CJM
CRIMINAL JUSTICE MATTERS

JUSTICE ON TRIAL

Miscarriages of justice and the prospects of change

Jacqueline Hodgson

The Royal Commission

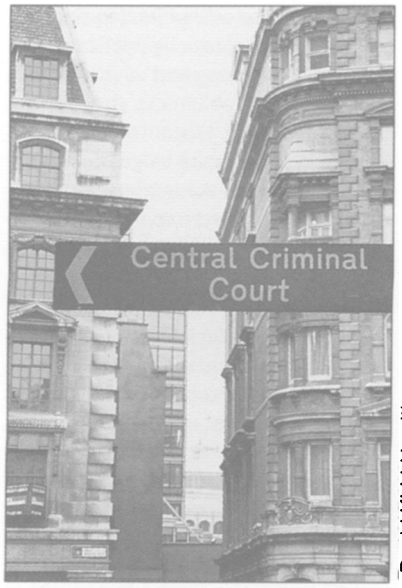
The police malpractice revealed in a number of well-publicised cases such as the 'Birmingham Six' and the 'Guildford Four', following on as they did from the West Midlands Serious Crime Squad cases, saw public confidence in the criminal process at a low. The Government responded with the establishment of the Royal Commission on Criminal Justice (RCCJ), whose aim was "to minimise so far as possible the likelihood of such events happening again", while at the same time seeking to minimise the impact of the cases by claiming that they represented exceptional practice. The Report which emerged two years later shattered hopes of structural improvements to the system of criminal justice and instead, instilled despair that many of the recommendations, if implemented, would ironically strengthen the hand of the police and leave the suspect or defendant less well protected.

Old problems - new solutions?

The systematic flaws which have risen to the surface of media attention are neither recent phenomena nor exceptional to high profile cases. In the 1970's, Sir Henry Fisher's report into the Maxwell Confait affair highlighted the dangers of a police investigation directed at assembling evidence towards conviction, rather than conducting a more neutral and wide ranging enquiry. Despite the establishment of the Crown Prosecution Service, this is still the case. A number of academic research studies demonstrated the inefficacy of safeguards established under the Police and Criminal Evidence Act 1984 (PACE), with police officers reluctant to accept either the value of these measures or the necessity to adhere to them. Instead, once a suspect is in the revolving door of police suspicion, all investigative efforts are mobilised towards reinforcing that suspicion through conviction. Those cases receiving media attention illustrate the range of malpractice uncovered, when police and prosecution do not play by the rules. Suspects were physically and psychologically coerced into confessing; relevant material which did not support the prosecution case was withheld from the defence; confession and other evidence was fabricated. This abuse on the part of those holding most power in the criminal justice process is compounded by failure on the part of defence lawyers to properly represent the interests of their clients. Again, the case of *Miller* serves to highlight what is far from exceptional practice. The failure on the part of the police and prosecuting lawyers to play by the rules, uncovered in the string of wrongful convictions preceding the establishment of the RCCJ, is not exceptional, but consistent with the police working practices described by researchers.

So how will the Commission's recommendations and recent and proposed legislation alter the climate of rule bending and injustice and improve the public's confidence in criminal justice? It seems that the police agenda has been preferred over the findings of independent research, both by the RCCJ and the Home Secretary. Instead of closer supervision of police investigation, whether it be a greater role for the CPS or the magistracy (as had been envisaged by the 1981 Royal Commission on Criminal Procedure), greater powers have been granted from the taking of body samples and searching of body orifices, to the stopping and searching of persons and vehicles even without the requirement for reasonable suspicion. Having placed the suspect under arrest, detained him/her in the alien and intimidating environment of police custody and revealed the barest of details of the police case, the police will now enjoy the additional psychological advantage that the suspect is expected to mention anything which may be relied on in his/her defence in court many months later. In many instances, the suspect will not have consulted a defence advisor at this stage and those that have may be at no great advantage as we shall see below.

Recent changes reflect a climate which is more concerned with eliminating the acquittal of the guilty than the conviction of the innocent.



David Kidd-Hewitt

The defence lawyer

In addition to failures on the part of the investigating and prosecuting bodies, the inadequacy of the advice and representation provided by many defence lawyers has emerged. Research had tended to focus upon the power imbalance between the state and citizen, neglecting to check whether defence counsel were keeping their part of the bargain. Yet, the role of the defence lawyer as adversary protector of the client's interests has been taken for granted in the provision of custodial legal advice as a counterbalance to extended police powers under PACE; in decisions as to the admissibility of evidence when the police have breached PACE or the Codes of Practice but evidence is admitted nonetheless, as a defence advisor was present; and again in the abolition of the right to silence and proposals to place an onus of evidence disclosure upon the defence. This assumption of the battling adversary is not borne out in practice. In most instances, custodial defence advisors are unqualified clerks with no legal training and many solicitors themselves lack the kind of adversarial ideology which requires them to protect the interests of their clients by constructing a defence case and testing out the prosecution version of events. Financial constraints doubtless aggravate this position, making the delegation of fee earning work an attractive proposition and further tightening of the legal aid belt will not help. Yet, improved funding alone will not solve the problem. For many defence solici-

