11. *The Courage of Our Convictions: Appeal*

'It is to the glory and happiness of our excellent constitution, that to prevent injustice no man is concluded by the first judgment; but that if he apprehends himself to be aggrieved, he has another Court to which he can resort for relief; for this purpose the law furnishes him with appeals, with writs of error and false judgment.'

Lord Pratt CJ, *R v Cambridge University, ex parte Bentley* (1723) 1 Str 557[1]

The impact of being imprisoned is difficult to estimate. The entire edifice of a life crumbles. It's not simply the immediate, day-to-day horror of prison life; the squalor, the boredom, the omnipresent threat of bloody violence, the nervously watching your schizophrenic cellmate crouching over a radiator forging a shiv from a melted toothbrush and razor blades and wondering into whose neck it will ultimately be plunged. That part, I have been told, you learn to normalize. Or at least to self-inure. The killer is what is happening outside the prison walls.

Your family and friends tell you on visits how they miss you, but while you are sitting caged in stasis for twenty-three hours a day, their lives carry on. And the absence of the daily minutiae of a free existence which we all take for granted creates the spaces of darkest loneliness. Your children are

growing up and hitting their milestones, which you will enjoy second-hand through teary retellings over a screwed-down table in a raucous visiting hall flanked by guards. Your partner is going to work, and doing the weekly shop, and going for drinks, and seeing friends, and attending parents' evenings, and imbuing rich new experiences, and cultivating new friendships, and maybe falling in love with someone able to offer more than a weekly bulletin on prison non-living. And day by day, they, your children and your friends are adjusting to a life in which you are incrementally shunted from centre stage to noises off. Some will wait for you; if your sentence is short, the bonds may withstand the strain. But many won't. People move on. They had lives before you. They've survived life without you. Even if they believe in your innocence and can withstand the stares, the gossiping, the incredulous looks – *she's standing by him?!* – and the vicarious loss of reputation, the trauma of separation will ebb away at resolve.

What I want to talk about in this chapter is what happens when the state admits that it was wrong to wreak this devastation in the lives of one of its citizens. Where a miscarriage of justice is identified by the Court of Appeal, an unsafe conviction is quashed and a wrongly imprisoned parent, sibling, spouse, child or friend walks out of the prison gate, what amends does our society make? How do we begin to put things right for one among us who has been so grievously wronged?

If Dostoevsky was right, and the degree of civilization in a society can by judged by how it treats its prisoners – those who have been justly convicted – an equally valid test is surely how it treats those who are wrongly convicted, and have suffered manifest injustice at the hands of the state.

On this count, I fear, we do not acquit ourselves well.

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On 13 December 2013, seventeen years after his prison cell door slammed shut for the first time, Victor Nealon watched over a video link from HMP Wakefield as the Court of Appeal considered his appeal against his conviction.

This was not his first appeal. Having been convicted on 22 January 1997, he had unsuccessfully appeared at the Court of Appeal in 1998. His conviction was on that occasion deemed safe and upheld, as was the life sentence imposed for the offence of attempted rape. He had now spent 6,169 nights sleeping in Wakefield prison, serving far longer than his seven-year minimum term, his refusal to admit the offence scuppering any chance of parole. Today, after his case had been picked up and referred by the Criminal Cases Review Commission, was his very last chance.

The offence itself took place in August 1996. There was no doubt that an offence was committed; the victim, Miss E, was attacked outside a nightclub by a stranger, who had knocked her unconscious, unbuttoned her blouse and groped her bra, and tugged at her knickers and tights, before she fortuitously regained consciousness and fought him off. She had recognized the attacker as a man she had noticed staring at her earlier in the night. She recalled that he had a lump on his forehead and was wearing a distinctive paisley shirt. Other witnesses had also seen this suspicious male. An e-fit was created by the police based on Miss E's description, and Mr Nealon was arrested.

