THE ROLE OF THE COURTS IN CORRECTING MISCARRIAGES OF JUSTICE

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I. Introduction

Pope Innocent III's abolition of the institution of trial by ordeal in 1215[1] left a major gap in the fact finding methodologies available to the then rudimentary English legal system. Over the centuries that followed, that gap came to be filled by processes which, in serious cases, depend primarily on jury evaluation of witness testimony. A traditional feature of the jury trial, which it shared with trial by ordeal (and indeed the similar but longer lived institution of trial by battle), was finality.

This finality imposed a moral responsibility on judges to develop criminal trial processes which were appropriate to prevent – or, more realistically, limit – the possibility of the innocent being convicted. But there is an inevitable tension between doing so and the requirement for a robust criminal justice system which is effective in punishing the guilty. While it is uncontroversial that the acquittal of the guilty is of less concern than the conviction of the innocent, a widespread public perception that the guilty are routinely acquitted would have the tendency to destabilise public regard for the criminal justice system. On the other hand, calibrating the criminal justice system to facilitate convicting the guilty carries the risk of also making it too easy to convict the innocent.

Our current criminal appellate system is based on the English Criminal Appeal Act 1907 which established the Court of Criminal Appeal. The English Act was very much a result of public controversies associated with miscarriages of justice, particularly those involving Adolph Beck and George Edalji and an associated sense that the way the criminal justice system was then calibrated did not adequately protect the innocent from conviction. The enactment in New Zealand of the Criminal Appeal Act 1945 (which in effect adopted the same appellate system) was, as the parliamentary debates show, much influenced by similar concerns, particularly that the extremely limited rights of appeal under the Crimes Act 1908 provided an inadequate basis for mitigating the risk of miscarriage of justice.[2]

An appeal system provides safeguards which are both systemic (because appellate supervision should result in the development of trial processes which limit the potential for the conviction of the innocent) and individual (by providing a direct remedy for an innocent person who has been wrongly convicted). In both respects, appellate courts have had to grapple with competing considerations. The development of criminal trial processes is

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1 Discussed by Finbarr McAuley "Canon Law and the End of the Ordeal" (2006) 26 OJLS 473.

2 (1 August 1945) 268 NZPD 780.

intimately tied up with the tension to which I have already referred between the need to avoid convicting the innocent and the requirement for a robust and effective criminal justice system. And the provision of a direct remedy for an appellant who asserts a miscarriage of justice has given rise to a related tension – between, on the one hand, the desirability for systemic reasons of maintaining the finality of jury verdicts and, on the other, demands for individualised treatment by those who claim to have been wrongly convicted.

The purpose of this article is to explore how appellate courts have, in practice, sought to resolve the tensions which I have just identified – and particularly the latter one – in relation to post-trial challenges to conviction.

II. Post-trial Mechanisms for Remedying Miscarriages of Justice

The primary mechanism for correcting miscarriages of justice is still provided for in s 385 of the Crimes Act 1961. This is in substantially the same terms as the Criminal Appeal Act 1945 which, as noted, was borrowed from the English Act of 1907. In essence, s 385 allows the Court of Appeal to intervene where a jury verdict was unreasonable (s 385(1)(a)), there was a wrong decision on a question of law, the trial was a nullity, and, most significantly where there was a miscarriage of justice (s 385(1)(c)). The proviso to s 385(1) permits the Court to dismiss an appeal if satisfied that no substantial miscarriage of justice actually occurred. These provisions are to be repealed and replaced once s 232 of the Criminal Procedure Act 2011 is brought into effect. It is reasonably clear that the new section was not intended to effect major change to the law and for this reason – and also given practicalities associated with the timing of the preparation of this article – I propose in this article to discuss the jurisprudence which has developed in relation to the existing legislative scheme and particularly s 385.

There are other legal routes by which the courts may correct a miscarriage of justice, for instance through the mechanism of a further appeal to the Supreme Court, or by the Court of Appeal after a reference from the Governor-General under s 406 of the Crimes Act. Although it is open to the Supreme Court to address new factual arguments on appeal – and it can be expected on occasion to do so[3] – this will occur only rarely. And in any event when it does so, it too acts within the confines of s 385 of the Crimes Act. The same is true of the Court of Appeal when dealing with a Governor-General's reference. Miscarriage of justice arguments thus always fall to be determined under s 385 and, given that the vast preponderance of cases in which such arguments are raised involve direct appeals as of right to the Court of Appeal under s 385, my primary focus is on the jurisprudence which has developed in relation to such appeals.