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tors, the routine delegation of important categories of work such as police station advice, proof taking and advice on plea is not seen as problematic. Instead, it is downgraded and routinised to a level where extensive knowledge of criminal law and evidence are not seen as necessary. The existence of defence practitioners who are able to provide a quality service and delegate work in a responsible way, not resorting to the employment of former police officers and young unqualified clerks, suggests that an alternative model within the same financial structure, exists. The Law Society has taken steps to address the problem of poor training, but only for police station advice and this is restricted to clerks. The solicitor's firm is the site where practice and values are learned and working ideologies develop and it is only by addressing the role and training of solicitors that defence practice can be transformed.

A changing climate

What prospect does this leave us with for a fairer criminal justice system in which we can place our confidence? There is continual talk of the scales being tipped in favour of the suspect, tellingly referred to as the criminal in many instances, despite an increasingly strong armoury of police powers and the further erosion of rights and safeguards designed to protect the citizen and ensure fair play. The power of one citizen, already stigmatised as a suspect, is no match for the might, authority and resources of the police force and they cannot be treated as being on equal terms with expectations of disclosure and the out of court resolution of contentious issues. It is our judges, juries and magistrates who are charged with the responsibility of trying defendants. Far from measures being taken to ensure that such miscarriages of justice do not re-occur, recent changes reflect a climate which is more concerned with eliminating the acquittal of the guilty than the conviction of the innocent, where senior police officers talk of 'noble cause corruption' and where a contested trial is contemplated as the exception. ■

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Reforming the criminal justice system: the ACPO position paper

Peter Neyroud

It is 4 years since the setting up of the Royal Commission on Criminal Justice in response to widespread concern about miscarriages of justice. Whilst it is clear that considerable progress has been made, there still remain serious concerns about the criminal trial process. However, the main focus of public concern has shifted from miscarriages to the perceived failure of the system to convict the guilty and treat victims and witnesses properly. It was this state of affairs that provided the starting point for the Association of Chief Police Officer's recently agreed position paper on criminal justice entitled 'In Search of Criminal Justice'. This article sets out and comments on some of the main points of the ACPO paper.

Major changes

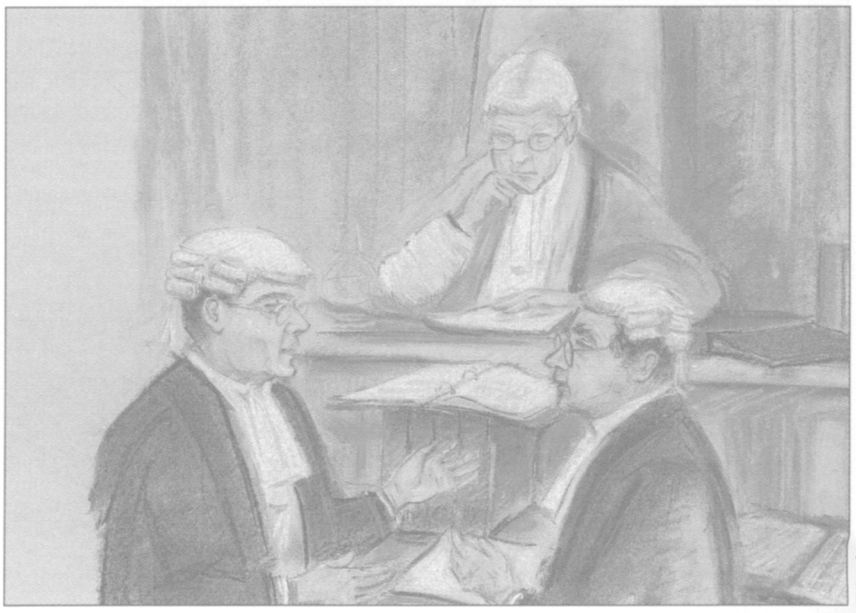
Since 1991 there have been two basic changes. First, there are those initiatives which have focused on the efficiency of the system, in particular, the administrative burdens created by its processes. This heading includes the Police Authority study of Administrative Burdens (1993) and the more recent Cabinet Office Scrutiny of Administrative Burdens (1995). Secondly, there are those which have dealt with the effectiveness of the system in a much broader context. This includes the Royal Commission (1993), the Criminal Justice sections of the Criminal Justice and Public Order Act (1994) and the Pre-Trial Issues Working Group report (1991)

Major areas of change have included bail, DNA, inferences from silence, transfer from trial, standard file formats, national charging standards and, most recently, the 'super abbreviated file' (for simple guilty pleas). Despite all the changes - and these have been hectic years for practitioners at every level of the system - there are a number of things which stand out.

