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## Real Possibility or Fat Chance?

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### Introduction

For the 96% of applicants to the Criminal Cases Review Commission whose cases are rejected without being referred to an appeal court the answer to the question set out above is clear. For them, and an increasing number of campaigners and lawyers, the Commission has come to be seen not a solution but as a contributor to systemic injustice in the criminal law. Initially high expectations among prisoners, families and their representatives have developed into cynical rejection of the Commission as a maintainer of the status quo and a means of taking the political sting out of the continuing reality of miscarriage of justice.

There is little doubt that a significant number of people (nobody knows the true figure) are convicted each year of offences that they did not actually commit. Similarly many receive sentences or other orders that are excessive or otherwise inappropriate. If they seek to challenge their conviction or sentence there are a number of possible routes depending on their circumstances.<sup>1</sup> Those seeking to challenge Crown Court convictions must seek leave to appeal in the Court of Appeal. If leave is refused or if a full appeal is unsuccessful that is normally the end of the matter.<sup>2</sup> Since 1997 the Commission has provided a remedy of last resort, replacing and expanding the functions previously performed unsatisfactorily by the Home Office. It does not decide appeals itself but has powers to investigate applicants' claims and may refer cases back to the Court of Appeal.

A common target for criticism is the nature and operation of the Commission's test for referring cases to the Court of Appeal. It is well known that the Commission may refer a conviction back to the relevant appeal court only where there is a real possibility of an appeal succeeding. The real possibility must (in the absence of exceptional circumstances) arise due to some new evidence or argument not previously advanced at trial or at the first appeal. This is a major limitation on the Commission's power to refer and has been criticised on numerous occasions as encouraging a deferential or dependent approach towards its statutory role in that it must always second guess the likely approach of the appeal court. This risks replicating rather than challenging endemic injustice within the system.

Nevertheless, the Commission has repeatedly expressed itself satisfied with the current test. It is realistically grounded in the test that is subsequently adopted by the appeal court if a referral is made. It is correct in principle and has been shown to work well in practice. A more permissive test would risk emasculating the role of the Commission and overwhelming the Court of Appeal.

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<sup>1</sup> For an excellent summary and critique of current appellate procedures see J. R. Spencer, Does our present criminal appeal system make sense? [2006] Crim. L. R. 677.

<sup>2</sup> In rare cases the appellant may appeal to the House of Lords but only where there is a point of law of general public importance and again only with leave of the Court of Appeal or House of Lords.

This contribution revisits this debate by focusing on the nature and interpretation of the real possibility test. It will be seen that the Commission currently performs a predictive, not a normative role meaning that it has very limited capacity to challenge failings in the appeal regime. The paper goes on to consider how changes to the threshold for referral may impact on applicants' cases. Examination of the consequences of various reform proposals will show there are significant problems with alternatives to the real possibility test. Ultimately the chapter concludes that much of the criticism of the real possibility test is misplaced and that prisoners' rights would not be significantly enhanced by reform of the test. Indeed, focus on the test applied by the Commission may serve to obscure the real obstacles to meaningful review of miscarriages of justice.

### Thresholds in the criminal justice system

There are various threshold tests in the criminal justice system where differing levels of proof are required to justify interference with the rights of a person accused of crime:

- Arrest threshold: is there reasonable suspicion that an offence has been committed?<sup>3</sup>
- Charge threshold: is there a realistic prospect of conviction?<sup>4</sup>
- Committal threshold: Is there sufficient evidence to put the accused on trial for the offence<sup>5</sup> i.e. is there a case to answer?<sup>2</sup>
- No case to answer threshold: Could a properly directed jury properly convict on the evidence?<sup>6</sup>
- Jury (or magistrates') verdict threshold: Has the prosecution proved the accused guilty beyond reasonable doubt?<sup>7</sup>
- Court of Appeal (conviction) threshold: Is the conviction unsafe?<sup>8</sup>
- Court of Appeal (sentence) threshold: Is the sentence manifestly excessive?<sup>9</sup>
- CCRC referral threshold: Is there a real possibility that the Court of Appeal may find the conviction to be unsafe?<sup>10</sup>

The test in each case differs depending on the decision at stake. Thus the temporary deprivation of liberty by arrest has a relatively low threshold with no requirement for admissible evidence at all whereas the trial verdict requires a high threshold so that the jury are sure of guilt on the basis of admissible evidence.

