him guilty, the jury were obliged to rely on a mass of circumstantial evidence to decide that the Crown had proved Mr Gassy's guilt beyond reasonable doubt.

The circumstantial evidence in the case was undeniably very strong, being collected by a police forensic investigation commenced immediately following Dr Tobin's death. It was intelligent, painstaking and imaginative. Because Mr Gassy was identified as an immediate suspect, enquiries were made at and about an interstate venue in Brisbane, Queensland, where Dr Tobin had earlier addressed a conference and also at garages and motels on the direct road between Sydney and Adelaide in the days immediately before and after the

²⁸ *Ibid* Gummow, Kirby and Hayne JJ; Crennan and Kiefel JJ dissenting.

shooting. The Brisbane evidence strongly suggested that Mr Gassy had been a guest at a motel near the conference venue whose staff picked him from a collection of police photographs. As well, a gun shop in Brisbane also identified Mr Gassy from police photographs as a person who had ordered a slide for a particular pistol at the time of the Brisbane conference. This slide was a part of the pistol necessary for firing. A motel record in Brisbane also revealed a guest who had used a similar factious name and address to that used on the road to and in Adelaide where it was postulated that Mr Gassy had stayed for sleep on the fateful journey.

The original Adelaide motel registration form matched a carbon copy of hotel registration documents found in a white bag at a rubbish dump of the town on the road from Adelaide to Sydney. It had been discarded by a man who had used a fictitious address and paid in cash at the motel but who answered to the general description of Mr Gassy. CCTV film taken at a service station in the town between Adelaide and Sydney was not sufficiently clear to confirm, with certainty, the identity of Mr Gassy. But the person shown in the film was seen to deposit a white bag of that description in a rubbish bin. It was from a white bag at the town dump that police retrieved the carbon copy of the original motel registration form. The vehicle hired by a person matching the appearance of Mr Gassy used a similar false identity and paid in cast. Moreover, the vehicle allegedly used by him revealed a mileage use equivalent to a return journey between Sydney and Adelaide.

Mr Gassy's primary complaint against his conviction was a technical one. Although he had appeared for himself at his trial, he had asked the trial judge for permission to allow a barrister to represent him in a legal

procedure within the trial. That application had been refused by the trial judge. Mr Gassy also complained about the suggested lack of balance of the trial judge's directions to the jury when they returned after long deliberation, seeking additional assistance from the judge. The judge's further direction included an expression of a factual conclusion that Mr Gassy "must have been carrying a pistol" in Brisbane and "must have gone" to Adelaide for the reason of killing Dr Tobin. Mr Gassy complained that directions in such terms lacked balance and were impermissibly biased in favour of the prosecution. They could have warped the jury's deliberations, pushing them into favouring the Crown's case

The Crown argued that, even if there were errors in the ruling and the supplementary direction given by the trial judge, they were ultimately immaterial because of the compelling strength of the circumstantial evidence against Mr Gassy, built by its reliance on numerous pieces of objective evidence (not all of which I have mentioned). The prosecution contended that this evidence demonstrated Mr Gassy's guilt "beyond reasonable doubt".

Two Justices of the High Court of Australia (Justices Susan Crennan and Susan Kiefel) upheld this last submission. However, three Justices (Justices Gummow and Hayne and myself in separate reasons) concluded otherwise. Under South Australian law (and indeed under the common form criminal appeal legislation applicable in most countries that have derived their criminal law from England) a provision applies that is designed to discourage success by prisoners who are clearly guilty on the evidence but who can point to some technical error arising

in the course of a trial.²⁹ Justices Gummow and Hayne rejected this argument by the Crown on the basis that, in a case of circumstantial evidence, such as Mr Gassy's, it was crucial that the jury should not be misled by a direction strongly favourable to the Crown, about the way in which they should reason to their verdict. I had sympathy for that approach. However, I also had sympathy for the view expressed by the dissenting Justices. This was because I concluded that "in the large canvas of [Mr Gassy's] trial, I am not convinced that this error alone would justify relief. Nor in terms of its consequences would it attract an argument based on the suggested category of "fundamental" departures from the hypothesis of a fair trial."³⁰

This took me back to analysing the prosecution's contention that there was no "substantial miscarriage of justice [that] had actually occurred" because the factual testimony was so overwhelming in proof of Mr Gassy's guilt as to be compelling. This, in turn, took me through all of the factual evidence that I have already mentioned. This demonstrates the way in which appellate judges can sometimes become embroiled in a detailed assessment of the testimony given at the trial (and inferences that arise from that testimony) in discharging the legal duties imposed upon them.

I made it clear that the "mosaic of evidence" presented in the prosecution case was extremely powerful.³¹

"Individually, the elements in the mosaic might be questioned or doubted. However, when placed together and in relation to each

²⁹ In South Australia, the "proviso" appears in *Criminal Law Consolidation Act (1935) (SA)*, s.353.