Room for improvement

Principally, these changes have been directed at pre-trial procedures. Efforts to alter the trial process itself have been limited to discounts for guilty pleas and plea and direction hearings, which may only have had an impact at the margins - small, though helpful, reductions in certain trials. This apparent lack of progress in dealing with the trial itself is particularly significant because of the impact that trial procedures have on all the processes that precede the trial.

Moreover, with the single exception of the amendments to the right to comment on the right of silence there has not been a serious attempt to place any



Elizabeth Cook

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responsibility on the defence.

Above all, a great deal more remains to be done to improve the treatment of victims and witnesses. At present over half the witnesses required to attend court are not called to give evidence. Over half of the cases coming before a Crown Court are adjourned or result in a late plea of guilty. Plea and Direction hearings may offer some relief. Nevertheless, this will still leave a huge waste of resources and immense frustration for victims and witnesses, which seriously harms their overall perception of the criminal justice system.

ACPO's views

ACPO's paper is directed at these issues and builds on the earlier arguments in the Police Service's submission to the Runciman Royal Commission (1991). There are seven key themes:

1. The search for the truth

The police role should be seen as that of the investigator, impartially and professionally gathering evidence. This is not a straightforward statement. The transition to such a wide ranging role is not an easy one for a service that has traditionally focused on building a case for prosecution. Moreover it could be seen to be particularly difficult juxtaposed to the new approach of targeting the offender, rather than the crime. However, the contradiction is not as stark as it might seem: targeting can and should involve careful and objective gathering of intelligence. Moreover the overall approach is underpinned by the police service's commitment to the training of investigators in the interviewing of suspects and witnesses and the gathering of evidence.

2. Disclosure and pre-trial review

It appears that the current chaotic 'system' for disclosure adds as much as 30% to the costs of investigation. It has also lead to a significant number of serious criminals escaping justice. Central to this is the absence of any requirement on the defence to disclose their case or establish the relevance of any prosecution disclosure. This should be rectified to some degree by the Criminal Procedure Bill currently before Parliament.

3. Transparency and the trial process.

The rules of evidence arbitrarily exclude a number of types of evidence, which render the trial, at best, a partial presentation of the facts. These are understandable caveats about the dangers of prejudicing the defendant. However, the Law Commission's current review of the laws of evidence is long overdue.

4. Administrative burden and waste

The criminal justice system is wasteful of resources. An immense amount of material is generated unnecessarily by the system (notably tape transcripts and disclosure). An immense amount of time of witnesses, police officers and lawyers is wasted. The system is particularly poor at adopting changes in technology such as video-taping of defendant and witness interviews, which will provide better evidence and then using them in a way that avoids yet more paper. It is interesting to note the very different developments in the civil court system.

5. Complexity of the criminal law

There is an urgent need for reform of the criminal law so as to create a proper and effective criminal code. Such a code would provide consistent language and consistent concepts, up to date law and clarity. I know that this is a key theme of the Law Commission which has such work as its core role. But there has been very little political attention devoted to simple law; we have had plenty more law, but no real attempt to simplify and codify crucial parts of the existing corpus.

6. Treatment of victims and witnesses in the system

Victims and witnesses are often poorly treated. They are not kept properly informed, are called to give evidence and, either not required or kept waiting for long periods but, when they do get in the witness box, are put 'on trial' themselves.

7. Public dissatisfaction

The public do not have confidence in the criminal justice system. In making this point in the ACPO 'Factsheet' in July 1995 the Police Service was accused of trying to sever itself from the system. This is a little difficult for the police to do, since we are so clearly identified in the public's minds as the visible aspect of that system. Moreover, it is clear that this dissatisfaction comes from all aspects of the system, from crime reporting to the trial.

However, what seems to have changed is that the public's view of the trial and the way that witnesses and victims are treated has worsened significantly.

The way forward?

ACPO has been a very influential lobbying organisation on criminal justice in the past few years. The accusation has frequently been levelled that it has done this only behind the scenes. This is not wholly fair. ACPO has taken an active part in encouraging more effective collaboration in the criminal justice system - notably as a partner with the CPS in the prosecution process and as a member of the Pre-Trials Issues Steering Group. It is just such a collaborative approach that underpins ACPO's paper - which is a very public attempt to set out the issues.

Furthermore, the debate needs to move outside the prosecution and involve others such as the Law Commission, Judges, the Magistrates Association, the Justices Clerks Society, the Bar and the Law Society. A high level of debate and a collaborative approach seem most likely to produce workable solutions which will be effective in the long term and command widespread support. ■

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THE COST OF PROSECUTIONS

It is estimated that in 1993/94 the average cost of a prosecution (excluding sentences) was £2,000-£3,000 for an indictable offence and £200-£300 for a summary offence. The average cost of a sentence was estimated to be £1,500-£2,000 for an indictable offence and (because income from fines roughly balances the cost of the other sentences) zero for a summary offence.

Source: DIGEST 3. Information on the Criminal Justice System in England and Wales. Home Office Research & Statistics Department. December 1995