Also, by way of clearing the decks, I note that resort to the trial court under s 347 by a defendant following conviction is not, except perhaps in the most extreme and obvious cases, an appropriate mechanism for ventilating a miscarriage argument.[4]

3 See for instance *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63.

4 See *Attorney-General v District Court at Auckland* [2008] NZCA 425, [2009] 1 NZLR 600.

III. What do I Mean by "Miscarriage of Justice"?

The expression "miscarriage of justice" popularly means a false attribution of guilt, that is, finding someone guilty who was actually innocent. This is particularly so where the adjective "substantial" is employed. The expression "substantial miscarriage of justice" which, to an appellate judge, merely conveys that the proviso is not applicable, is very likely to be taken by the public as the equivalent in meaning of substantive miscarriage of justice. Of course, the expression "miscarriage of justice" is not used, at least primarily, in that sense in s 385(1)(c) of the Crimes Act which is rather largely addressed to process errors. But as the qualifiers ("primarily" and "largely") I have just used suggest, a bright-line distinction between substantive and procedural miscarriage is not always sustainable, for instance in new evidence cases. And the concept of a substantive miscarriage of justice is necessarily itself uncertain in application because of the difficulty of distinguishing those who are genuinely innocent from those in respect of whom there is inadequate proof of guilt. Both groups of course are entitled to acquittals but there is likely to be scope for argument as to the group to which particular individuals belong.

In this article, I generally use the expression miscarriage of justice in a slightly modified version of its popular sense – as referring to circumstances where a conviction is recognised as wrongful primarily because of an unacceptable level of doubt as to guilt. This concept encompasses unreasonable verdict cases which turn on s 385(1)(a) as well as new evidence cases which fall for determination under s 385(1)(c). Cases where application of the proviso is addressed raise rather different – but nonetheless overlapping – considerations which I also discuss.

IV. The Trial Process – Problems and Developments

In an ideal world, the trial process would result in the courts discriminating accurately between those who have been proved to be guilty (and who should accordingly be convicted) and everyone else (who should be acquitted).

The reality, however, is that determination of questions of historical fact is not always easy and the criminal process for determining these questions also has its own difficulties.

The evidence presented to juries is very diverse, including eye witness testimony (sometimes involving identification), expert evidence (sometimes of a complex scientific nature), intercepted communications, propensity evidence, confessions and circumstantial material. The reliability of much evidence depends upon the recollections of the witnesses concerned. Not all witnesses tell the truth. Some witnesses are mistaken. Jurors have no expertise in the fact finding techniques which professional judges develop, little real understanding of often complicated scientific evidence and limited grasp of the Bayesian logic which is implicitly invoked in a circumstantial case.

As well, the standard of proof does not equate to certainty.[5] Jurors who are invited to place a mathematical value on the concept of proof beyond reasonable doubt are likely to refer to probability percentages with a wide range.[6] Implicit in these probability percentages, and indeed in the adoption of a standard of proof which is less than certainty, is the inevitability that some who are innocent will be found guilty. Indeed, even if the criminal standard of proof was "absolute certainty" human frailty and error would likewise necessarily result in some false verdicts of guilty.

Significant developments in criminal procedure over the last thirty five years include:

(a) the emergence of a requirement on the prosecution to disclose all relevant material in its possession;

(b) the routine videoing of police interviews with suspects in serious cases;

(c) the adoption of measures to mitigate the risk of faulty identification evidence;

(d) the increasing availability of largely incontrovertible evidence of whereabouts, activity and the like associated with the electronic footprints we all leave (with our use of cell-phones, credit cards, computers and swipe cards and so-forth) and the apparent ubiquity of security cameras;

(e) the frequent use of electronic interception evidence; and

(f) scientific developments – particularly those associated with DNA.

The first three of these developments have addressed (at least in part) three aspects of the old criminal justice system which were closely associated with established instances of miscarriage of justice (police suppression of inconvenient evidence, coerced or falsely attributed admissions, and faulty identifications). And although misleading or inaccurate expert evidence is sometimes a cause of miscarriages of justice, the last three developments have facilitated enhanced accuracy in decision-making at all stages in the criminal justice system. Importantly, the evidence which is now available as a result of these developments not only inculpates the guilty but can also exculpate the innocent.

The developments which I have just mentioned have made the criminal justice system more accurate than it was in the past. But not all developments in the criminal justice system have necessarily had the tendency of limiting

5 See *R v Wanhalla* [2007] 2 NZLR 573 (CA).
6 Ibid at [41]–[45] and [73]–[95].

the risk of the innocent being convicted. This proposition is illustrated by changes in relation to the way in which the courts (and police) deal with sexual offending.