³⁰ *Gassy* (2008) 236 CLR 293 at 315 [64].

³¹ *Ibid*, 321 [90]-[91].

other, the resulting case was in my view powerful. ... I am brought to the conclusion that the present case is a borderline one... Definitely, it is at the cusp.”

The jury in the trial had asked the judge to explain what was meant by the expression “beyond reasonable doubt”. In Australia, juries must be told that these words are well known and of longstanding and that the jury must give them their ordinary meaning. With the benefit of this somewhat opaque direction, the jury continued their deliberations.

To the question, where did the truth lie in criminal prosecution of Mr Gassy at his trial, the answer, overwhelmingly, was that it lay with the conclusion that he was guilty of the crime. However, the answer to that question, on its own, was insufficient to sustain his conviction. This was because of a number of legal requirements that presented other, and different, questions before the overall issue of proof of guilt could be treated as determinative. First, our system of criminal justice is accusatorial in its essential character. It is not simply adversarial or inquisitorial. The onus of proof of guilt remains throughout on the prosecution. The accused does not have to prove his or her innocence. Secondly, the proof of an accused’s guilt must be established to a very high standard: namely “beyond reasonable doubt”. Probability or comfortable satisfaction are not enough. Yet incontrovertibility of every element in the case would be too much. Thirdly, the accused person is ordinarily entitled to have the issue of guilt decided by a jury of 12 citizens who have been properly instructed about the law. Although appeal judges have a reserve role to play, it is a serious step to take away the right to trial by jury where, because of misdirection, an earlier trial has miscarried.

In my reasons in the *Gassy* case, I tried to explain how I resolved the quandary presented by the even split by my colleagues (2:2). I could not respond that it was just too difficult. Or that I could not make up my mind. I had to reach a decision. It was obligatory for me (effectively with the casting vote) to describe in some degree my mental processes. Not only was this important for Mr Gassy. It was also important for the community concerned about a brutal homicide in its midst but also, potentially, about the costs of a lengthy second trial. This is what I said:³²

“The trial had reached a critical point and the judge was perfectly correct to attempt to save it. However, that endeavour could not be at the cost of manifest impartiality and neutrality and a fair presentation to the jury of [Mr Gassy’s] case. ... For the judge to give the jury a clear and firm reminder of the prosecution case, at that critical point, without equally reminding the jury of [Mr Gassy’s] main arguments, placed [him] at a very great disadvantage. Not least was this important because, from the duration and the announced difficulties of the jury’s deliberations, it is apparent that Mr Gassy had succeeded with some or all of them at least on some of his criticisms of the prosecution case. ... The reasons for manifest judicial impartiality and neutrality derive from the very nature of the judicial function and the purposes of a public criminal trial. They are reflected in fundamental principles of human rights as expressed in international law. They have been repeatedly stated in the reasons of this and other courts. They were well explained by [the dissenting judge] in the [appeal] court below.”

³² *Id* 322-323 [95]-[97] (footnotes omitted).

In the result, I favoured ordering a new trial so that the problem presented by the suggested lack of balance in the judge's final redirections would not be an ingredient. Whilst this would be inconvenient and expensive for the community, Mr Gassy stood in risk of receiving a life sentence of imprisonment if his guilt of murder were confirmed. I therefore joined in the orders for quashing the first verdict and ordering a retrial.

There is a postscript to this case. Mr Gassy was retried in Adelaide before a new jury and a different judge. Once again, he was found guilty and convicted. A further appeal was brought but dismissed by the Court of Criminal Appeal of in South Australia. Another application was made for special leave to appeal to the High Court of Australia.³³ That application (which raised different objections) was rejected. Interestingly, the first jury deliberated for two and a half days.³⁴ The second jury took only three hours to reach their guilty verdict. Each Crown case was basically the same:

- (1) Evidence that Mr Gassy had travelled to Adelaide at the critical time;
- (2) Evidence of hand gun involvement;
- (3) Evidence of his earlier presence in Brisbane where Dr Tobin was lecturing;
- (4) Evidence of opportunity in Adelaide; and
- (5) Evidence of motive.

³³ *Gassy v The Queen* [2010] HCASL 189 (22 September 2010) per Heydon J and Bell J.

³⁴ (2008) 236 CLR 293 at 322 [92]–[94].

Different decision-makers sometimes view the same evidence in different ways. The task of reasoning to a conclusion is not automatic or mechanical. It is affected by perceiving the same evidence in different ways. This can be affected by the attitudes and values of individual decision-makers. This is so however much the law must operate upon assumptions of rationality, logical reasoning and compliance with legal directions as to the proper approach that should be taken to the evidence and the location and burden of proof to be applied in arriving at a conclusion.