### The real possibility test

Where does the CCRC test fit into this framework? The real possibility test is a unique threshold in

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<sup>3</sup> Police and Criminal Evidence Act 1984 section 24.

<sup>4</sup> Code for Crown Prosecutors paragraph 5. The Code also permits a charge to be temporarily based only on reasonable suspicion where there is insufficient information to justify a charge on the full code test but it is thought inappropriate to release the suspect on bail: see paragraph 6.

<sup>5</sup> Magistrates' Courts Act section 6(1).

<sup>6</sup> R v Galbraith [1981] 1 WLR 1039.

<sup>7</sup> Woolmington v DPP [1935] AC 462.

<sup>8</sup> Criminal Appeal Act 1968 section 1.

<sup>9</sup> See R v Waddington 5 Cr. App. R.(S) 66

<sup>10</sup> Criminal Appeal Act 1995 section 13(1).

the criminal process. It is the last resort of the aggrieved prisoner and normally comes after all other appeal routes have been exhausted. In cases where the applicant was convicted on indictment<sup>11</sup> it is linked directly to the unsafety test applied by the Court of Appeal.

Thus when Commissioners come to consider whether an applicant's case should be referred to the Court of Appeal they must predict the potential outcome in the Court of Appeal. This requires the Commissioners to anticipate the application of the deceptively simple legal test for quashing a conviction: whether the conviction is unsafe.

Real possibility is not defined in the statute. In R v Criminal Cases Review Commission ex parte Pearson the Divisional Court stated:

"The "real possibility" test ... is imprecise but plainly denotes a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty. The Commission must judge that there is at least a reasonable prospect of a conviction, if referred, not being upheld.<sup>12</sup>

When the Home Affairs Select Committee first examined the operation of the Commission it thought there were potential problems with the phrase:

"[Real possibility] is a phrase which could mean something different to the ordinary public from how it might be understood by a court. This gives rise to there being a range of possible interpretations by the Commission..."<sup>13</sup>

The Select Committee thought it was "... important that proper opportunities for referral are available in all cases, and accordingly that the statutory test for referral is as effective as possible in allowing justified cases to be referred ... we think it is worth noting, even at this early stage, that there may be problems with the statutory test laid down in the Criminal Appeal Act 1995."<sup>14</sup>

The real possibility test has been variously described as "deferential", "subordinate", "second guessing", "restrictive" and "legalistic". The first chairman of the Commission tellingly explained the limits on the Commission's task: "The question is not in the true sense 'Is a person in jail who should not be?'"<sup>15</sup>

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<sup>11</sup> Different considerations apply when the applicant is seeking to appeal against a summary conviction as an appeal following referral takes the form of a re-trial so the test is whether the prosecution can prove guilt beyond reasonable doubt: see Kerrigan, Miscarriage of justice in the magistrates' court - the forgotten power of the Criminal Cases Review Commission, [2007] Crim. L. R. Feb

<sup>12</sup> [2000] 1 Cr App R 141 at page 149

<sup>13</sup> First Report of the Home Affairs Select Committee session 1998-99, HMSO, 23 March 1999.

<sup>14</sup> Ibid.

<sup>15</sup> Oral evidence by the Commission's then Chairman, Sir Frederick Crawford, Home Affairs Select Committee, 11 April 2000, HC 429. Although accepting the reality of the deferential role, Peter Duff, Criminal Cases Review Commissions and "deference" to the courts: the evaluation of evidence and evidentiary rules, [2001] Crim L.R. 341 suggested that it does not mean the Commission is

This leads to criticisms that the Commission is not actually concerned to resolve miscarriages of justice<sup>16</sup> or helpless to refer the cases of innocent convicts who do not fit the real possibility criteria.<sup>17</sup>

The approach of the CCRC before the Home Affairs Select Committee was to argue that there was no realistic alternative. There was a need to avoid cases being referred by the Commission on one set of criteria only to be rejected by the Court of Appeal using a different set of criteria.<sup>18</sup> In addition it believed that it was inappropriate at that stage to consider changing the statutory test after so few referrals had been considered.