Until comparatively recently the courts approached cases involving alleged sexual offending on the basis that such allegations were inherently suspect and that it was therefore dangerous to convict on the uncorroborated evidence of a complainant. By the mid-1980s predominant thinking had changed radically and with this change of opinion came changes in the rules of evidence and court practice. The purposes of these changes have been to make the criminal trial process easier for complainants (particularly by reducing the scope for indignity and humiliation), to preclude (or at least limit) reliance on stereotypical thinking and rape myths and more generally to reduce the incidence of wrongful acquittals. The police have also come under considerable pressure to improve the way they deal with sexual abuse complainants. All of this means that offending which would have gone unpunished 30 years ago is now routinely prosecuted, often successfully.

I suspect (although I do not know for sure) that conviction rates are low in true "she says/he says" cases (ie where there is both an absence of independent evidence supporting the complainant and also the existence of an at least reasonably plausible competing "he says" narrative from the defendant). Where juries do convict in such cases I imagine that the underlying reasoning process involves the jury:

(a) Accepting the "why should she lie?" line of argument which can be run by prosecutors in New Zealand[7] but not Australia[8] and which might generally be thought to enhance the credibility of the complainant; and

(b) Discounting defence denials along the lines of the "He would, wouldn't he?" response of Mandy Rice-Davies at the Old Bailey when it was put to her that Lord Astor denied having had an affair with her. Although this line of argument is not available to prosecutors, it would be surprising if it did not feature in jury deliberations.

Common sense might suggest that false sexual abuse allegations are likely to be associated with a motive on the part of the complainant to harm the defendant or to explain away an embarrassing sexual encounter. But the reality – illustrated by the judgment of the Court of Appeal for England and Wales in *R v Blackwell*[9] – is that there may be no obvious motive for what may be a false complaint. In any event, actual or at least alleged motives are a common feature in such cases and the professional experience of judges and the life experiences of jurors may not necessarily equip them to assess accurately their significance.

It would be interesting to know how common false complaints are.

7 *R v T* [1998] 2 NZLR 257 (CA).
8 *Palmer v R* [1998] HCA 2, (1998) 193 CLR 1.
9 *R v Blackwell (Warren)* [2006] EWCA Crim 2185.

The relevant literature[10] tends to look at complaints which are categorised by the police (or perhaps police doctors) as false. It seems clear enough that these categorisations result in many false positives, that is true complaints which are wrongly regarded as false. Complaints are often labelled as false by investigating police for reasons which do not withstand scrutiny and some of the published literature includes re-evaluations by the researcher.[11] This research necessarily does not allow for false complaints which are not recognised as such by the police (or whoever adjusts the police figures). It would not be safe to assume that all false complaints are sifted out by the investigation process, a point which is illustrated by *R v Blackwell*. So there is also, in all probability, a false negative problem (ie complaints which actually are false but which are not recognised as such by the police or researchers).

Obviously, the more the investigation and criminal trial process is focussed on the identification of false complaints (for instance, in terms of scepticism by investigators or reluctance of the courts to convict in the absence of supporting evidence):

(a) the more distressing and discouraging the process becomes for complainants;

(b) the higher the attrition rate (between complaint and prosecution); and

(c) the greater the number of offenders who are either not prosecuted to verdict or acquitted at trial.

On the other hand, it might be thought to follow that the greater the focus the other way, the greater the risk of the wrongful conviction.

All in all, I think that it would be unwise to assume that there is only a negligible risk of innocent defendants being found guilty. It is, however, very hard to develop a feel for the incidence in New Zealand of wrongful convictions. This was discussed by Sir Thomas Thorp in his 2005 paper, "Miscarriages of Justice",[12] but he adopted a definition of the term "miscarriage of justice" which was broader than the one I have adopted (mine refers to circumstances where a conviction is considered wrongful mainly because of an unacceptable level of doubt as to guilt).

In most instances, demonstrating that there has been a miscarriage of justice (in the sense I am using the term) is almost always dependent on something new turning up after trial. Given that the police normally investigate cases properly and that defendants facing criminal charges can be expected to put their best case at trial, the number of cases in which material evidence will come to light after trial is likely to be limited. As well, in many cases the underlying dynamic is that there is not much potential for anything new to emerge (for instance in a "she says/he says" case). And after conviction and unsuccessful appeal, there will normally be no access to state funded

10 For a useful survey, see Philip N.S Rumney "False Allegations of Rape" (2006) 65 CLJ 128.

11 For such an exercise carried out in relation to New Zealand cases, see Jan Jordan "Beyond Belief? Police, Rape and Women's Credibility" (2004) 4 Criminal Justice 29.

12 Thomas Thorp "Miscarriages of Justice" Legal Research Foundation, December 2005.

legal assistance. My impression is that cases where new evidence comes to light tend to involve either dogged inquiries by the convicted defendant or supporters, or, alternatively, fortuity.