IV

DECIDING ON SELF-SELECTED OR SUSPECTED EVIDENCE

My third case illustration comes from a process of decision-making outside the familiar environment of courtrooms.

In 2013, the United Nations Human Rights Council (HRC) established a Commission of Inquiry (COI) to investigate, and report on, alleged human rights abuses in the Democratic People's Republic of Korea (DPRK) (North Korea).³⁵ The inquiry followed many years of disturbing reports about North Korea. Although a Member State of the United Nations since 1993, DPRK had not cooperated with the United Nations human rights machinery. It had not permitted successive special rapporteurs, appointed by the HRC to visit to investigate reported abuse. It had not permitted the High Commissioner for Human Rights (HCHR) to visit. Effectively, it had closed its borders, only allowing a trickle of tourists who were kept under close watch and restricted in their movements. DPRK is commonly referred to as the "hermit kingdom".

³⁵ United Nations, Human Rights Council Resolution 19/13 (2014). The report is UN document A/HRC/25/63.

Getting up to date, accurate and representative evidence to respond to the nine point mandate of the COI inquiry, was bound to be extremely difficult. As expected, the government of DPRK, through its mission in Geneva, ignored requests from the COI to permit its members and staff to visit the country. It maintained that stance throughout the COI's inquiry. When, in the end, copy of the draft report was transmitted electronically through the Geneva embassy of North Korea to the Supreme Leader of DPRK (Kim Jong-un), with a warning that he might be himself personally accountable for crimes against humanity found in the report, this too was ignored. However, DPRK was aware of the inquiry. It regularly denounced the COI and its members. When it criticised the inquiry and its procedures, the members and the United Nations, offered to come to Pyongyang to explain their report and to answer questions. This offer was also ignored.

Faced with such intransigence, the COI appreciated the importance of the compulsory procedure of *subpoena* (lit. "under the power"), developed in national legal systems to ensure that parties, relevant persons and records relevant to a proceeding are brought before those with the responsibility of decision. The COI did not enjoy that facility. Whilst the HRC strongly and repeatedly urged DPRK to cooperate with the COI, its injunctions fell on deaf ears. Yet, obviously, this want of cooperation could not of itself prevent the COI from discharging its mandate. Any more than a national court or inquiry would simply surrender in the face of non-cooperation.

The three members of the COI came from differing cultural and legal traditions. Two (Marzuki Darusman, Indonesia and Sonja Biserko,

Serbia) came from countries that follow the civil law traditions, ultimately traced back to France and Germany. My own experience had been in the common law tradition, derived ultimately from England. Most UN inquiries are carried out by professors and public officials selected from civilian countries. The COI on DPRK gave a great deal of attention, at the threshold, to the methodology that it should adopt in order to overcome (as far as possible) the hostility and non-cooperation by the subject country.

The COI was not itself a court or tribunal. It was not authorised to prosecute, still less to arraign or to determine the guilt of the DPRK, its institutions or named officials. The object of UN COIs in the area of human rights is to be “effective tools to draw out facts necessary for wider accountability efforts.”³⁶ Self-evidently, all such inquiries must themselves conform to United Nations human rights law. This means that they must accord natural justice (due process) to those who are the subject of inquiry and protection to those who must give testimony and may for that reason be at risk. The COI on DPRK took these obligations seriously.

The methodology adopted by the COI on DPRK included:

- (1) Advertising publicly to invite witnesses to identify complaints to which they could testify and to offer testimony;

³⁶ UNSC *Report of the Secretary-General on the Rule of Law in International Justice in Conflict and Post Conflict Societies* (2011) UN Doc S/2011/634 [24]; UNHRC, *Report of the Secretary-General on Impunity* (2006) E/CN.4/2006/89. See also G. Palmer, “Reform of UN Inquiries”, ch 36 in *Festschrift for Roger Clark*, Victoria University of Wellington, New Zealand, 2015 (Brill, Leiden, 2015), 595.

- (2) Conducting public hearings to receive such testimony so far as could be safely procured in public (with other evidence received in private);
- (3) Filming recordings of such public testimony and placing it online accompanied by written transcripts in relevant languages;
- (4) Inviting national and international media to attend and cover the testimony and to draw it to global attention;
- (5) Producing a report written in simple, accessible language;
- (6) Indicating clearly in the report the findings made by the COI and the evidence upon which such findings was based;
- (7) Providing a draft of the report to the nations most concerned, with an invitation to correct, or comment on, factual or legal conclusions;
- (8) Publishing with the report any such comments (comments were received and published from China); and
- (9) Engaging with media in all forms to promote knowledge of - and to secure support for – the stated conclusions and recommendations.