The Select Committee recommended that a formal review of wording of the test be conducted after the Commission has been in operation for 5 years. In 1999 the government accepted that such a review should take place.

The review should have taken place some time after April 2002 when the Commission had been in operation for 5 years. There is no indication that a formal review ever took place either in the Commission or in the Home Office. There is no mention of the Select Committee's recommendation in either of the Annual reports for 2001-2 or 2002-3. The closest the Commission came to analysing the statutory test was as follows:

“During the period 2000-03, the Commission's case committees have referred to the relevant courts of appeal about 55% of the 331 cases that they have considered ... of the 133 appeals that have been heard to 31 March 2003, 65% have succeeded .... This suggests that the Commission's interpretation of 'real possibility' is reasonably generous, both in considering plausible referrals, and in the decisions made on them by case committees.”<sup>19</sup>  
(My emphasis.)

This is exactly the same conclusion as was reached the previous year.<sup>20</sup>

More recently the Commission Chairman stated, “I have no objection to a review. We will simply restate the arguments that I have attempted to state here this morning, and as I did on the last occasion, and alternative formulations can be considered. It is our view, it is certainly the view of the Court of Appeal, that the current test has worked satisfactorily.”<sup>21</sup> Moreover, “we are of the view that the present test is not only correct in principle but actually it has been shown over the last

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prevented from taking its own view of the evidence and acting “outwith and independent of the criminal justice process, not as further rungs on the ladder of the formal legal process. (Page 362)”

<sup>16</sup> Exchange between Graham Zellick and Home Affairs Select Committee, 10 October 2005 at Q 33-34.

<sup>17</sup> Michael Naughton, Wrongful convictions and innocence projects in the UK: help, hope and education, Web J.C.L.I. 2006, 3.

<sup>18</sup> Select Committee Report, Appendix 13, Further note by the Criminal Cases Review Commission.

<sup>19</sup> Criminal Cases Review Commission Annual Report 2002-3 paragraph 4.7.

<sup>20</sup> See Criminal Cases Review Commission Annual report 2001-2 paragraph 4.7.

<sup>21</sup> Professor Grahma Zellick, oral evidence to Home Affairs Select Committee session 2005-2006, HMSO, 10 October 2006.

decade to work extremely satisfactorily. ... [T]here is no point at all, and considerable dangers, in our applying a test which is different from that which is applied by the courts to which we send the cases”<sup>22</sup>

#### Alternatives to the current test for referral?

There appear to be two variables within the current test for referral. First there is what may be described as the *probability* value (currently real possibility) which dictates the degree of certainty required before a referral may be made. Secondly there is what I shall refer to as the *consequence* value (currently unsafety) which dictates the outcome anticipated by the referral. These are not the only ways of describing the probability and consequence values. There are a large number of potential alternatives including:<sup>23</sup>

- Arguable case [probability value] of wrongful conviction [consequence value].<sup>24</sup>
- A miscarriage of justice [consequence value] may have occurred [probability value].<sup>25</sup>
- A possibility [probability value] of innocence [consequence value].<sup>26</sup>

A coherent critique of the Commission’s current approach must address the implications of changing the probability and / or consequence values.

#### Increasing referrals by relaxing the probability value?

It would be possible to alter the statutory test so as to enable more referrals to be made. Rather than the current “real possibility” a lower threshold of certainty could be imposed. The three values set out above are possible examples, but there are others such as “potential” or “suspicion”. At least in theory, the lower the threshold of certainty required the higher the applicant’s chances of persuading the Commission to refer. The judgement to be made by the Commission would become less onerous because it would be able to refer cases with less chances of success.<sup>27</sup>

This confirms that liberalising the test for referral by adjusting the probability value would not itself achieve anything apart from a larger number of referrals. Each of the cases referred would still have to meet the exacting standards required in the Court of Appeal. The appellant would need to satisfy

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<sup>22</sup> Ibid.

<sup>23</sup> These alternatives assume that the Commission will retain its statutory function of referring cases to the Court of Appeal. It is acknowledged that this role has been criticised. A further alternative would be to remove the Commission filter altogether, permitting an automatic right to a second appeal.