There are some New Zealand cases in which it has been demonstrated beyond all doubt that the defendant was innocent of the offence of which he or she was convicted. There are rather more cases in which convictions are set aside on the basis that there is an unacceptably high level of doubt as to guilt. The number of such cases in both categories is so small as not, in itself, to raise serious doubts about the general accuracy of the criminal trial process.[13] However, and for the reasons just discussed, logic suggests that besides the cases in which innocence (or unacceptable doubt) has been demonstrated, there will be other cases where innocent defendants have been found guilty without later vindication. This is consistent with what the experience in other jurisdictions. A recently published book by Bibi Sangha, Kent Roach and Robert Moles[14] reviews a significant number of miscarriages of justice which have occurred in England and Wales, Canada and Australia. There is also extensive literature in America in relation to the many instances where post-trial analysis of DNA evidence has resulted in the exoneration of defendants who were undoubtedly wrongly convicted.[15]

V. The Role of Appellate Courts

The terms of s 385(1)

Section 385 is relevantly in these terms:

> *385 Determination of appeals in ordinary case*
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> …
>
> (1) On any appeal ... the Court of Appeal or the Supreme Court must allow the appeal if it is of opinion—
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> (a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
>
> (c) that on any ground there was a miscarriage of justice; or
>
> (d) that the trial was a nullity—
>
> and in any other case shall dismiss the appeal:
>
> provided that the Court of Appeal or the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

13 By which I mean accuracy in the sense of almost always not convicting the innocent.

14 Kent Roach, Bibi Sangha and Robert Moles *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality* (Irwin Law, Canada, 2010)

15 See for instance Brandon Garrett, "Judging Innocence" (2008) 108 Colum L Rev 55.

This statutory text is notoriously difficult to apply in a coherent way.[16] The difficulties with the language and the underlying tensions to which I have already referred have resulted in varying approaches in different jurisdictions to similar statutory language and, within New Zealand, to the key principles only having become finally established in very recent times.

Section 385(1)(a) and (c) – the relationship

The only explicit provision in s 385 which is addressed to factual determinations is s 385(1)(a) which, as just recorded, permits a verdict of a jury to be set aside

> on the ground that it is unreasonable or cannot be supported having regard to the evidence … .

I note in passing that the words "or cannot be supported having regard to the evidence" are otiose.[17]

That s 385(1)(a) is addressed to factual issues might suggest that something else is addressed by s 385(1)(c):

> That on any ground there was a miscarriage of justice

Accordingly, the structure of s 385 does not obviously equate "miscarriage of justice" with "false (or likely false) attribution of guilt".

Nonetheless, it would be simplistic to assume a complete dichotomy between the two subsections with s 385(1)(a) addressed to substance and s 385(1)(c) to process. Most significantly (for present purposes), where an appeal is based on new evidence, the appellant will rely on s 385(1)(c) in circumstances where the Court is required to address the merits of the conviction in light of the new evidence. And likewise, where the proviso is under consideration, the Court is required to address the overall strength of the case against the appellant. In both instances, the question of whether there has been a "substantial miscarriage of justice" necessarily involves an assessment of the evidence.[18]

Section 385(1)(a) – the test

In the past, the test came down to whether there was an adequate evidential basis for the verdict. This point was made very starkly in *R v Hand*:[19]

> It has not been the law in New Zealand that if the Court of Appeal considers there exists a reasonable doubt, then so too must the jury.
>
> In our view *R v Ramage* encapsulates the view expressed in other authorities to the effect that the Court on appeal "… does not proceed on such lines as these – look at the evidence, see what conclusion the Court would have come to and set aside the verdict if it does not correspond with such conclusion".[20]

16 See the discussion in *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [9]–[11].
17 See *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37.
18 See *Matenga*, above n 16, at [31]. For a worked example, see *R v Haig* (2006) 22 CRNZ 814 (CA).
19 *R v Hand* CA200/98, 28 October 1998.
20 *R v Hancox* (1913) 8 Cr App R 193 at 197.

As that passage indicates, the leading New Zealand case was *R v Ramage*[21] where the test was put this way by Somers J: [22]

> A verdict will be of such a character if the Court is of the opinion that a jury acting reasonably must have entertained a reasonable doubt as to the guilt of the applicant. It is not enough that this Court might simply disagree with the verdict of the jury: see *R v Mareo (No 3)* [1946] NZLR 660; *R v Ross* [1948] NZLR 167; *R v Kira* [1950] NZLR 420; *Chamberlain v R* (1984) 51 ALR 225.