The COI was aware that false testimony by witnesses could potentially damage the credibility of its findings. Therefore, it took care to limit the witnesses to those who, on interview by the COI's secretariat, appeared to be honest and trustworthy. It also secured the agreement of the Government of the Republic of Korea (ROK) (South Korea), exceptionally, to permit DPRK to send representatives or advocates, or to engage lawyers who could make submissions on its behalf and, with permission of the COI, to ask questions of other witnesses. This offer was communicated to DPRK but ignored. In giving testimony, the

witnesses were examined in the manner of “examination in chief” i.e. by non-leading questions. This course permitted the witnesses to give their testimony, in a generally chronological way, in their own language, and in a fashion that was comfortable to them. It gathered evidence by non-leading questions asked by a commissioner. The COI did not cross examine witnesses unless it considered this course to be essential to clarify apparent inconsistencies or to address doubts raised in the minds of COI members by the evidence. The “non-leading” mode of examination allowed witnesses to speak for themselves.

The mass of testimony procured by the COI was substantially organised under the headings of the nine point mandate received by the COI from the HRC. In each case, analysis of the issues and the overall effect of the testimony was supplemented in the COI report by short extracts from the transcripts. These passages add light and colour to the report which third person chronicles will commonly lack. Part of the power of the report of the COI on DPRK derives from the care devoted by the members and the secretariat to provision of a readable text. The object was to ensure that the conclusions and recommendations grew naturally out of the preceding passages of testimony, evidentiary extracts, recommendations and analysis.

To the criticism expressed by DPRK of the report and the ‘self-selected’ character of the witnesses, the COI repeatedly responded with appeals to permit COI members to visit the country to conduct a transparent investigation among a wider pool of witnesses and on the spot. This appeal was ignored. Moreover, the testimony of more than 80 witnesses (taken and recorded in Seoul, Tokyo, London and Washington D.C.) was placed online and is still available on the internet. This means that

people everywhere throughout the world (except in the DPRK) can view and hear the witnesses for themselves, read the transcripts of their testimony, and reach their own conclusions as to their truthfulness, balance and representativity.³⁷

The objections and alternating “charm offensive” and bullying tactics adopted by DPRK, following publication of the COI report, are all recorded online. Sharp (but respectful) exchanges between the DPRK Ambassador at the United Nations and me are also captured online (and available on the internet). These allow both the political actors and the general international public to evaluate the COI report. Certainly in the first instance, the political actors in the organs of the United Nations indicated their strong conclusions by overwhelming votes endorsing the report, recorded successively in the HRC, in the General Assembly and in the Security Council of the United Nations. In the Council, by a procedural vote not subject to the veto³⁸ the human rights situation in DPRK was added to the agenda of the Council by a two third majority (11 for; two abstentions; two against).

Two Permanent Members of the Security Council, China and the Russian Federation, on a show of hands, voted against the procedural resolution adding the COI report to the Council’s agenda. One substantive matter where the concurring decision of the Permanent Members would be essential concerns the COI’s recommendation that the case of North Korea should be referred to the International Criminal Court so that prosecutorial decisions might be made, and if so decided, trials conducted to render those arguably guilty of grave crimes

³⁷ A paper by the author on the methodology of the COI appears in *NSW Judicial Officers’ Bulletin* 2015 (November 2015).

³⁸ United Nations, *Charter*, Art. 27.2.

accountable before the people of Korea and the international community.³⁹ That substantive resolution has not, so far, been voted on.

Under the Security Council's procedural resolution of December 2014, the issues of human rights in DPRK remain on the agenda of the Council for three years at least. Hopefully, a time will arrive when a consensus has formed that at least the gravest findings on the part of the COI should be fully considered by a prosecutor with appropriate powers to initiate action. Under international law, where a nation state fails to secure accountability for grave human rights crimes, the other members of the international community, in the United Nations, have a "responsibility to protect" those who are left unprotected by their own country.⁴⁰

In reaching its conclusions, the COI explained the origins of its mandate,⁴¹ its methodology⁴² and the interpretation that it took of its mandate as well as its methods of work.⁴³ Specifically, the COI described the standard of proof that it applied in considering the acceptance of the testimony of witnesses and in deriving conclusions from that testimony so as to respond to its mandate.⁴⁴ On the issue of differentiating probative from non-probative evidence, the COI said:⁴⁵

³⁹ COI Report (A/HRC/25/CRP.1) 370 [1225(a)].

⁴⁰ *Ibid*, 363-365 [1204]. See G.J. Evans *Responsibility to Protect*, Brookings Institution, Washington D.C., 2008.

⁴¹ *Ibid*, 5-6 [6]-[12].

⁴² *Id*, 6-8 [12]-[20].

⁴³ *Id*, 10-13 [28]-46].

⁴⁴ *Id*, 15-18 [63]-[78].

⁴⁵ *Id*, 16 [67]-[68].