<sup>24</sup> This formulation was proposed by JUSTICE to the Royal Commission on Criminal Justice.

<sup>25</sup> This is the test in section 194C of the Criminal Procedure (Scotland) Act 1995 as amended. The Scottish Commission must also find that it is in the interests of justice to refer the case.

<sup>26</sup> This approach or something similar is implicit in the critique of Naughton, op. cit. fn. 17 above.

<sup>27</sup> As Lord Bingham CJ put it in the Pearson case: “... its function would be mechanical rather than judgmental.”

the Court that the conviction was unsafe or the sentence excessive. In reality, relaxing the threshold for referral would only make a tangible difference if there are a significant number of cases that are not currently being referred that would succeed *under the existing safety test* if they were referred. It is not possible to make any clear assessment of whether this is likely to be the case.

An alternative to altering the statutory test is to reconsider the way in which the Commission currently interprets the real possibility criteria. “Success” rates in the Court of Appeal following CCRC referrals have remained consistently high at around 70%. The 1999 Home Affairs Select Committee report reviewed the interpretation of the test and considered that the success rate (then 10 out of 13 referrals) “... suggests that the Commission has perhaps been cautious in its interpretation.”<sup>28</sup>

As we have seen, the Commission itself rejects the accusation of being over-cautious, describing its approach as “reasonably generous“. Nevertheless, equating real possibility with a 70% chance of success does seem counter-intuitive. The civil standard of proof (balance of probabilities) is often characterised as a 51% or higher threshold. By contrast real possibility appears to be conceptually lower in terms of probability so it might be expected to have a success rate of less than a half. In other words the statutory language would appear to support the Commission referring applications even though it thinks they will be likely to fail.<sup>29</sup> It is acknowledged that it is very difficult and perhaps inappropriate to reduce serious arguments in complex criminal cases down to crude probability grades. The overall point, though, is that the 70% success rate could be much lower (indeed it could be reversed) while still fitting comfortably within the existing statutory test.

Ironically, the high rate of success in referred cases leads some to question the Commission’s commitment to challenging unsafe convictions. Arguably, if more cases were referred then the Court of Appeal would have a more realistic view of the number and causes of post-appeal grievances by prisoners and perhaps a better insight into the practices within the criminal justice system, including those of the Court itself, that may contribute to enduring injustice. Thus, a more liberal interpretation of the probability variable within the statutory test may have a beneficial educative effect on the Court of Appeal. Whether this is something that would be welcomed by the Court is another matter. There have been a number of occasions even under the current fairly conservative referral approach where the Court has taken it upon itself to express surprise or concern at the decision to refer a case and urge the Commission to take account of its resource limitations.<sup>30</sup>

The current Chairman of the Commission pointed out more recently in his evidence to the Select Committee that a change to the probability value would potentially change fundamentally the nature of the Commission itself.

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<sup>28</sup> Op cit. paragraph 26.

<sup>29</sup> This would be consistent with the Pearson formulation which includes “less than a probability”. Op. cit. fn. 12 above.

<sup>30</sup> See for example R v Gerald [1999] Crim L. R. 315, a case relating to the identification of exceptional circumstances. See also the “old” and “law change” cases discussed by Nobles and Schiff, The Criminal Cases Review Commission: establishing a workable relationship with the Court of Appeal [2005] Crim L. R. 173.

“When the Commission was established it was not established simply to be an investigative body. [Commissioners] are charged with the vital duty of deciding whether the new evidence, or the new argument, as the case may be, raises a real possibility that there should be another appeal. So, if you introduced an arguable case test, you are totally emasculating the Commission, you are giving it a completely different role ... In fact, you would not need Commissioners. You would, however, be giving a great deal of extra work to the Court of Appeal, in my judgment, for no particular purpose and with considerable disadvantages.”<sup>31</sup>

If changing the nature of the Commission in this way would improve the chances of miscarriages of justice being resolved then clearly it ought to be supported. However, it seems that the log-jam would simply move further down the river. Appeals referred by the Commission as arguably unsafe would routinely be upheld by the Court of Appeal as safe; having an argument is not the same thing as winning it.