He told police that he had never been to the nightclub, and immediately offered to undergo a DNA test. No test was carried out by the police. Instead, the prosecution case at his trial relied largely upon the purported identifications of those other eyewitnesses. Only one among many picked out Mr Nealon during the identification procedure. Others were only able to give descriptions of the man with a lump on his forehead and the paisley shirt. Another was sure that the attacker had a strong Scottish accent. At trial, there was

no evidence that Mr Nealon had a lump on his forehead. Neither, his partner confirmed, did he own a paisley shirt.[2] And, it was clear to the listening jurors, Mr Nealon was unmistakably Irish.

The jury nevertheless had accepted the somewhat vague and inconsistent identification evidence, and found Victor Nealon guilty. The dismissal of his first appeal in 1998 looked to have shut the door on any prospect of challenge.

Then, in 2010, following a development in the law, Mr Nealon's solicitors were able to apply for scientific tests to be carried out on the victim's clothing. And the findings were significant. DNA testing indicated the presence of saliva on her blouse and bra cups, where her attacker had groped her. Critically, this saliva was not Mr Nealon's. The clothes that the victim had worn that night were new, and the DNA testing excluded the possibility that the saliva had been deposited by her boyfriend, any of the eight police officers involved in the investigation, any of the four men who came to her aid at the scene of the attack and the scientists. In other words, 'Every sensible inquiry that could be made to identify an innocent source of the DNA [had] been made.' The only reasonable explanation was that it had been left by the attacker.[3] Who could not have been Victor Nealon.

The three judges of the Court of Appeal, having heard this evidence, did not take long to hand down their decision. The effect of this fresh evidence upon the safety of the conviction was, they said, 'substantial'. The conviction was quashed. Later that day, Victor Nealon was released, a free man. Seventeen years behind bars, wrongly branded a violent, dangerous sex offender, were over.

The esoteric workings of the Court of Appeal (Criminal Division) rarely flicker onto the public radar. To the media, appellate proceedings are a confusing, befuddling addendum

to Crown Court trials – even more impenetrable and with even more loquacious judgments – and newsworthy only in a minority of high-profile cases. For junior practitioners like me, trips to the CACD are an exercise in regressing to the terror of a year seven pupil on their first day at big school, desperate to simply make it out alive and without anyone's head being shoved down a U-bend. Even seasoned hacks, such as my pupilmaster who prowled the Crown Courts for years with a fearless territorialism that fell just short of marking the perimeters of his favourite courtroom, admit that when they are beckoned through the archway of the Royal Courts of Justice and into the lair of the Lord and Lady Justices of Appeal, they're not *entirely* sure what they're doing.

But to the Victor Nealons stuck in our prisons, the Court of Appeal is everything. It is the last vestige of hope. When the jury verdict has been returned and the judge has sentenced, the only people who can unlock your cell door and quash a wrongful conviction or reduce an excessive sentence are the three[4] monochrome figures towering over the benches in the first-floor courtrooms at the Royal Courts of Justice on London's Strand.

Between October 2015 and September 2016, ninety-four appellants successfully appealed their convictions as 'unsafe', and 924 successfully appealed their sentence as 'manifestly excessive' or 'wrong in law or principle', the respective tests that apply. They are the fortunate few. You can only appeal to the Court of Appeal with permission (or leave), either of the Crown Court judge (which is, unsurprisingly, rare) or of the Court of Appeal itself. If permission to appeal is refused, or if permission is granted but your substantive appeal is dismissed, that is the end of the line (save for the exceptional circumstances, such as with Warren Blackwell and Victor Nealon, where something new emerges and the Criminal Cases Review Commission agrees to refer a conviction back to the Court of Appeal).[5]

The statistics are not in your corner. Putting the numbers above into perspective is a sobering exercise. Those ninety-four successful conviction appeals in 2016 were drawn from a pool of 1,417 applications, giving a success rate of 6.6 per cent. And that's only applications lodged. Most defendants do not even try to appeal their convictions, and if you consider that roughly 70,000 Crown Court convictions were recorded over a similar period,[6] you can arrive at a (very unscientific) overall 'quashing rate' of 0.13 per cent.[7] Put another way, 99.87 per cent of all convictions are upheld. Which looks a little insurmountable.

