

JERSEY LAW COMMISSION



CONSULTATION SCOPING PAPER

CRIMINAL APPEALS AGAINST CONVICTION

The Jersey Law Commission is an independent body appointed by the States Assembly to identify and examine aspects of Jersey law with a view to their development and reform. This includes in particular: the elimination of anomalies; the repeal of obsolete and unnecessary enactments; the reductions of the number of separate enactments; and generally the simplification and modernisation of the law. Members of the Law Commission serve on a part-time basis and are unremunerated.

The current Law Commissioners are:

Mr Clive Chaplin (chairman)

Advocate Barbara Corbett

Advocate Alan Binnington

Ms Claire de Than (the Topic Commissioner and author of this report)

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1. HOW TO RESPOND TO THIS SCOPING CONSULTATION

The Jersey Law Commission is currently working on a project on criminal appeals in Jersey. The key issues are whether and how the grounds for appealing a criminal conviction to the Jersey Court of Appeal should be reformed.

The project is likely to have three phases. In phase 1 (this scoping consultation), we are seeking to discover what people consider to be the problems with the current law by asking a series of ‘scoping’ questions. In phase 2 (consultation), we expect to publish a further consultation report, containing provisional findings and recommendations. In phase 3 (Topic Report) we will set out our final recommendations to the Chief Minister.

We are keen to hear from a wide range of people, including lawyers in the Channel Islands, lawyers from other jurisdictions, individuals with experience of criminal appeals, members of the Royal Court, members of the States Assembly, Ministers, charities and other organisations whose role involves helping people with criminal cases. We also welcome comments from experts outside the island.

You do not have to respond to all the scoping questions. We are happy to receive comments by email or letter.

The consultation period runs from 27 July 2016 to 31 October 2016. Please send responses in writing

- **by email to: jerseylawcommission@gmail.com or**
- **by post to: Criminal Appeals Scoping Consultation, Jersey Law Commission, c/o Institute of Law, Law House, 1 Seale Street, St Helier, Jersey JE2 3QG.**

When responding, please include your name and (if relevant) any organisation on whose behalf you are responding. In the Consultation Paper, which will set out our initial findings and provisional recommendations, and in any subsequent Final Report, we may

- summarise views expressed in response to this Scoping Paper
- list the names of people and organisations who respond to this Scoping Paper.

If you do not want your views to be summarised or your name listed at the end of such published documents, please say so in your response.

2. THE CURRENT LAW

The relevant provision is the Court of Appeal (Jersey) Law 1961, Art 26(1):

‘Subject to the following provisions of this Part, on any appeal against conviction, the Court of Appeal shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that, on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the 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.’

The current provision is heavily based upon s. 4(1) of the (English) Criminal Appeals Act 1907, a much-criticised test for criminal appeals in England which led to repeated reforms in that jurisdiction, where it was repealed and has not applied since 1968.

Further, the House of Commons Justice Committee has recently expressed concerns about the grounds of criminal appeal in England and Wales, recommending that the Law Commission for England and Wales should consider whether the Court of Appeal ‘should be able to quash a conviction whenever it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument’.¹

Jersey’s courts have from time to time noted difficulties in applying Art 26 of the 1961 Law due to its anachronistic nature.²

‘...we consider that it may well be desirable, in an appropriate case, to consider whether, and to what extent, the English authorities relating to the 1907 Act should continue to be applied uncritically in relation to the 1961 Law and to what extent, if at all, it is permissible to apply the approach of modern English Criminal Law...having regard to more modern conditions and thinking on the operation of the criminal justice system.’

Jersey’s courts have generally followed the same approach to interpreting the 1961 Law as English courts did to their equivalent provision under the 1907 Act; however from the outset the English courts took a more restrictive approach to their role in deciding criminal appeals than Parliament had intended, leading to criticism from both the JUSTICE Committee in 1964 and the Donovan Committee in 1965.