“Consistent with the practice of other United Nations fact-finding bodies, the Commission employed a ‘reasonable grounds’ standard of proof’ in making factual determinations on individual cases, incidents and patterns of state conduct. These factual determinations prove the basis for the legal qualification of incidents and patterns of conduct as human rights violations and, where appropriate, crimes against humanity. ... There are ‘reasonable grounds’ establishing that an incident or pattern of conduct has occurred when the Commission is satisfied that it has obtained a reliable body of information, consistent with other material, based on which a reasonable and ordinary prudent person has reason to believe that such incident or pattern of conduct has occurred. The standard of proof is lower than the standard required in criminal proceedings to sustain an indictment, but it is sufficiently high to call for further investigation into the incident or pattern of conduct and, where available, initiation of the consideration of a possible prosecution. The findings of the Commission appearing in this report must be understood as being based on the ‘reasonable grounds’ standard of proof, even where the full explanation... is not necessarily expressed throughout the text of this report.”

After the publication of the COI report, and the action of the three organs of the United Nations which considered it, an event occurred which the DPRK used to attempt to destroy the entire credibility of the COI report and its processes. In January 2015, the DPRK released a video film concerning a witness who had given evidence before the COI and who had subsequently taken part in conferences and meetings recounting his alleged experiences in escaping DPRK. Shin Dong-hyuk (Shin) was an articulate, engaging young man whose story about how he had escaped from DPRK was unique, in that he claimed that he had fled from the

highest security detention camp in DPRK, reserved for the most dangerous political detainees and their families.

Shin's story was not only recorded in the transcript of the COI. It was the subject of an earlier best-selling book by Blaine Harden, a United States journalist.⁴⁶ The video released by DPRK showed a person later confirmed as the father of Shin who stated that Shin's testimony and account of his experiences were fake; that he was given to falsehood; and that he should return to DPRK and seek forgiveness. Shin subsequently acknowledged his critic was indeed his father and that parts of his story in the book (and hence of his testimony to like effect before the COI) were not factually correct, including in relation to his being detained in Camp 14; the age at which he was tortured; alleged circumstances by which he had claimed that he escaped. Three other refugees have been identified by DPRK who are claimed to have made false allegations against DPRK. However, Shin is the only one of these who gave evidence to the COI in its public hearings.

The question becomes to what extent the entire report of the COI, its conclusions and recommendations, are damaged, or undermined, by the exaggerations acknowledged by Shin and the possibility that other witnesses, not yet identified or acknowledged may have similarly falsified or exaggerated their allegations? Unsurprisingly, DPRK has asserted that the entire COI report on human rights in their country has collapsed. It has called for the United Nations to make an apology to DPRK and to rescind its condemnatory resolutions.

⁴⁶ B. Harden, *Escape from Camp 14*, Penguin, New York, 2013.

Because Shin had been prominent in international media reports that preceded, and accompanied, the COI hearings, he was called first amongst the witnesses who gave evidence to the COI in Seoul. Some support for the DPRK criticisms has been voiced by an assistant professor of political science in Singapore (Jiyoung Song) in an article “Unreliable Witnesses” published in August 2015.⁴⁷ In her article, Ms Song referred to a practice of paying North Korean refugees for interviews on human rights experiences (fees up to \$US200/hour were mentioned); receiving second hand accounts without adequately checking for reliability; allowing witnesses to change their names allegedly to protect their families from retaliation but thereby making objective scrutiny more difficult; using “older white male interviewers” to collect testimony who are not native Korean speakers and who cannot detect nuances in witness evidence; receiving testimony through interpreters and paying insufficient attention to gender, age and social status considerations; and failing adequately to follow-up inconsistencies possibly deriving from perceived self-advantage.

Ms Song concludes:⁴⁸

“In my 16 years of studying North Korean refugees, I have experienced numerous inconsistent stories, intentional omissions and lies. I have also witnessed some involving fraud and other illicit activities. In one case the breach of trust was so significant that I could not continue research. It affected my professional capacity to analyse and deliver credible stories in an ethical manner but also had a deep impact on personal trust I invested in the human subjects I sincerely cared about.”

⁴⁷ Jiyoung Song, “Unreliable Witnesses: The Challenge of Separating Truth from Fiction When it Comes to North Korea”, available <http://www.policyforum.net/unreliablewitnesses/>

⁴⁸ *Ibid*, 6.