Of course, in reality the raw data tells you very little. An 'ideal' appeal rate is about as easily identifiable as an 'ideal' conviction rate. Short of the facile observation that an appeal success rate of either zero per cent or 100 per cent suggests that something is seriously amiss, it is very difficult to draw meaningful conclusions on whether our first instance or appellate systems are working. 99.87 per cent of convictions remaining undisturbed may be a sign of many things. It could be a reflection of a trial method that reliably returns safe convictions in the overwhelming majority of cases. Or it could be that there is a wave of miscarriages of justice being excluded by unduly strict principles of appeal. Likewise, that only 6.6 per cent of applications for leave to appeal result in successful appeals may appear startlingly low, but there are possible explanations. Roughly 10 per cent of applications will be lodged by unrepresented applicants who have been advised by their trial lawyers that there is no merit in an appeal, and have decided to chance their arm with a speculative appeal.[8] Some counsel may positively advise over-optimistically, with an eye on placating a difficult client or generating further work. Frequently, errors in the trial process will have been correctly identified by the lawyers, or fresh, relevant evidence will have been found,

but the Court will disagree that these are so serious as to justify interfering with the conviction.

Academic criticism abounds over the operation of the Court of Appeal, and the extent to which the Lord and Lady Justices of Appeal contrive to justify upholding convictions in the face of what is said to be plain error and injustice. In too many cases, the argument goes, do the Justices and Lord and Lady Justices of Appeal find a way to minimize failings in the trial process or explain away obvious flaws in the conviction with a judicial, 'Yes, but . . .'. And certainly there are instances from history which rather embarrass the Court of Appeal in this respect. Criminal law commentators McConville and Marsh offer this unappealing summary:

> There has been an official determination to uphold convictions in the face of abundant contrary evidence . . . For example, in the Bridgewater case, three of the defendants (the fourth had died in prison) wrongfully convicted in 1979 were not exonerated until 1997 after six separate police inquiries and two earlier failed appeals; the Guildford Four, convicted in 1975, were not exonerated until 1989, one of their number (Giuseppe Conlon) having died in prison; in the related case of the Maguire Seven, their appeals did not finally succeed until 1991; Stefan Kiszco, convicted in 1976 of a murder he could not have committed, had his appeal dismissed in 1978, with Bridge (the trial judge at the Birmingham Six) stating that there were 'no grounds whatever' to allow the appeal with the result that Kiszco was not cleared until 1992 . . . and the Cardiff Three convictions for murder in 1988 were not overturned until 1992 and the defendants not exonerated until the real killer was convicted in 2003.[9]

However, not knowing personally the senior judiciary Class of 2018, I am not going to assume their politics, least

of all pin upon them the sins of their predecessors, nor enter the debate over whether the Court of Appeal is or is not inherently small-c conservative. Others have the space and intellectual ability to do that issue far greater justice than I could hope to. Instead, I want to focus on what takes place once an innocent victim of a miscarriage of justice finally succeeds in persuading the Court of Appeal to quash his conviction. After that judgment is handed down, how does the state begin to make amends?

The tone is set by the conspicuous absence of fanfare that accompanies the correction of state error. Save for the exceptional cases that catch the eye of the press, the public hears nothing about unsafe convictions. Of the 625 unsafe convictions quashed by the Court of Appeal between October 2011 and September 2016,[10] you can probably count on one hand the number that received attention outside the law reports.

Of course, not every quashed conviction represents a finding of innocence. Some of those successful appellants will have had retrials ordered and gone on to be reconvicted. Some will be cases in which prosecutorial or police misconduct, rather than insufficiency of evidence, lie behind the quashing. But nevertheless, those 625 wrongful convictions – roughly 100 a year – are remedied in the dark. While the Crown Prosecution Service calls a press conference upon merely *charging* a defendant in a high-profile case, no corresponding public acknowledgement of failure comes forth from the system when it fouls up. No apology escapes official mouths.