There are some New Zealand cases where judges have used the expression "lurking doubt"[23] – a concept to which I revert shortly. However, the lurking doubt approach was not discussed in either *Ramage* or *Hand*. Indeed, my impression is that it was never really applied by the New Zealand courts. It has now been firmly rejected in the decisions of the Court of Appeal in *R v Munro*[24] and the Supreme Court in *R v Owen*.[25] Those cases, however, have adopted a rather more (or perhaps slightly more) liberal approach to this ground of appeal than was taken in *Ramage* and *Hand*. A qualitative assessment is called for and an "any evidence" approach is not taken. The ultimate issue for the appellate court is whether it can be said that the jury could not reasonably have been satisfied beyond reasonable doubt of guilt.

The survey of international practice in *R v Munro*[26] shows that the position adopted in Canada is substantially the same as in New Zealand. The same is true of Scotland.[27] Somewhat different approaches, however, have been taken in England and Wales and Australia.

From the outset, the English Court of Criminal Appeal set its face against the idea that criminal cases could be retried on appeal.[28] Indeed, there never has been any enthusiasm for such an approach to criminal appeals. But over time, the approach (or at least the language in which it was described) evolved and by the 1940s the test applied by the Court of Criminal Appeal was said to depend on the question of whether the trial or verdict was "unsatisfactory".[29] In 1966 the Court of Criminal Appeal became the Criminal Division of the Court of Appeal and "unsafe or unsatisfactory" and "material irregularity" grounds were introduced in lieu of the equivalents of our s 385(1)(a) and (c). Under this statutory scheme the "lurking doubt" jurisprudence developed.[30]

As a result of amendments made in 1995, the only ground of appeal now is that the conviction is "unsafe". While there is authority indicating that the lurking doubt approach no longer applies,[31] it is possible to find recent

21 *R v Ramage* [1985] 1 NZLR 392 (CA).
22 Ibid, at 393.
23 See for instance *R v Lui* [1989] 1 NZLR 496 (CA) at 501 and, in the context of an appeal from summary conviction, *Herewini v Ministry of Transport* [1992] 3 NZLR 482 (HC) at 491.
24 *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.
25 *Owen*, above n 17.
26 *Munro*, above n 25, at [22]–[40].
27 See for instance *Harper v HM Advocate* [2005] HCJAC 23, 2005 SCCR 245 at [33]–[35].
28 *R v Williamson (TH)* (1909) 1 Cr App R 3.
29 *R v Barnes (Frederick)* (1943) 28 Cr App R 141.
30 *R v Cooper (Sean)* [1969] 1 QB 267.
31 See *R v F (Anthony Robin)* [1999] Crim LR 306 and LH Leigh "Lurking Doubt and the Safety of Convictions" [2006] Crim LR 809.

judicial formulations of the test to be applied which seem to be much to the same effect as the lurking doubt principle. For instance in *R v Graham* Lord Bingham CJ stated of the new ground: [32]

> [I]f, for whatever reason, the Court concludes that the appellant was wrongly convicted of the offence charged, or is left in doubt whether the appellant was rightly convicted of that offence or not, then it must of necessity consider the conviction unsafe.

In 2007, the lurking doubt jurisprudence received a boost from the Privy Council in *Dookran v The State (Trinidad and Tobago)*,[33] as signified in the following passage of the judgment:

> [28] … Although reference to lurking doubt has been criticised from time to time as an unwarranted gloss on the language of the statute regulating appeal proceedings in England and Wales, it is really just one way in which an appeal court addresses the fundamental question: Is the conviction safe? In the vast majority of cases the answer to that question will be found simply by considering whether the rules of procedure and the rules of law, including the rules on the admissibility of evidence, have been applied properly. Very exceptionally, however, even where the rules have been properly applied, on the basis of the "general feel of the case as the Court experiences it", there may remain a lurking doubt in the minds of the appellate judges which makes them wonder whether justice has been done: *R v Cooper* [1969] 1 QB 267, 271, per Widgery LJ. See Archbold, *Criminal Pleading Evidence and Practice* (2006), paras 7-47–7-49. …

The Board later resolved this case on this basis:

> [36]… [F]or the reasons which they have set out, having considered all the circumstances, their Lordships cannot avoid a residual feeling of unease about whether justice has been done in Malharri's case and so about the safety of her conviction. For that reason, … their Lordships have come to the conclusion that Malharri's appeal should also be allowed and her conviction quashed.