The statutory wording was also regarded as confusing and overlapping by the Royal Commission on Criminal Justice in 1993, which recommended that it should be replaced with a simpler test. Parliament’s response to such criticism was major statutory reform: s.2 of the Criminal Appeal Act introduced a test based on whether the conviction was ‘unsafe and unsatisfactory’ with the aim of encouraging judges to take a more liberal approach to their task in considering appeals; and the 1995 Criminal Appeal Act replaced that wording with simply whether the conviction is ‘unsafe’. English judges have also created a test based on ‘lurking doubt’ which has not been adopted in Jersey, but which enables English judges to allow an appeal if there is some lurking doubt about a conviction which makes them think that an injustice has been done.³

We are examining whether reform is also necessary in Jersey and are seeking views and evidence on this matter from interested parties via the questions asked in this consultation scoping report. Responses to any, or all, of the questions would be appreciated. To assist consultees, there are two Annexes which provide further detail on the relevant law in Jersey, England and Wales, and other jurisdictions, and outline the case for reform in Jersey’s law:

- Annex A – an expanded version of a conference paper by Dr Stephanie Roberts, presented at the Institute of Law’s Conference ‘Does Jersey Need a Criminal Code?’ in November 2015
- Annex B – an article by John Kelleher, first published in the *Jersey and Guernsey Law Review* in October 2011.

¹ <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/850.pdf> at paragraph 28; the UK Government has not referred the issue to the Law Commission for England and Wales.

² *Swanston v Att Gen*, Jersey unreported (25 November 1998) CA.

³ *R v Cooper* [1969] 1 QB 267.

3. SCOPING QUESTIONS ON PROBLEMS WITH THE CURRENT LAW

Questions to which we would like you to respond are in **boxes**.

Jersey currently has four grounds for appeal against conviction under the 1961 Law⁴. An appeal court may allow an appeal if they think that the verdict of the jury should be set aside on the grounds that it is

- (i) unreasonable or
- (ii) cannot be supported having regard to the evidence; or
- (iii) that the judgment of the court by whom the appellant was convicted should be set aside on the ground of any wrong decision of any question of law; or
- (iv) that on any ground there was a miscarriage of justice.

These grounds were originally designed to give courts very wide powers to overturn convictions, but both the Jersey Law and its English predecessor have been interpreted in a narrow way: the Jersey Court of Appeal's role is to review the decision of the trial court, and it cannot allow an appeal simply because it would have reached a different verdict on the evidence.⁵

The current English equivalent law has a single ground of appeal: under s.2(1) of the Criminal Appeal Act 1968 as amended, '... the Court of Appeal ... shall allow an appeal against conviction if they think that the conviction is unsafe...'.⁶

Question 1: Would a single ground be simpler and fairer?

The test in England and Wales since 1968 is perceived as setting a lower threshold than that in Jersey : the Jersey Court of Appeal in *Barette v Att Gen*⁶ said that the Jersey law is 'more robust in regard to the upholding of a jury's verdict than the law which now exists on the mainland'.⁷

Question 2: Do you agree that the test applied in Jersey is more difficult to satisfy? Please provide any illustrative examples.

Question 3: Does the current law in Jersey risk miscarriages of justice? If so, could you please provide any illustrative examples of which you are aware?

John Kelleher has suggested in the article reproduced at Annex B below that the current Jersey law in this area is unsatisfactory because of a lack of clarity in three respects: that it is unclear 'as to—(a) the threshold that must be achieved for the ground(s) [for appeal] to be made out; (b) the nature of the examination to be undertaken by the Court; and (c) the factors the Court will take into account in that examination'.

Question 4: Do you agree about this lack of clarity?

⁴ There is also the possibility of a *doléance*, the customary law right to review by a superior court when no appeal is available; it has been used in criminal cases recently, albeit unsuccessfully: *AG v Michel & Gallichan* 2006 JLR N15.

⁵ *AG v Edmond-O'Brien* 2006 JLR 133

⁶ 2006 JLR 407

⁷ At 434, para 109.

Looking in greater detail at the fact-related current grounds of appeal, we would appreciate views on the following issues.

