Criminal Cases Review Commission - written evidence (CIC0051)

House of Lords Constitution Committee
Inquiry into the Constitutional Implications of COVID-19

Background

1. The Criminal Cases Review Commission (CCRC) is the statutory body created in 1997 to investigate alleged miscarriages of justice and refer appropriate cases for appeal. Our jurisdiction covers the criminal courts of England, Wales and Northern Ireland. The CCRC has the power to refer a conviction, sentence, verdict or finding to the appropriate appeal court where there is a "real possibility" that such an appeal would succeed. Since starting work 23 years ago, the CCRC has referred over 750 cases to the appeal courts. Around two thirds of those appeals have succeeded.

2. In addition to reviewing applications brought by individuals convicted of criminal offences (and/or those acting for them), the CCRC has a lesser known but significant role investigating on behalf of the Court of Appeal Criminal Division in relation to cases where the Court is considering a first appeal or an application for leave to appeal.[1] To date, the CCRC has been called upon to conduct around 80 such investigations; in more than two thirds of those, the matter to be investigated has been a jury issue of one type or another.

3. Beyond these core functions, the CCRC also seeks, where appropriate, to feed back into the Criminal Justice System, offering observations and analysis from its unique viewpoint. The CCRC's principal concern is the safety of the convictions obtained in our justice system.

Jury Trials

4. The COVID-19 pandemic has led to debate as to whether smaller juries or trials in the absence of a jury may be a viable option to help clear "backlogs" or otherwise allow the Criminal Justice System to function better during and, potentially, after this crisis. The CCRC's view is that it is now appropriate to consider a change to the model we use for deciding the most serious criminal cases and that any such consideration must be clearly focussed on, above all else, achieving fair trials and safe verdicts.

5. The jury system has long been a cornerstone of the way we deal with serious offences in this country and it has come to be seen by some as sacrosanct. It would be wrong, however, to assume that this model is without its flaws or that alternative systems (whether with or without juries[2]) used in other jurisdictions, are necessarily inferior.

6. Over the last 23 years we have had cause to refer over 750 cases back to the appeal courts; the majority of which have been convictions arising from jury trials.[3] However, most of the convictions we have referred were on the basis of things that were not before the jury at the original trial (such as evidence which was not disclosed to the

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[1] Pursuant to section 15 of the Criminal Appeal Act 1995 and 23A of the Criminal Appeal Act 1968.
[2] A range of trial systems are in use around the world. Some do not involve juries at all, others involve juries made up professional judges and lay judges or professional judges and lay jurors, or, as in this jurisdiction, lay jurors only.
[3] The CCRC has also referred numerous cases related to convictions where juries played no part, such as in guilty pleas in the Crown Court, convictions in Northern Ireland "Diplock" courts, and cases from magistrates' courts.

defence or new scientific understanding) rather than flaws in the system itself. Research conducted into the operation of juries tends to suggest that that our jury system is generally fair[4] and that there is something attractive and democratic in the diversity of thought and perspective that comes from convening a group of citizens as a jury.

7. The CCRC has, however, investigated cases, usually on behalf of the Court of Appeal, and uncovered concerns about specific juries and the system in which they operate. Examples include:

    a. A robbery trial in which the jury foreman contacted the court expressing concern that they had returned the wrong verdict. Interviews with the jury (less than a month after the trial) resulted in a confused and contradictory response as to what the correct verdict was. The CCRC also discovered that 9 members of the jury were part of a "WhatsApp" group. The Court of Appeal quashed the conviction.

    b. A serious assault case in which a court usher provided the jury with guidance on the meaning of the word "intent" whilst they were considering their verdict. The Court of Appeal quashed the conviction.

    c. A case in which a prison officer sat on a jury where the defendant was held on remand at the prison where they worked, and the Trial Judge was unaware of this fact.

8. Whilst these are isolated examples, the CCRC observes that the secret nature of jury deliberations means that the system is usually reliant on a member of the jury "blowing the whistle" on any misconduct or errors in order for a potentially unsafe conviction to be identified and investigated. This is perhaps more likely in cases of deliberate or malicious impropriety rather than error despite the fact that either could give rise to a miscarriage of justice.