#### Increasing referrals by relaxing the consequence value?

As we have seen, the current consequence value is unsafety, the same as that applied by the Court of Appeal when considering whether to allow an appeal.<sup>32</sup> The Commission approach would clearly be less sub-ordinate if it adopted a different test to that applied by the Court. The three alternatives stipulated above (wrongful conviction, miscarriage of justice and innocence) would arguably free the Commission from the shackles of the appeal court and enable it to fulfil a more holistic and creative approach to the grievances of convicted people.

The alternative formulations are not without their definitional difficulties and it is not certain that they would all lead to increased referrals being made but it is certainly the case that the Commission would be less concerned with anticipating the legal intricacies of the safety test and may be more able to conform to the popular notion of a last resort Commission as being concerned to uphold concepts like justice or innocence.

However, it must be recognised that if the Commission approach ceased to be anchored to the test applied by the Court of Appeal it would no longer have any concern with the likelihood of an appeal succeeding. If the approach of the Commission were divorced from that of the Court then applicants could be referred to the Court despite them having no prospects of success at all. Whichever alternative to the consequence value is formulated the problem remains that each case will ultimately be considered by the Court of Appeal on the basis of the safety test.<sup>33</sup> Referring on a basis other than the safety test would mean the Court of Appeal would not have the power to quash the conviction. For example, if the Commission referred a case to the Court of Appeal on the basis that the applicant may be innocent, the Court of Appeal would still not be able to quash the conviction unless it found that the conviction was unsafe. To the extent that there is a difference

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<sup>31</sup> Professor Graham Zellick, oral evidence to the Home Affairs Select Committee, 10<sup>th</sup> October 2006, HC 1635-I.

<sup>32</sup> This is not explicitly required in the Criminal Appeal Act 1995 but given that the Commission must apply the real possibility test to the question of whether an appeal will succeed it is inevitable that it will anchor its reasoning in the concept of unsafety.

<sup>33</sup> It should be recalled that the Court of Appeal is itself a creature of statute and the test for quashing a conviction is laid down in the Criminal Appeal Act 1968.



between the safety of a conviction and innocence the court would be obliged to follow the safety test.

### Is there a Scottish solution?

Scotland has its own Criminal Cases Review Commission established following the recommendations of the Sutherland Committee Report.<sup>34</sup> The Scottish approach differs somewhat from the CCRC in that it may refer a case if it believes: “(a) that a miscarriage of justice may have occurred; and (b) that it is in the interests of justice that a reference should be made.”<sup>35</sup> This has led some to suggest that the Scottish Commission does not need to “second-guess” the appeal court<sup>36</sup>, that the test is more ethically based<sup>37</sup> and that the Scottish approach should be adopted by the CCRC.<sup>38</sup>

However, on closer inspection the Scottish test is in reality more of a reflection of the Scottish appeal court test than at first appears. Section 106(3) of the Criminal Procedure (Scotland) Act 1995 permit’s a person to appeal “against any alleged miscarriage of justice in which he was convicted”, including any miscarriage on the basis of evidence not heard at the original trial, provided there is a reasonable explanation of why it was not heard or on the basis that the jury’s verdict was one that no reasonable jury, properly directed, could have returned.<sup>39</sup> Thus the language of miscarriage of justice is not a general invitation to the Scottish Commission to refer cases irrespective of the likely approach of the Scottish High Court. Rather, it is expressly prevented from referring unless it considers the appeal test may be met.

Nevertheless, there is some indication that the Scottish Commission is willing to push at the boundaries of the appeal test somewhat. In Harper v HMA<sup>40</sup> the Commission, in referring a conviction for murder, acknowledged that the referral did not identify any ground previously recognised by the Court as amounting to a miscarriage of justice but that in view of the material discovered during the investigation the Commission had an unease about the conviction. It is submitted that if there is a greater willingness to refer cases in Scotland (the referral rate is somewhat higher at around 10% of applications) it is not so much due to the wording of the referral test but more to do with the nature of cases that come before it and the constructive relationship that has been nurtured between the Scottish Commission and the High Court.<sup>41</sup>

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<sup>34</sup> Criminal Appeals and Alleged Miscarriages of Justice, 1996, Cmnd. 3425

<sup>35</sup> Criminal Procedure (Scotland) Act 1995, section 194C.