Article 26(1) of the 1961 Law states ‘...the verdict is unreasonable or cannot be supported having regard to the evidence...’

The current judicial approach as recognized in *Waite v Att Gen*⁸ precludes the court from reviewing the evidence and making its own evaluation of it, stating that the court can only overturn a conviction under this ground if there was no case to answer or no evidence which a reasonable trial court could have accepted. The basis for this is, as recognized in *Evans v Att Gen*,⁹ that the trial court is in a better position to judge the witnesses who appeared in court. However in *McGuffie v SG*¹⁰ the court seems to have applied a more generous test, although that case has been sidelined.

Question 5: Is the *Waite* approach the correct approach? How should an appellate court determine this issue?

John Kelleher has suggested (see Annex B below, para 27) that the test for Ground 1 should be

‘a verdict of guilty will be unreasonable where it is a verdict that, having regard to all the evidence, no jury or the Jurats could reasonably have reached to the standard of beyond reasonable doubt. The words ‘cannot be supported having regard to all the evidence’ ought to be interpreted as representing the extreme end of “unreasonable.” ...A doubt experienced by the appellate court ought to lead to a conclusion that a reasonable jury or bench of Jurats ought also to have experienced that doubt and therefore cannot have been sure as to guilt’.

Question 6: Do you agree with this proposal? Is it in practice any different from the English approach to ‘lurking doubt’ and ‘unsafe’ convictions? Please explain your reasoning.

The test for miscarriage of justice is currently defined in *Swanston v Att Gen* and *Simao v Att Gen*¹¹ as whether it can be said that no reasonable jury could have come to the conclusion that [the court] did’, and including both conviction of those who are demonstrably factually innocent and those who are not.

Question 7: Is this approach satisfactory? If not, why not?

In relation to the proviso as indicated in *Barette v Att Gen*, the appellate court can dismiss an appeal if no substantial miscarriage of justice has occurred.

Question 8: Should an exception such as ‘the proviso’ remain, and if so, is it the correct test to use for upholding convictions which have an element of doubt?

In relation to the strengths of the current law, there is a lack of published evidence on how well the current law works in practice in Jersey.

Question 9: What do you consider to be the strengths of the current Jersey law on criminal appeals? Please provide any relevant illustrative examples.

⁸ 2007 JLR 170

⁹ 1965 JJ 527

¹⁰ 1968 JJ 955.

¹¹ 2005 JLR 374.

Lessons may be drawn from the history of criminal appeals in England and Wales. In England and Wales, it took 60 years and 31 Bills to create a court of criminal appeal with jurisdiction over errors of fact, but ‘the history of criminal appeals in England and Wales reveals a pattern of crisis and reform’.¹²

Question 10 : To what extent do you agree with this statement and is the same true in Jersey?

There has been some debate in Jersey courts as to the scope, if any, to modernise Art 26 via judicial interpretation in the absence of modernising Laws. Some Jersey courts have appeared open to the possibility of stretching the wording of Art. 26 to incorporate the ‘unsafe or unsatisfactory’ test from the more recent English legislation.¹³

Question 11: Is this practice defensible and if so, what would the practical implications be?

The current English test for appeals on the facts is simply whether the conviction ‘is unsafe’.

Question 12: What would be the merits, if any, of introducing this approach in Jersey?

According to Lord Widgery in *R v Cooper*,¹⁴ the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.

In the Guernsey case of *Law Officers v Guest*¹⁵ the Court of Appeal stated that it did have a ‘lurking doubt’ about the conviction, and that they would have overturned it if the English test had applied, but they were unable to do so under Guernsey law. Hence the conviction was upheld in spite of the doubt.¹⁶ Jersey’s courts have repeatedly confirmed that ‘lurking doubt’ is not a ground for appeal in Jersey.¹⁷

Question 13: What would be the merits, if any, of introducing a ‘lurking doubt’ ground of appeal in Jersey?

Question 14: What are the merits, if any, of bodies such as the Criminal Cases Review Commission? Do you think that an equivalent or similar body is needed in Jersey? Please explain your reasoning.