To revert to what Lord Bingham CJ said in *Graham*, there is perhaps some ambiguity in the proposed test, as many judges would conclude that an appellant was "rightly convicted of [an] offence" providing there was an appropriate evidential basis for the verdict. There is scope for debate as to how broadly the Court of Appeal (Criminal Division) applies Lord Bingham's approach. I suspect that the innocent English defendant who has been found guilty despite competent representation at a trial which was both fair and free of procedural error is unlikely to do much better than he or she would in New Zealand.[34]

In *M v R*[35] a majority of the High Court of Australia (Mason CJ, Deane, Dawson and Toohey JJ) took what was an expansive view of the role of the appellate court in relation to appeal provisions similar to s 385(1)(a).

They saw the test as turning on whether the verdict was unsafe or unsatisfactory. After assessing the evidence independently, the appellate court must decide whether it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. In doing so the appellate court must recognise that the jury has primary responsibility for determining the facts and has had the benefit of seeing and hearing the witnesses.

32 *R v Graham (Hemamali Krishna)* [1997] 1 Cr App R 302 at 308.
33 *Dookran v The State (Trinidad and Tobago)* [2007] UKPC 15.
34 This is rather the picture which emerges from the Leigh article, above n 31.
35 *M v R* [1994] HCA 63, (1994) 181 CLR 487.

Up to this point, the approach of the majority was generally consistent with New Zealand practice. But then came substantial deviation.

In the view of the majority, a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced, unless that doubt can be addressed in terms of the jury having seen the witnesses and heard the evidence. Further, if the evidence contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court to conclude that, even making full allowances for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted; the court is bound to set aside the verdict.

I note that this approach is not far removed from that taken in New Zealand in respect of appeals to the Court of Appeal under the Judicature Act 1908 – appeals which are declared to be by way of rehearing.[36]

Why have the New Zealand courts taken a narrow approach to s 385(1)(a)?

The English approach has been influenced by a large number of highly publicised miscarriages of justice and much critical analysis of the way the criminal appeal system works. Although New Zealand has not been free of established cases of miscarriage of justice, the workings of the justice system have not come under anything like the same scrutiny. This is a point which emerges clearly from Sir Thomas Thorp's report, "Miscarriages of Justice".[37] As already discussed, that does not mean, of course, that there have not been a number of unrecognised miscarriages of justice. The fact nonetheless remains that the New Zealand judiciary has not been forced to confront the reality of error as often as the English judiciary.

Whatever its faults, the system of trial by jury enjoys a large measure of public confidence. In saying this I recognise that some convictions have been shown to have been factually wrong (although not that many) and convictions in some other cases are widely regarded as either wrong or at least suspect. As well, on occasion there has been outrage at acquittals. But such examples are exceptional and by and large jury verdicts are accepted at face value – an acquittal is the end of the story and so too is a conviction save for the possibility of a successful appeal.

In this context, it is perhaps not surprising that there has been a reluctance to adopt procedures which might tend to reduce the public regard for jury verdicts. Many judges consider that it would be destabilising for the jury system if appeals come to resemble second trials, albeit on the papers, and appellate courts were to adopt the approach that a doubt held by the court is a doubt which should have been held by the jury.

36 Under r 47 of the Court of Appeal (Civil) Rules 2005 and as discussed in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13].

37 Thomas Thorp, above n 12.

As will become apparent, I tend to think that appellate courts have not been particularly accurate in detecting unacceptable doubt in cases in which innocence has been later demonstrated. But I am also sceptical whether a doubt experienced by an appellate court necessarily warrants overturning the verdict of a jury.

A slow-paced trial, at which the evidence emerges gradually, may well offer a better opportunity than an appeal for evaluating the strengths and weaknesses of a case. In assessing the plausibility of what is said by the witnesses, the jury has the advantage of being also able to form a view as to what sort of people they are. I see this advantage as quite valuable despite being generally sceptical of demeanour-based credibility assessments. As well, the collective strength of a jury of 12 is not to be under-estimated. While there are some cases (particularly those involving factual or scientific complexity) which may be more suited to determination by professional judges than by juries, this particular problem is perhaps better addressed by providing for trial by judge alone in such cases rather than having a second trial on the papers before a bench of professional judges.

Finally, the text of the statute also can hardly be ignored. The approach taken in *Munro* and *Owen* is closely tied into the language of s 385 and its history. If the legislature had intended to provide for an appeal by rehearing of the kind provided for in civil cases, it might have been expected to use rather different language from that used in s 385(1)(a).

VI. Issues Posed by New Evidence

A new evidence argument has the great advantage (from the viewpoint of the appellant) that the case as it stands before the appellate court is not the same as it was when the jury decided it. Allowing an appeal on this ground therefore is not as destabilising to the finality of jury verdicts as a broad approach to s 385(1)(a).