<sup>36</sup> See Peter Duff, Criminal Cases Review Commissions and “deference” to the courts the evaluation of evidence and evidentiary rules, [2001] Crim. L. R. 341.

<sup>37</sup> Martin Salter MP, during questioning of Professor Graham Zellick, Home Affairs Select Committee Oral Evidence, 10<sup>th</sup> October 2006, HC 1635-I.

<sup>38</sup> See Joint Memorandum of United Against Injustice, Innocence Network UK and INNOCENT to the Home Affairs Select Committee 4 September 2006 paragraph 3.53.

<sup>39</sup> Criminal Appeal (Scotland) Act 1995 section 106(3)(a) and (b) as amended by the Crime and Punishment (Scotland) Act 1997.

<sup>40</sup> [2005] SCCR 245.

<sup>41</sup> See Gerald Sinclair, Miscarriages of Justice, The Journal (Magazine of the Law Society of Scotland) August 2005 page 28: “... the relationship in Scotland has demonstrated a clear wish on the part of the appeal court to accommodate the changes necessarily enforced upon it by the

### Are the number of referrals determined by the threshold test?

It has been assumed thus far that the statutory language may have a significant impact on the willingness of the Commission to make referrals to the Court of Appeal. However, it should be recalled that the Criminal Appeal Act 1995 does not impose any obligation on the Commission to make a referral. It does not follow that a relaxation of the test would necessarily produce an increase in referrals. It should be recalled that the Home Office formerly had an unfettered power to refer convictions to the Court of Appeal. Nevertheless, following transfer of its powers to the Commission the number of referrals increased threefold.<sup>42</sup> Clearly there are dramatic differences between the Commission and the old CCU of the Home Office, but the point is that the wording of the test alone does not dictate the level of referral.

### Are criticisms aimed at the wrong target?

Questions about whether the current threshold test is adequate and whether the Commission's approach to the current test is appropriate are not easy to resolve. The notion that an aggrieved applicant's claim of miscarriage of justice should be measured against the approach of the very court that has already failed to recognise the potential injustice seems at first bizarre. However, the elephant in the room is the Court of Appeal. It is the body charged with deciding whether convictions should be upheld or quashed. It does so on the basis of the statutory safety test. No amount of changes to the CCRC referral test or creative interpretation of the existing test is likely to change this. Accusations that the CCRC is deferential or sub-ordinate to the Court of Appeal are truisms.<sup>43</sup> That is the way that the system has been designed by Parliament.

While we have a Commission with a power to refer post appeal grievances back to the same appellate structures, applying the same test for receiving fresh evidence and for quashing convictions then such a Commission is bound to be deferential. If the Commission did not predict and respond to the likely approach of the appeal court then cases would just be rejected. Hopes would have been unjustifiably raised, time and resources would have been wasted and cases that might succeed would have been denied justice.

It is beyond the confines of this chapter to provide a thorough analysis of the role of the Court of Appeal but it is submitted that here, rather than in the concept of real possibility, lies the answer to

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creation of a Scottish Commission. Likewise, the Commission eagerly awaits each and every decision issued by the High Court, in both successful and unsuccessful referrals, to see what guidance or assistance, if any, the court is able to give it, in the ongoing interpretation of the 'miscarriage of justice' test." Sinclair, the chief executive of the Scottish Commission, considered the Commission's interpretation of the statutory test to be similar but not identical to that adopted by the Court.

<sup>42</sup> R. Nobles and D. Schiff, The Criminal Cases Review Commission: Reporting Success? (2001) 64 M.L.R. 280 at p.283.