9. The CCRC's work (and that of the appellate courts) in identifying unsafe convictions is often complicated by the jury system and, in particular, by the absence of reasons for their verdicts. By way of an example, in 2016 the Supreme Court ruled that the courts had been incorrectly applying the law around what is commonly referred to as "Joint Enterprise" for over 30 years.[5] This meant that for three decades judges had (in good faith) been incorrectly directing juries (often in very serious offences involving murder) on this aspect of the law. Following that decision, the Court of Appeal ruled that it would only quash convictions reached under the "old" (i.e. "wrong") Law where it would amount to a "substantial injustice" for the conviction to stand. In practical terms, the Court explained that they would:

    > "…primarily and ordinarily have regard to the strength of the case advanced that the change in the law **would, in fact, have made a difference.**" [**emphasis** added][6]

    And that to do this, their duty was:

    > "…to examine the matters before the jury and the jury's verdict (including the findings of fact that would have been essential to reach such a verdict)."[7]

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[4] See "Are Juries Fair?" by Professor Cheryl Thomas of UCL (2010)
[5] *R v Jogee* [2016] UKSC 8
[6] *R v Johnson and Others* [2016] EWCA Crim 1613 at 21
[7] *Johnson* at 22

10. In the vast majority of these cases, juries were given multiple "routes" by which they could convict the defendant(s), only one of which was "wrong" in light of the Supreme Court's decision. However, as juries are only required to deliver a simple verdict (i.e. "guilty" or "not guilty") it is very difficult to say with any degree of certainty whether or not the defendant's conviction was a result of the law being applied incorrectly and was therefore, arguably, unsafe.

11. The CCRC considers that it is extremely challenging to demonstrate that the correct legal direction "would, in fact, have made a difference" without first knowing on which basis the jury reached their original decision. The act of examining the jury's verdict and seeking to infer findings of fact is fraught with difficulty and, arguably, unsatisfactory in an appellate system which relies upon the primacy of the jury's verdict.

12. Since the Supreme Court's decision in 2016, only two convictions under the "old" law have been quashed by the Court of Appeal in England and Wales.[8] In the CCRC's view, were juries required to give reasons (or at the very least confirm the "route" they had taken), there would be considerably more certainty as to the safety (or otherwise) of any conviction reached under the "old" law.

13. The CCRC also considers that a requirement for juries to give reasons may also help prevent verdicts that appear perverse, contradictory or otherwise inconsistent. It may also deter behaviours such as those uncovered in investigations carried out by the CCRC and offer an opportunity for any such issues to be identified and rectified earlier (i.e. at trial rather than on appeal and/or by the CCRC).

14. Whilst the CCRC recognises that the Committee's focus is on the impact of COVID-19, we consider that now would be a sensible time, perhaps as part of the forthcoming Royal Commission on Criminal Justice, for a careful and evidence based review of the jury system as a whole. It stands to reason that we might be able to learn from the various different systems used around the world and that a critical eye cast over our own system may reveal areas where we can improve. The CCRC is not advocating any particular model, instead suggesting that we approach reform of the jury system in a cautious but open-minded way.

Progress of cases

15. Delays caused by the COVID-19 pandemic (whether taken on their own or coupled with other factors pre-dating the current crisis) in the hearing and ultimate disposal of criminal proceedings have a negative impact on the Criminal Justice System as a whole. It stands to reason that there must, at least, be a danger that the growing length of time between offences, investigations and trials could affect issues such as the quality / reliability of witness testimony and or the willingness of witnesses to attend and take part.

16. Whilst such issues may lead to an increase in acquittals in cases which might otherwise have resulted in safe and just convictions (rather than the type of miscarriages of justice which the CCRC investigates), this is still contrary the interests of justice. We also cannot rule out those same risks (or others that cannot yet be foreseen) leading to unfair trials and, ultimately, unsafe convictions.

[8] Only one of which (*R v Crilly* [2018] EWCA Crim 168) required the Court of Appeal to find "substantial injustice", as the other (*R v Dreszer* [2018] EWCA Crim 454) related to a conviction shortly before the decision in *Jogee* and the appeal was therefore brought "in time".

17. Lengthy pre-trial delays could lead to situations where defendants on remand spend longer in custody than the sentence they might ultimately receive following a trial. Similarly they could lead to circumstances where the Crown abandons a prosecution as the the sentence has, effectively, already been served. Neither of these situations are pursuant to the interests of justice.

18. The CCRC's role involves the correction of errors by the Criminal Justice System, many of which take years (in some cases, decades) to come to light and be resolved. Long delays for justice can lead to anger, frustration and a general lack faith in the Criminal Justice System; not just for those wrongly convicted but for their families, victims and the wider public. The CCRC firmly believes that "justice delayed is justice denied". If the risks caused by delays flowing from the COVID-19 pandemic can therefore be avoided or, at the very least, lessened, without compromising the integrity of the Criminal Justice System or impacting on the safety of convictions, then action should be taken sooner rather than later.