Any person who has been involved over time in the gathering and examination of testimony, offered in connection with serious formal proceedings designed to illicit the truth about significant and potentially disturbing subjects, knows that the process is full of difficulty and far from perfect. Each of the members of the COI on DPRK had extensive experience, over many years, in receiving, scrutinising and evaluating evidence. I did, appearing as a clerk, lawyer and advocate in courts over 16 years and then as a judge and inquiry commissioner in Australia over 34 years. I had also held earlier United Nations offices that involved gathering of testimony, evaluating it and expressing conclusions.⁴⁹

Of course, long experience is not a guarantee of infallibility. As already pointed out, I have long been sceptical about the claimed capacity of judges to have an ability to differentiate truth from falsehood with unerring accuracy based on their impression of witnesses. Commissioner Marzuki Darusman likewise had long experience in the law and in the courts in Indonesia as Prosecutor-General and Attorney-General of that country. These posts, and daily legal practice, would have given him experience similar to my own. Commissioner Sonja Biserko, also had long engagement with civil society organisations addressing the extremely upsetting evidence of communal hatred, violence and alleged genocide in countries of the former Yugoslavia, including her own country, Serbia.

⁴⁹ For example as a member of the International Labour Organisation Fact-Finding and Conciliation Commission on Freedom of Association, Inquiry into South Africa (1991-92); as United Nations Special Representative of the Secretary-General for Human Rights in Cambodia (1993-6); and as a member of the United Nations Development Programme Global Commission on HIV and the Law, Risks, Rights & Health, New York, July 2012.

Each of the commissioners in the COI on DPRK was aware that witnesses can sometimes be fraudulent and dishonest; occasionally irresponsible and exaggerated; and not uncommonly confused and forgetful. However, those with the responsibility to undertake an inquiry (including from the United Nations) and to reach conclusions cannot allow the imperfections of human nature and decision-maker capacity to paralyse them. Nor can they permit the possibility that they have sometimes been deceived by a witness to dominate their reaction to the testimony of witnesses generally, as Ms Song appears to have done. To permit disappointment with one or a number of witnesses to destroy one's faith in the investigatory process, as such, is to allow one's personal sense of pride and importance (or even outrage at cases of deception) to overcome the duty to press on and to reach and explain reasoned conclusions in an inquiry that is objectively significant. Especially so, as Ms Song has acknowledged, because a general conclusion can be reached that "there is no doubt that the North Korean regime has violated serious human rights".⁵⁰ If this is so, members of a United Nations inquiry, established by the HRC, do not have the luxury to walk away from their duty nor to exaggerate the dangers, nor to allow personal ego to overcome their professional obligations.

In the case of the COI on DPRK, each of the Commissioners, at the time of embarking on their duties, made a solemn undertaking before the UN High Commissioner for Human Rights (Ms Navi Pillay) that they would act with integrity, impartiality, independence and professionalism.⁵¹ Subsequently, this undertaking was reduced to writing and deposited with the President of the HRC. As well, before any witness was asked

⁵⁰ J. Song, above n.45, 2-3.

⁵¹ These are qualities identified in the *Bangalore Principles of Judicial Conduct*. See United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (UNODC, Vienna, 2007).

questions by a member of the COI, each was requested to declare publicly that the evidence that they would provide to the COI would be the truth. Each witness so declared. Similar procedures were followed in respect of witnesses interviewed privately.

Additional considerations need to be noted in light of Ms Song's article. It is important that scholars working in circumstances where free criticism of officials is possible should not lend credence to the strategy of DPRK which is to attack witnesses and independent investigators who record faithfully and carefully evidence of grave abuse.⁵²

- * No monies were paid to witnesses as such, appearing before the COI in order to induce them to give their evidence. In the normal way, compensation or reimbursement was usually provided; generally by civil society organisations whom the witnesses had come to trust, to cover transport and accommodation. Most such witnesses have faced difficulties in re-establishing their lives in new countries. Most would not otherwise have the funds to travel to, and appear before, a body such as the COI. There is nothing unusual or reprehensible in any of these arrangements;
- * DPRK would not allow the COI access to its own territory despite repeated requests. The COI could not therefore go to places in North Korea where it might investigate relevant matters for itself, on the ground. It was obliged to invite testimony, including from escapees, refugees and experts – all of them resident outside DPRK. There was no difficulty in securing testimony in response to the COI's invitation. In the end, gathering evidence had to be

⁵² Steven Borowiec, "North Korea's New Tactic: Discredit Those Who Report Human Rights Abuses - Analysis" in *Eurasia Review* (March 2015).

terminated in order to ensure compliance with the short deadline for report given to the COI by the HRC;