<sup>43</sup> "... it is difficult to construct a workable relationship between the Commission and the Court of Appeal that does not routinely subordinate the former to the latter..." Nobles and Schiff, *op. cit.*

why so few applications are referred and so many prisoners maintaining innocence<sup>44</sup> remain convicted:

“It may be that what really lies at the root of the problem is not the test we apply but the test that the Court of Appeal applies, the test of safety, because, of course, any change to that test would have corresponding implications for us; we would have to adjust our approach accordingly.”<sup>45</sup>

In the third ‘Birmingham Six’ appeal<sup>46</sup> the Court of Appeal felt the need, when finally quashing the convictions, to explain its function and purpose. The comments reveal the limited nature of an appeal following conviction on indictment:

“(1) The Court of Appeal (Criminal Division) is the creature of statute. ... we have no power to conduct an open-ended investigation into an alleged miscarriage of justice, even if we were equipped to do so. Our function is to hear criminal appeals, neither more nor less.

(2) by section 2(1) of the 1968 Act we are directed to allow an appeal against conviction if, but only if, [we think that the conviction is unsafe] In all other cases we are obliged to dismiss the appeal. Nothing in section 2 of the Act, or anywhere else obliges or entitles us to say whether we think that the appellant is innocent. This is a point of great constitutional importance. The task of deciding whether a man is guilty falls on the jury. We are concerned solely with the question whether the verdict of the jury can stand.

(3) Rightly or wrongly (we think rightly) trial by jury is the foundation of our criminal justice system. ... The primacy of the jury in the English criminal justice system explains why, historically, the Court of Appeal had so limited a function. ... Since justice is as much concerned with the conviction of the guilty as the acquittal of the innocent, and the task of convicting the guilty belongs constitutionally to the jury, not to us, the role of the Criminal Division of the Court of Appeal is necessarily limited. Hence it is true to say that whereas the Civil Division of the Court of Appeal has appellate jurisdiction in the full sense, the Criminal Division is perhaps more accurately described as a court of review.”<sup>47</sup>

These propositions help to explain why it is so difficult, once a defendant has been convicted by a jury, to persuade the Court of Appeal to quash the conviction.<sup>48</sup> The Court of Appeal shows great deference to the jury decision and does not seek to second-guess the jury decision on the guilt or innocence of the appellant. Instead it is motivated by a desire to check the legal direction by the trial

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<sup>44</sup> This helpful phrase is from Michael Naughton.

<sup>45</sup> Professor Graham Zellick, op cit. Despite determined efforts on the part of the Government to change the safety test to prevent the Court of Appeal quashing a conviction where it was convinced of the appellant’s guilt, at the time of writing the clause seeking to achieve this has been removed from the Criminal Justice and Immigration Bill.

<sup>46</sup> R v McIlkenny and others [1991] 93 Cr. App. R. 287.

<sup>47</sup> Ibid. at pages 310-312.

<sup>48</sup> In 2003 the Court of Appeal dealt with 1685 applications for leave to appeal against conviction (approximately 3% of those convicted in the Crown Court). 178 of these led to the conviction being quashed (10.56%): Criminal Statistics England and Wales 2003 Table 3D, Home Office 2004.

judge and to ensure fairness and due process at the trial.<sup>49</sup> The appeal is limited to those grounds of appeal which have been accepted at the leave stage or, if the case is referred by the Commission, to those matters identified in the Statement of Reasons as leading to the referral.<sup>50</sup> The Court of Appeal does not consider the case or the evidence as a whole, there is no presumption of innocence and there is no question of the prosecution having the burden of proving guilt at the appeal.<sup>51</sup>

This contribution it is an attempt to reveal the real possibility debate as something of a red herring. The referral powers of the Commission are in fact perfectly adequate given our current system. The key obstacle to success for aggrieved prisoners is the restrictive culture within the appellate system for addressing potential error. This is underpinned by statute, embraced by the Court of Appeal and merely reflected by the Criminal Cases Review Commission.

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<sup>49</sup> "This court is not concerned with guilt or innocence of the appellants; but only with the safety of the convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distorted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened." R v Hickey and others, unreported, July 30, 1997, cited in R v Davies Rowe and Johnson [2000] Crim.L.R. 584.

<sup>50</sup> Criminal Appeal Act 1995 section 14(4)(a) and (b) inserted by the Criminal Justice Act 2003 section 315.

<sup>51</sup> Although it is not specified in the statute, it does seem that the appellant has the burden in respect of satisfying the court as to the grounds of appeal.