We are interested in approaches from other jurisdictions. The attached article by John Kelleher considers the approach of various other Commonwealth jurisdictions, including the generous interpretation to statutory provisions given by the High Court of Australia in *M v R*.¹⁸

Question 15: Given that the 1907 Act which formed the basis of Jersey’s law was adopted by many jurisdictions but has been adapted and interpreted in many different ways, would you recommend that

¹² Stephanie Roberts, Annex B below.

¹³ Eg *Swanston v Att Gen*, and the Court of Appeal in *Edmond-O’Brien*, although the latter was overturned by the Privy Council. Other courts have rejected such ideas, for example those in *Bayliss v Att Gen* 2004 JLR 409 and *Att Gen v Bhojwani* [2001] JCA 034.

¹⁴ [1969] 53 Cr. App.R. 82.

¹⁵ (2003) Cr App 290.

¹⁶ Guernsey’s 1961 Law is identical in effect to Jersey’s.

¹⁷ see for example *Bhojwani v AG* [2011] JLR 249 and *Barnett v Att-Gen* [2016] JCA 064.

¹⁸ (1994) 181 CLR 487.

Jersey adopt any approach used elsewhere in Commonwealth or former Commonwealth countries? For example, would the approach taken to the proviso in *Weiss v R*¹⁹ be an improvement? Please give reasons for your answer.

We welcome other suggestions and comments on the criminal appeals process

Question 16: Since it has been suggested that the problem in England is not the wording of the test but how it is applied in practice by judges, do you think that changing the test is likely to have an impact on judicial practice in Jersey?

Question 17: In the context of English law, it has been suggested that ‘An appeal process that allows the appeal court to assess whether the jury *should* have convicted rather than whether it *could* have convicted may provide an answer to ... problems [relating to a lack of focus on factual innocence]²⁰’. Do you think that such a proposal has merit in relation to the Jersey criminal justice system?

Question 18: Do you think that more focus should be placed upon the prevention of miscarriages of justice in Jersey? If so, why and how?

Question 19: Is there any other aspect of criminal appeals in Jersey which merits consideration by the Jersey Law Commission?

¹⁹ [2005] HCA 81, discussed at [94] in the attached article.

²⁰ Stephanie Roberts and Carole McCartney, ‘Building Institutions to Address Miscarriages of Justice in England and Wales: “Mission Accomplished?”’ (2012) *University of Cincinnati Law Review*: Vol 80: Iss.4, Article 13, available at <http://scholarship.law.edu/uclr/vol80/iss4/13>

4. ANNEX A

Preventing Miscarriages of Justice

Paper presented at Institute of Law Jersey Conference– Does Jersey Need a Criminal Code?

2nd November 2015

Dr Stephanie Roberts

University of Westminster

The creation of the Court of Criminal Appeal in the Criminal Appeal Act 1907 has been described by Justice (Criminal Appeals, 1964, p.6) as ‘the product of one of the longest and hardest fought campaigns in the history of law reform.’ It is now well documented that between 1844 and 1906 there were approximately 31 Bills²¹ considered by Parliament on the subject of criminal appeals, before the Court was finally created.

Appeal procedure prior to the Court of Criminal Appeal

There had been a long-standing practice whereby judges postponed judgment in cases of difficulty and consulted the other judges at Serjeants’ Inn. If the judges thought that a prisoner had been improperly convicted, he received a free pardon. This procedure was only available for trials presided over by judges of the superior courts and for trials at the Old Bailey. Various reports from the period²² reveal that the judges were not opposed to a criminal appeal system as such, as the judiciary did not object to their decisions being reviewed in relation to sentences or questions of law, but were clearly very hostile to an appeal system based on errors of fact. The reasons given by the judges were to resonate through the history of criminal appeals and can be summed up as follows: they did not believe that innocent people were convicted;²³ they felt that it would lessen the responsibility felt by jurors who would be less reluctant to convict on doubtful evidence if they knew the decision could be appealed;²⁴ they felt a right of appeal would lessen the deterrent effect of the criminal law;²⁵ and they felt that there were insufficient numbers of judges to handle the anticipated volume of appeals.²⁶ But despite their early vehement opposition, by the end of the nineteenth century the reform movement was unstoppable and an appeal system based on errors of fact became inevitable.