When in August 2016, the Attorney General's office proudly boasted that 'more than 100 offenders had their prison sentences lengthened' by the Court of Appeal under the Unduly Lenient Sentence scheme in 2015,[11] the government

found no space to mention, for balance, that over roughly the same period nearly ten times as many sentences (997) were reduced by the Court of Appeal as manifestly excessive or unlawful.[12]

Perhaps this issue of presentation is a reflection of public attitudes. No one wants to think that the system fails. We trust that the man behind bars deserves to be there. It is far more comforting to focus on celebrating the police rounding up the bad guys than to dwell on the occasions where the wrong person suffers.

But the problem goes deeper than PR. How we substantively treat those people – ordinary men and women – who have been fed into the justice machine, mangled, battered, confined and, years later, spat back out onto the streets, is inexcusable.

When justice is eventually restored, and the Court of Appeal clerk faxes the order to the prison to confirm your release, you stand in the prison car park, with the prison-standard £46 travel money in your pocket, a free man, but one frozen in time. Ready to pick up where you left off, only to find that your life has fast-forwarded without you in it. If years have passed, joblessness, friendlessness and mental trauma may be the least of your worries; finding somewhere to sleep on that first night of freedom is the immediate battle.

In many respects, the released innocent is worse off than the released convict, the latter of whom will at least have a measure of institutional assistance with their reintegration. A probation officer will help those on licence to access services for accommodation, or mental health support. Not so for the wrongly imprisoned, awkwardly shuffled out of the building with the minimum of fuss. *Good luck rebuilding your life from scratch.*

Victor Nealon knows the feeling. Upon his conviction being quashed, he was taken from HMP Wakefield and dumped at a railway station with £46 in his pocket. He relied

on the kindness of strangers, including a journalist and his MP, to put him up while he tried to piece together his life.[13]

The final insult came when he tried to apply for compensation. Money cannot possibly restitute seventeen years lost from a human life nor the perennial mark of the wrongly convicted sex offender, but it would be something. A gesture of goodwill by the state, to apologize for a plain miscarriage of justice, is the least that should be offered. Unfortunately for Mr Nealon, he became one of many victims of the government's crushingly tight grip on the reins of compensation for the wrongly convicted.

We are required by international law – article 14(6) of the International Covenant on Civil and Political Rights 1966 – to provide a compensation scheme for victims of miscarriages of justice. From 1976, when the ICCPR entered into force, the UK operated a discretionary compensation system for this purpose. In 1988, following pressure exerted on the UK to put the compensation scheme on a statutory footing, Parliament enacted section 133 of the Criminal Justice Act 1988, which provided for payment of compensation where a person's 'conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.'

The term 'miscarriage of justice' was not initially defined. Therefore the courts, in a series of cases, were forced to step into the breach and offer some guidance. After all, not all quashings of convictions necessarily represent miscarriages of justice. But many will. To cut a long common law story short, the position as of 2011 was that the courts had identified four possible categories of quashed conviction:

(1) Where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted

(2) Where the fresh evidence so undermines the evidence against the defendant that no conviction could possibly be based upon it
(3) Where the fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant
(4) Where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted

The statutory scheme, the Supreme Court ruled by a majority in 2011, should cover (1) and (2), but not (3) or (4).[14] A narrow interpretation, one might feel, but one which would offer compensation to those such as Victor Nealon.

Not narrow enough though, for the Home Office and Ministry of Justice presided over by Theresa May and Chris Grayling. Despite the fact that payments under the compensation scheme were already scant – out of forty to fifty applications each year, around two or three are deemed eligible for compensation, and the maximum payments have been restricted (no more than £500,000 for up to ten years in prison, and no more than £1 million where over ten years) – it was decided to make it tougher.[15]

'Miscarriage of justice' was redefined. A new subsection (1ZA) was inserted into the legislation, which provided: '. . . there has been a miscarriage of justice . . . if and only if the new or newly discovered fact *shows beyond reasonable doubt* that the person *did not commit the offence*.'