- * The reliability of most escapees and refugees can be considered against the fact that very few escapees or refugees have elected to return to DPRK;
- * Several of the witnesses before the COI gave evidence that effectively corroborated the testimony of others. In particular, evidence concerning detention camps, starvation and lack of food; restrictions on travel and movement; controls over access to media and the internet; harsh treatment for returnees coming from China and especially for religious adherents; and totalitarian presentation of propaganda uniformly supporting the regime in DPRK, all came in similar terms from the mouths of several witnesses who did not know the other witnesses offering like testimony;
- * Testimony was filmed, transcribed and (where it was received in public hearings) is available online. Exceptions were provided for witnesses whom the COI regarded as likely to be endangered if they gave evidence in public;
- * Satellite images of DPRK available to the COI confirm what appear to be the buildings of detention camps following the general lines of the oral testimony provided by oral witnesses. Moreover, by way of contrast with images of ROK, China and Japan, these satellite images demonstrate the bleak physical and economic situation in DPRK;
- * Opportunities were given to DPRK, in respect of testimony gathered in ROK to appoint lawyers (or representatives) to advance their interests and, with leave, to ask questions of all witnesses. Their refusal to accept this possibility makes it unpersuasive now for DPRK to rely on alleged imperfections of

some of the evidence to which it is the main contributor by its total lack of cooperation;

- * The COI report did not simply accept and summarise the claims of witnesses. The commissioners were assisted by a skilled secretariat, which was itself independent of other UN organs. Members of the secretariat provided advice and analysis on witnesses and their relevance to mandate issues but accepted, as they were bound to do, that the commissioners had the right and duty to have the last word on all matters in the COI report. Some parts of individual testimony of witnesses were not included in the COI report because the COI was unsure as to their reliability. For example, an account suggesting the performance of unconsensual medical experiments in DPRK was not included for that reason. Similarly, the COI ultimately rejected witness suggestions of genocide, because of the view it took as to the state of the evidence before it and the legal requirements for proving “genocide” under current international law.⁵³ Although some witnesses on religious persecution argued for a finding of genocide, the COI did not accept their contention. It acknowledged the radical reduction of the population of religious adherents in DPRK. It expressed some sympathy for a broader definition of ‘genocide’ in current international circumstance. However, it postponed any finding to that effect because the relevant evidence was “difficult or impossible to [gather] without access to the relevant archives of DPRK”.⁵⁴ Care was observed both in conducting confidential interviews and in undertaking the public hearings, to pose questions in such a way as to extract only

⁵³ COI report, 350-351 [1155]-[1159].

⁵⁴ *Id.*, 365 [1211].

first-hand information known to the speaker. It was not necessary to its conclusions for the COI to rely on second-hand or purely hearsay accounts;

- * Whilst it is true that cultural considerations are relevant to testimony received through interpreters, this is an inescapable feature of collecting evidence in multicultural societies, including those from which each of the commissioners and members of the COI secretariat derived. There is nothing peculiar or special to the DPRK in this regard. Many of the conclusions reached by the COI are similar to those earlier, and subsequently, recorded by Korean civil society organisations in South Korea that conducted their interviews in the Korean language, with complaints questioned by Korean native speakers. On the issue of gender, the COI adopted a practice of ensuring, so far as possible, that female witnesses were interviewed confidentially by female investigators. Many of the female witnesses in the public hearings of the COI were questioned primarily by Commissioner Sonja Biserko in the first instance; and
- * Finally, so far as the evidence of Shin Dong-hyuk was concerned, adjustment can be readily made for his partial recantation and the withdrawal of his testimony that he had been detained in Camp 14 (as well as certain other evidence he had given about his parents). That still left evidence by Shin that was entirely believable, reliable and corroborated by other witnesses. In any case, the quotations from Shin's testimony, actually contained in the COI report, are relatively few and immaterial to the point of recantation. None of the other persons named as unreliable by Ms Song gave public evidence to the COI or were relied on by the COI or its secretariat.

In the big pictures of human rights violations in DPRK, found to be “systematic, widespread and gross” extending over many years and affecting millions of people, the subtraction of part of the testimony of Shin Dong-hyuk has no consequence for the overall impact of the witness testimony to the COI report. It does not require withdrawal of a single conclusion or recommendation. Any more than, in municipal jurisdiction, conclusions and recommendations of a large and significant inquiry would have to be withdrawn or disbelieved in their entirety because it was later found that part of the testimony of one witness was false, careless or exaggerated in identified respects.

Reflecting on the recantation by Shin, Blaine Harden wrote in August 2015 in language that is convincing:⁵⁵

“If there’s one truth to be gleaned from... memoirs [of escapees from DPRK], it is about the centrality of lying. For me, it is a haunting issue. Shin Dong-hyuk, the subject of my 2012 book, “Escape from Camp 14”, misled me for 7 years about some details of his life in North Korea’s gulag. When I asked him why had done it, he said the complete truth was simply too painful. He chose to tell me (and human rights groups and UN investigators) an expurgated story, which he wore as body armor for life in the free world. It protected him from trauma he was unwilling to relive. It hid behaviour he was ashamed to disclose. He had no idea, he said, that the precise details of his life would ever be considered important. Shin’s experience in North Korea was particularly gruesome. His body is covered with scars from repeated torture. He is stunted from malnutrition. As a young teen, he betrayed his mother and brother,

⁵⁵ B. Harden, “How can we know North Korea stories are true?” in *Washington Post*, August 9, 2015, B1 and B5.

causing their execution. Psychologists agree that victims of such severe trauma almost always tell stories that are fragmented, self-protective and intermittently untrue. But Shin's relationship to the truth is not completely foreign to other defectors now writing memoirs. ... Some skepticism, then, is probably in order for readers coming fresh to memoirs about North Korea. But for what it's worth, I believe these books. They are consistent with a recent UN investigation that found overwhelming evidence that crimes against humanity are being committed in North Korea. For journalists who have spent hundreds of hours interviewing defectors these memoirs ring true about North Korea's culture of cruelty and lies."