Finality considerations, however, remain relevant. No appellate court could contemplate with equanimity the possibility of the defendants keeping in reserve a witness who was available at trial to be deployed in support of an appeal should the trial go badly. For this systemic reason, the appellate courts developed restrictive rules in relation to the admission of new evidence. But because of the need to do justice in individual cases, these rules have come to be applied very flexibly. This is apparent from the leading New Zealand case, *R v Bain*,[38] where the issue was discussed by Tipping J in this way:

> [22] An appellant who wishes the Court to consider evidence not called at the trial must demonstrate that the new evidence is: (a) sufficiently fresh; and (b) sufficiently credible. Ordinarily if the evidence could, with reasonable diligence, have been called at the trial, it will not qualify as sufficiently fresh. This is not an immutable rule because the overriding criterion is always what course will best serve the interests of justice. The public interest in preserving the finality of jury verdicts means that those accused of crimes must put up their best case at trial and must do so after diligent preparation. If that were not so, new trials could routinely be obtained on the basis that further evidence was now available. On the other hand the Court cannot overlook the fact that

38 *R v Bain* [2004] 1 NZLR 638 (CA).

> sometimes, for whatever reason, significant evidence is not called when it might have been. The stronger the further evidence is from the appellant's point of view, and thus the greater the risk of a miscarriage of justice if it is not admitted, the more the Court may be inclined to accept that it is sufficiently fresh, or not insist on that criterion being fulfilled.
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> [23] Whether new evidence is sufficiently credible to be admitted cannot be much elaborated in the abstract. Both inherent and contextual credibility will usually need consideration. Obviously evidence which is wholly incredible cannot avail the appellant, but beyond that it is neither necessary nor desirable to go in this general summary. The criteria of freshness and credibility govern whether the new evidence should be admitted or, putting the matter more formally, whether leave should be granted to admit the evidence. Fresh evidence is not admitted as of right. Its admission is a matter of discretion under s 389 of the Crimes Act. The freshness and credibility criteria are the standard measures which guide the exercise of the discretion. In the end, however, the discretion must be exercised in whatever manner the Court considers will further the overall interests of justice, both to the appellant and to the Crown which represents the community.

VII. The Proviso

While the proviso applies to all four grounds listed in s 385 the practical reality is that it is only applicable to cases under subss (1)(b) and (1)(c). The proviso cannot logically be applied to subs (1)(a) if the Court has already found that the verdict cannot reasonably be supported by the evidence.[39] Likewise, a conviction that is a nullity under subs (1)(d) cannot be upheld through the proviso.[40]

The relationship between subs (1)(c) and the proviso gives rise to conceptual difficulty which lies beyond the scope of this article. It is sufficient for present purposes to note that the question of whether subs (1)(c) applies to a process error may require an analysis of the likely impact of the error in the context of the case as a whole, and thus an analysis by the appellate court of the strength or otherwise of the prosecution case.[41]

The application of the proviso is governed by the principles set down by the Supreme Court in *R v Matenga*:[42]

> [31] … [H]aving identified a true miscarriage, that is, something which has gone wrong and which was *capable* of affecting the result of the trial, the task of the Court of Appeal under the proviso is then to consider whether that potentially adverse effect on the result may *actually*, that is, in reality, have occurred. **The Court may exercise its discretion to dismiss the appeal only if, having reviewed all the admissible evidence, it considers that, notwithstanding there has been a miscarriage, the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict, on that evidence. Importantly, the Court should not apply the proviso simply because it considers there was enough evidence to enable a reasonable jury to convict. In order to come to the view that the verdict of guilty was inevitable the Court must itself feel sure of the guilt of the accused.** Before applying the proviso the Court must also be satisfied that the trial was fair and thus that there was no breach of the right guaranteed to the accused by s 25(a) of the Bill of Rights Act.

39 *R v Owen* above n 17.
40 *Matenga*, above n 16.
41 Ibid at [30].
42 Ibid.

> [32] In coming to its conclusion concerning the inevitability of the verdict, the appeal court must of course take full account of the disadvantage it may well have in making an assessment of the honesty and reliability of witnesses on the sole basis of the transcript of the oral evidence. In a case turning on such an assessment the court will often be unable to feel sure of the appellant's guilt and will therefore be unable to apply the proviso. (Emphasis in bold added, citations omitted)

The Supreme Court has subsequently described this test as a requirement that the appellate court "is affirmatively satisfied of guilt".[43] And returning to *Matenga*, the Court also said:[44]

> [29] …While the jury is in general terms the arbiter of guilt in our system of criminal justice, the very existence of the proviso demonstrates that Parliament intended the Judges sitting on the appeal to be the ultimate arbiters of guilt in circumstances in which the proviso applies. The general rules that guilt is determined by a jury rather than by Judges does, however, mean that the proviso should be applied only if there is no room for doubt about the guilt of the appellant … .