The mishandling of the Adolf Beck and George Edalji factual innocence cases by the Home Office in the early 1900s and the controversy surrounding a number of other convictions persuaded some politicians that a criminal appeal on matters of fact was urgently needed. In the aftermath of Beck, the Home Secretary was constantly criticised in the press for how he exercised the prerogative of mercy and the only way to alleviate public fears that miscarriages of justice were constantly occurring was to create an appeal system to review errors of fact and law.

²¹ This is an approximate figure because different sources suggest different numbers of bills. However, this is the figure listed in the Return of Criminal Appeal Bills (1906), H.L. Pap. 201.

²² The views of the judges can be ascertained from the evidence given in the following reports: Commissioners on Criminal Law (1836), Second Report on the Criminal Law, cmnd. 343. (London:HMSO); Commissioners on Criminal Law (1845), Eighth Report on the Criminal Law, Parl. Pap., vol. xiv, 161; House of Lords Select Committee (1848), Report of the Select Committee of the House of Lords on the Administration of the Criminal Law, cmnd. 523 (London:HMSO); Royal Commission on the Law Relating to Indictable Offences (1879), Report of the Royal Commission on the Law Relating to Indictable Offences, cmnd. 2345. (London:HMSO).

²³ See Select Committee Report (Baron Parke, p.4; Lord Denman CJ, p.44; Lord Brougham, p.49).

²⁴ *ibid* (Lord Denman CJ, p.45; Lord Brougham, p.49).

²⁵ *ibid* (Baron Parke, p.8; Lord Brougham, p.49).

²⁶ *ibid* (Baron Parke, p.5; Baron Alderson, p.10; Lord Brougham, p.8).

The debates on the Criminal Appeal Bill of 1907

Various objections to the Bill were raised during the course of the debates, many of which were a re-run of the objections that had plagued the reformers over the previous sixty years and can be summarised as follows: The first objection was that the Bill would prove to be unworkable due to the amount of persons convicted each year who, in theory, could apply to have their conviction reviewed by the new Court.²⁷ The second objection was that the Court would have a detrimental effect on the jury as it would weaken their sense of responsibility as they would know their decision could be reviewed. The third objection was still a belief that the Home Secretary provided a mechanism for reviewing miscarriages of justice so therefore the Court was not necessary.

The creation of the Court was not only innovative in terms of creating a criminal appeal system for errors of fact it was also innovative in creating a court of review as a mechanism for determining appeals.²⁸ When the Court was created, appeals to the Court of Appeal in civil cases²⁹ and appeals from magistrates' courts in criminal cases both involved a re-hearing of the facts and the Court of Appeal in civil cases had the power to order a retrial thereby sending the case back to the jury for determination. The contradiction that emerged from the debates on the 1907 Criminal Appeal Bill was how far the Court of Criminal Appeal was supposed to fulfil the function of re-hearing as well as review. Arguably the root of the Court's problems were summed up by the Attorney General, Sir John Walton, who introduced the Bill for the Government, when he said 'how the experiment would work would largely depend upon the views of the court itself.'³⁰

The Criminal Appeal Act 1907

The statutory test for quashing a conviction was set out in section four of the Act so the Court could allow the appeal:

'If they think 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 that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice.'

There was also a proviso to this section which allowed the Court to dismiss the appeal if they considered that no miscarriage of justice had actually occurred.³¹

This is the test adopted by Jersey:

Court of Appeal (Jersey) Law 1961, Art 26(1):

Subject to the following provisions of this Part, on any appeal against conviction, the Court of Appeal shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of

²⁷ See for example, the Earl of Halsbury Par. Deb. HL 8 August 1907, c.243.

²⁸ See John Rawlinson, HC Debs, 8 May 1907, col 284.

