CJM
CRIMINAL JUSTICE MATTERS

# SAFE & SATISFACTORY?

## The Criminal Appeals Act 1995

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There has been much criticism over the years of the way in which the Court of Appeal has exercised its present statutory powers under S2 of the *Criminal Appeals Act 1968*. In part that has been due to an extremely woolly piece of statutory drafting - originally intended, it must be said, to aid rather than hinder the quashing of wrongful convictions - which gave the power to allow an appeal where there had been a wrong decision on a question of law, a material irregularity in the course of a trial, or where in all the circumstances the conviction is unsafe and unsatisfactory.

It is unnecessary to rehearse all the well-worn criticisms of this provision, save to say that the Royal Commission recommended its replacement by a single simple test that a conviction should be quashed where the Court was satisfied that 'it is *or may be* unsafe' (my italics). The Government and indeed the judges were unhappy about this because it was felt to go wider than the current Court of Appeal practice. The bill provided instead for an even simpler test: that the conviction *'is unsafe'*. The Minister argued that this would allow the quashing of a conviction on a lurking doubt and would cover both evidential and procedural flaws. Indeed the Lord Chief Justice argued that there was no distinction between 'is or may be unsafe' and 'is unsafe' since the greater includes the lesser: 'A conviction which may be unsafe, is unsafe.'

So long as the Court adopts this robust approach, the practice of the Court of Appeal may well be improved and will avoid the Byzantine complexity that occasionally the former overlapping provision necessitated in judgements. The danger, however, is that it will not be so and that the jurisprudence of the court will become more cautious.

### The Criminal Cases Review Commission

This provision has an importance beyond the right of appeal, since it also has an impact on the Criminal Cases Review Commission which is set up by Part II of the Act. The Commission can only refer cases back to the Court of Appeal where they consider there is a 'real possibility' that the conviction may not be upheld if a reference is made, because of some evidence or argument 'not raised' at trial or on appeal. In debate there was pressure to change the test for referral to require simply a 'viable argument'. That was resisted by the Government who specifically wanted the test to be closely allied to the Court's practice. As for what might amount to a 'real possibility', the Minister said that is 'not an artificial, remote or slight possibility' and that the addition of 'real' 'shades the test and makes "possibility" slightly firmer.'

Certainly, a right to have one's case referred to the Court of Appeal on a simple test that it was 'possible' the Court would quash the conviction, would be a complete departure from past practice. The Minister's view that a 'real possibility' means only something greater than a slight or artificial possibility of a conviction being quashed seems hardly to qualify 'possibility' at all. If the Court of Appeal is not to be swamped with referrals, the Commission will have to interpret 'real' as being something nearer a 50% possibility of success in the Court of Appeal.

### Real possibilities

It is worth noting, too, that the 'real possibility' has to arise from a matter not previously 'raised', significantly wider than past practice of requiring 'fresh' evidence. Fresh evidence was interpreted as evidence which was not available for use at trial or on appeal and could not with reasonable diligence have been found. The concept of unraised evidence gives the possibility of a referral back where there has been evidence or an argument known about at an earlier stage, but which the lawyers, through tactical decisions or negligence, have not adopted. In Justice's experience this is a frequent cause of valid complaint by the convicted, in holding the convicted person accountable for the ill-judged or negligent tactical decisions of his or her lawyers. If the Commission takes the opportunity to interpret this in this way, it will go far to remedying one of the greatest perceived injustices. Though here again the practice of the Court of Appeal, since the requirement for a 'real possibility' that the conviction will be quashed, will not be met unless the Court will take the same approach to matters previously known about but not raised. Presently, of course, such matters only amount to a valid ground of appeal where there has been 'flagrant incompetence' on the part of counsel.

There are other unquantifiable elements in the structure created for the Commission, beyond the scope of this article, which will in large part determine how far it fulfils the need identified by the Royal Commission, or merely replicates the present system in another guise. Not least amongst these are the provisions for control over re-investigations and for disclosure to applicants of information gleaned in the investigation which will be crucial in determining effectiveness. Much will therefore depend on the identity of the Chairman (due to be appointed early in the New Year), and other members and on the decisions they take about their operating methods prior to starting work in the summer of 1996. We can only hope for a firmness of approach to ensure that the Commission meets the acknowledged need for an adequate system for the remedying of miscarriages of justice. ■

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