What all of this means is that once the proviso is in play, the task of the appellate court is broadly similar to that of a jury. If left in a reasonable doubt as to guilt, the court must allow the appeal. But if the court is sure of guilt, it may dismiss the appeal.

Given the nature of the appellate process, application of the proviso is most likely in cases which do not turn on challenged oral evidence. It has thus been applied in cases where guilt is established by compelling scientific evidence,[45] the accused's own testimony[46] and documentary evidence.[47] All of this is not to say, however, that it cannot be applied in other cases. For instance, an appeal has been dismissed under the proviso where witnesses gave critical, reinforcing, evidence independently of each other and were unshaken by defence cross-examination.[48] An illustrative case is *Tuhura v R,*[49] where the complainant alleged she was sexually violated by her neighbour but was too intoxicated to remember the event and the neighbour claimed that the sexual intercourse was consensual. Despite evidence which was inappropriately prejudicial having been admitted, the Court of Appeal applied the proviso given the overwhelming nature of the admissible evidence and the implausibility of the appellant's explanation. The Supreme Court has declined leave to appeal.[50]

How good are appellate courts at recognising wrongful convictions?

As will now be apparent, appellate judges are sometimes required, as part of the appeal process, to form a view as to the strength of the prosecution and thus the safety of the conviction. This may arise (a) directly under s 385(1)(a), (b) in determining whether a procedural error was likely to have affected the result, (c) in assessing new evidence and (d) in deciding whether

43 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [59].
44 *Matenga*, above n 16.
45 *R v Templer* (2003) 20 CRNZ 181 (CA).
46 *Williams v R* [1997] AC 624 (PC) (on appeal from Jamaica).
47 *R v Spark* [2009] NZCA 345, [2009] 3 NZLR 625.
48 *R v Carse* CA211/06, 25 August 2006.
49 *Tuhura v R* [2010] NZCA 246.
50 *Tuhura v R* [2010] NZSC 128.

to apply the proviso. Appellate judges in American jurisdictions are also often required to assess the strength of the prosecution case (for instance as to whether established procedural infelicities were merely "harmless errors").

The procedural histories of cases in which miscarriages of justice have later been demonstrated rather suggest that around the common law word appellate courts hearing first appeals often have not detected what have later been revealed to have been miscarriages of justice.[51] This is perhaps not entirely surprising. Of course there is an inherent difficulty in identifying cases in which jury verdicts were factually unsound. As well, as a function of the design and operation of our criminal appeal system, appellate judges tend to focus largely on process. The reality is that this is predominantly in relation to defendants who are guilty and – as that remark might be thought to show – appellate judges (along with many others in the justice system) are susceptible to becoming case-hardened. So the professional experience of judges does not necessarily well equip them to identify innocence. For this reason, judicial education has an important role to play in terms of educating judges to understand better (a) the strengths and frailties of witness testimony (for instance as to how memory operates),[52] (b) the scientific underpinnings of the types of forensic evidence which most commonly feature in criminal trials and (c) when, how and why miscarriages of justice have occurred.[53]

VIII. Conclusions

More than one hundred years have now elapsed since the introduction (in England) of a comprehensive criminal appeal system and sixty five years since the English system was first pressed into service in New Zealand. So there has been ample time for the system to become mature and thus stable and rules-based. Yet many fundamental issues associated with the way it works have only been resolved in New Zealand over the last five years or so[54] and the reality is that much is left to broad evaluative judgments to be made by the Court of Appeal. All of this is indicative of the pervasive tensions which I have been addressing. The reality is that the more the courts give effect to the systemic considerations which favour a restrained approach by appellate courts the greater the risk that some miscarriages of justice will not be recognised.

Given that avoiding all conceivable risk of conviction of the innocent would be practically inconsistent with the punishment of the guilty, there is no simple systemic mechanism available for resolving in a completely satisfactory way the tensions I have discussed. That being so, I see it as incumbent on appellate judges – and trial judges too for that matter – to focus

51 This is very much what I take from the work of Roach, Sangha and Moles, above n 14 and the article by Brandon Garrett, above n 15.

52 See for instance Anthony Heaton-Armstrong, Eric Shepherd, Gisli Gudjonsson and David Wolchover (eds), *Witness Testimony: Pyschological, Investigative and Evidential Perspectives* (England, Oxford University Press, 2006).

53 Topics which are regularly addressed by the Institute of Judicial Studies in New Zealand.

54 I have in mind *Owen* above n 17, *Matenga,* above n 16, and also *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730.

on, and to develop techniques which facilitate as accurate a discrimination as possible between those who are, and have been acceptably proved to be, guilty and those who are or may be innocent.