²⁹ The Court of Appeal heard only civil cases until 1966 when the criminal division was created.

³⁰ *ibid*

³¹ 'Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.'

any question of law or that, on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the 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.

This law in England and Wales has been changed and therefore, it is necessary to review why those changes needed to be made by looking at the problems associated with it.

The initial approach of the Court of Criminal Appeal to its powers

Although it is generally accepted that one of the main reasons for the creation of the Court of Criminal Appeal in England and Wales was for it to be a review tribunal for the findings of the jury, from the very first year of its existence the Court did not assume the role that the legislature seemed to have envisaged for it and adopted a restrictive approach. The first case reported in the Criminal Appeal Reports set the tone for subsequent decisions. In *Williamson*,³² Lord Alverstone, the Lord Chief Justice stated:

‘It must be understood that we are not here to re-try the case where there was evidence proper to be left to the jury upon which they could come to the conclusion at which they arrived.’

Similarly in *Simpson*,³³ Darling J stated:

‘The jury are the judges of fact. The Act was never meant to substitute another form of trial for trial by jury. The case was not a strong one. It would have been open to the jury to acquit and no one could have called the verdict perverse. But the verdict which the jury have given must stand.’

And again in *Graham*³⁴ a year later, Channell J stated:

‘Unless we are to retry cases we can do nothing in a case like this. It is not because the jury might properly have found the other way that we can do anything. We are not authorised to retry the case.’

This attitude of the Court was a correct one as it was created to review the jury’s decision and not to rehear the case. The Court of Criminal Appeal’s inability to substitute itself for the jury had a major impact on its application of the proviso to section 4 which allowed the Court to uphold a conviction where there had been an irregularity at the trial but the appellant’s guilt had been established by the evidence. The purpose of the proviso was described in an early case as being that it ‘enables the court to go behind technical slips and do substantial justice.’³⁵ There were two main problems associated with the proviso which were, firstly, the test the appellate court applied was not based on degree of error but was whether, despite the fault, ‘a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict,’³⁶ and secondly, the lack of a power to order a retrial in the 1907 Act. The Court was finally given the power to order a retrial in the 1964 Criminal Appeal Act.

³² [1908] 1 Cr. App. R. 3

³³ [1909] 2 Cr. App. R. 129

³⁴ [1910] 4 Cr. App. R. 218

³⁵ *Meyer* [1908] 1 Cr. App. R. 10

³⁶ *Stirland v DPP* [1944] A.C. 315

The problem this caused was that any major error which may have had an impact on the jury meant that the Court allowed the appeal so the Court gained a reputation at the time that an appeal based on a procedural irregularity had a better chance of success than one concerning factual innocence.

The powers of the Court and the reforms of the 1960s

The Court was broadly well received and the initial positives were said to be a noticeable improvement in the trial courts but by the 1960s the restrictive approach of the Court was being widely criticised. The JUSTICE Committee produced a report in 1964 which acknowledged that the Court's reluctance to usurp the jury had its origins in 'the history of the Court' and 'also reflects the inherent limitations of the system of appeal' as the Court 'was not set up to re-try cases but to ensure that the due forms of trial were properly observed'(para. 58). However, it argued that the statute did not itself require the Court to apply its powers in such a limited manner, the consequences of which were 'absurd and unjust' (para. 59). It saw the restrictive approach of the Court as an 'expression of an attitude of undue reverence for the verdict of a jury'(para. 60) and argued that 'the jury as an instrument of justice should not be regarded as infallible, especially in cases where there is an issue of identity'(para. 60). The Committee stated that the attitude of the Court to its powers was contrary to the intentions of the 1907 Act and it recommended that either the present powers should be interpreted in such a way as to include a wider range of circumstances where the court is prepared to intervene or that a specific ground should be introduced, namely that 'it would not be safe to allow the verdict of the jury to stand having regard to all the evidence'(para. 61). The report stated:

'There is nothing in section 4 that requires the court to apply so stringent a principle on the exercise of its powers. While it is true that a trial on indictment is to be determined primarily by the verdict of a jury, no special sanctity need be given to such a determination where in the event it seems unsafe.....it seems absurd and unjust that verdicts which experienced judges would have thought surprising and not supported by really adequate evidence should be allowed to stand for no other reason than they were arrived at by a jury'(para 59).