V

CONCLUSIONS

Scientists, mathematicians and statisticians often search for truthful and reliable data. To the extent that they can work with incontestable facts, objective observations and digital symbols and numbers, their lives are rendered easier. The uncomfortable features of human imperfections can then, to that extent at least, be subtracted.

In resolving disputes and contests over what has happened in the past, or is happening now, in individual countries and in the world, it is usually not so easy to delete the human element. Decision-makers work with imperfect materials. But these are the materials that make up our

societies and our world. Where the issue presented for decision is straightforward, in a civil case, the question where truth lies can be pursued by the decision-maker, applying well-worn rules to come to a conclusion that is probably objectively correct. The obligation to give reasons subjects the decision maker to discipline and the conclusion to analysis and review. High courts of law may have the last word for legal purposes. But in a free society, that does not prevent other citizens from continuing to question the official decision and possibly to demand fresh analysis and further consideration.⁵⁶

Where a case involves criminal charges, and potential punishment with loss of liberty, reputation and other humiliations and burdens, the simplistic question “where does truth lie?” will be complicated because of other considerations. In such a case, the risk of error on the part of the decision-maker is more intolerable. Hence error must more carefully be guarded against.

In a multifaceted inquiry at an international level, it is true that there are serious dangers of fraudulent, false, exaggerated, confused and unreliable testimony, sometimes affected by the consequences of psychological trauma, political motivations and even idealistic aspirations. Yet in this case, as in national formal decision-making, the decision-maker does not have the luxury of walking away. He or she must do the best that is possible to unveil the truth. A measure of scepticism is about the sources of the evidence used is usually appropriate. Certainly, caution should be used in accepting the testimony of witnesses generally. Decision-makers need to be made

⁵⁶ This occurred in Australia following the death of an infant Azaria Chamberlain which was the subject of several cases and ultimately a Royal Commission that cleared her mother of a charge of murder. See *Chamberlain v The Queen* [No.1] (1983) 153 CLR 514; [No.2] (1984) 153 CLR 521.

aware of the neurobiology of decision-making and what it means to have a “feeling” of “actual persuasion” or a belief that a conclusion can be classified as “beyond reasonable doubt”.⁵⁷

Similarly, the decision-maker needs to be aware of cultural considerations that can influence the way evidence is given when it comes through the medium of a different language or culture.⁵⁸ We now know how some evidence, given with conviction and certainty, can be erroneous, simply because of the operation on our fallible human recollection of unconscious psychological factors such as expectations, interests, hopes and desires.⁵⁹

Formal decision-making in a court, tribunal or a commission of inquiry involves a journey that has many uncertain and some missing guide posts. But the journey must generally be taken and completed. Those on that journey must have clear eyes and an honest objective to come to the right destination. Because of our human weaknesses, we will all sometimes fail in the journey. However, that risk does not release us from the obligation to pursue the place where truth lies.

“What is truth?” When Pilate was told by Jesus that he had come into the world to bear witness unto the truth, the Roman Governor asked the question: “What is truth?”⁶⁰ He did not stay for an answer; but he immediately declared to the angry crowd: “I find in him no fault at all”. Yet instead of sticking to his own conclusion, he attempted a dishonest

⁵⁷ H. Bennett above n. 11 at 67-68.

⁵⁸ E. Kyrou, above n.10. Justice Kyrou raises a number of novel questions and offers suggestions.

⁵⁹ For example observations on the dangers of identification evidence in *Domican v the Queen* (1992) 173 CLR 555.

⁶⁰ *St. John's Gospel*, Ch. 18, v.38.

compromise by offering up a murderer, only to find that the rabble was not appeased, so he felt forced to proceed to a gravely unjust decision.

In official decision-making, the discovery of truth is not scientific. But when it found, it can correct an injustice in a civil case and bring to a temporary conclusion a criminal accusation. On the global stage, truth can shine the light of knowledge on a country of dreadful wrongs. Truth alone is not enough for justice to be done. Yet without truth injustice may go unnoticed and unrepaired. That is why, with all the risks, humanity and its institutions stubbornly search for truth. And sometimes find it.