Going back to our list of four, this restricts eligibility to Category 1. Unless the 'newly discovered fact' proves beyond reasonable doubt that you did not commit the offence, you will be excluded from the scheme. Which is a frankly impossible standard to meet. You are asking people to prove a

negative. The DNA evidence in Mr Nealon's case cannot prove conclusively that he is innocent; *theoretically* he could have committed the offence without depositing any DNA, and the unknown male's DNA could have been innocently deposited in highly suspicious places by some convoluted method of third-party transfer. The DNA finding alone cannot positively exclude anyone. It can't exclude me. Or you. Either of us could have attacked Miss E and been fortunate enough not to have left traceable DNA. We didn't, of course; but in the absence of an alibi we couldn't *prove* that. So if we were mistakenly identified, tried and convicted, and wanted compensation for seventeen years of our lives wrongly spent in prison, we would be left swinging in the breeze. Just like Victor Nealon was when Chris Grayling's MoJ refused to pay him a penny. And when, in 2016 and 2019, the Court of Appeal and Supreme Court refused his challenges to the lawfulness of this nasty, spiteful non-compensation scheme.[16]

In his legal challenge, Victor Nealon argued that the operation of the scheme amounted to a perversion of the presumption of innocence guaranteed by Article 6(2) of the European Convention on Human Rights. The Court of Appeal and the majority of the Supreme Court disagreed, using (in my view) highly tenuous reasoning; but whether lawful or not, this state of affairs is morally repugnant.

Our system operates so that unless you can prove to the highest legal standard that you are innocent, no miscarriage of justice will be acknowledged. It creates a legal fiction as to what constitutes a 'miscarriage of justice', entirely at odds with our common understanding of the term. This much was recognized as long ago as 1994, before the scheme was further tightened, when Master of the Rolls Lord Bingham said of an applicant:

> He is entitled to be treated, for all purposes, as if he had never been convicted. Nor do I wish to suggest Mr.

> Bateman is not the victim of what the man in the street would regard as a miscarriage of justice. He has been imprisoned for three and a half years when he should not have been convicted or imprisoned at all . . . But that is not, in my judgment, the question. The question is whether the miscarriage of justice from which Mr. Bateman has suffered is one that has the characteristics which the Act lays down as a pre-condition of the statutory right to demand compensation.[17]

As a consequence, we now have a stratum of purgatory populated by the dispossessed 'nearly innocent', whom we agree are victims of miscarriages of justice as 'the man on the street' understands the term, but who are expected to lump the consequences of their wrongful convictions as the price to pay for membership of our enlightened democratic society. It is difficult not to see this as an admission that, notwithstanding the traditions by which we set so much stock, we still bend to the no-smoke-without-fire whispers of our worse natures. Rather than accept and admit official wrongdoing, we set unattainable standards for victims of miscarriages to meet, and, when they inevitably fail, can reassure ourselves deep, deep down that this person didn't *really* suffer. There's a shade of grey. The system got the right person, we just couldn't *prove* it in court. The state did not fail. No injustice was caused. Move along please.

And this attitude, to me, strikes at the heart of the entire purpose of our criminal justice system. It uproots what we all understand by innocence and guilt, and erects artificial reconstructions of those terms for the sole purpose of saving the government money. The state is told that, where the conviction it has secured against one of us is *so undermined that no conviction could possibly be based upon it*, it need not say sorry. The deliberate ruination of entire lives, where the burden and standard of proof that we cherish so noisily

has been fatally compromised, can be shrugged off as not even worthy of apology. And again, it is something the state has given itself the power to do without anyone in the general public, save for the unfortunate Victor Nealons of our society, becoming aware; the casual cheapening and silent degradation of our most basic dignities.

In October 2016, reborn as Secretary of State for Transport, Chris Grayling announced that he was introducing a new, more generous compensation scheme for passengers whose trains were delayed by fifteen minutes. It was only fair, he said, to 'put passengers first' and to 'make sure that they receive due compensation' for inconvenient events outside their control.[18]