The JUSTICE Committee was far more stringent in its criticisms of the Court's failure to overturn jury verdicts than the Donovan Committee who believed that the problem lay more with the wording of section 4(1) than the Court's interpretation. The Donovan Committee was set up to review the Court's powers and the report stated:

'Purely as a matter of construction of the language of section 4(1) we cannot say that the interpretation adopted by the Court is open to serious doubt. If there was credible evidence both ways, and the jury accepted the evidence pointing towards guilt, it is difficult to say that the verdict was 'unreasonable' or could not 'be supported having regard to the evidence' or that 'there was a miscarriage of justice.' If there be some defect in the situation which requires to be remedied, the defect lies in the statutory language rather than in its judicial interpretation'(para.141).

The Committee were particularly concerned with disputed identity cases and felt that if the terms of section 4(1) were strictly construed, an innocent person who had been wrongly identified, and therefore wrongfully convicted, had virtually no protection conferred by a right to appeal provided that the evidence of identification was, on the face of it, credible (para. 145). The Committee felt this defect should be remedied and proposed that the Court should be given an express power to allow an appeal where 'upon consideration of the whole of the evidence, it comes to the conclusion that the verdict is unsafe or unsatisfactory'(para. 149). This had been the test proposed by F.E. Smith during the debates on the 1907 Act which had been defeated as the words proposed were 'too loose and obscure.' The Committee felt that in spite of the rejection of the words 'unsafe and unsatisfactory' the Court had sometimes acted as though this was the proper test to apply to a jury's verdict and had quashed a verdict which it considered to be unsafe and unsatisfactory in spite of there being some

evidence to support it (para. 147).³⁷ The Committee felt that although one of the consequences of this recommendation being accepted was that some guilty appellants may escape on appeal, they thought that ‘reliance can safely be placed upon the experience and acumen of Her Majesty’s judges to reduce this risk to a minimum.’ The advantages to be gained were that the safeguards for an innocent person, wrongfully identified and wrongfully convicted, would be increased which ‘the country would probably be prepared to pay a small price for reform (para. 150).’

The Donovan Committee also proposed an amendment to the proviso to section 4(1) which allowed the Court to dismiss the appeal if ‘no substantial miscarriage has actually occurred.’ The Committee felt that the word ‘substantial’ should be deleted as ‘it seems to us devoid of practical significance’ (para. 164). The Committee felt that in exercising the proviso, the Court had been coming to a conclusion of fact and therefore it would not be a complete innovation if the Court was also charged with the duty of deciding whether a verdict of guilty was ‘unsafe or unsatisfactory’ (para. 166). Schiff and Nobles have argued (*Understanding Miscarriages of Justice*, 2000, p. 66) that the Committee’s acknowledgement that the Court had been coming to conclusions of fact suggests that the language of the statute permitted the Court to explore facts as much or as little as they wished. Therefore, the JUSTICE Committee approach that what restrains the Court is not the language of its powers but the approach that it takes to its task appears to be the correct one rather than the Donovan Committee approach that it is the wording of the statute that is the problem.

In introducing the Criminal Appeal Bill into the Lords for the second reading, the Lord Chancellor stated:

‘There has been a general feeling in the legal profession that if you go to the Court of Criminal Appeal for an obviously guilty client who has some technical point, if the technical point is good, then the guilty man gets off; but that if your only complaint is that your client is entirely innocent and had nothing at all to do with the crime, then it is much more difficult. The recommendation of the Donovan Committee provides an additional ground on which the appeal may be allowed; namely, that the Court is of the opinion that, on the whole, the verdict is too unsafe or unsatisfactory to be allowed to stand.’³⁸

The three amendments in the Bill to section 4(1) of the 1907 Act are as follows – (a) the words ‘under all the circumstances of the case it is unsafe or unsatisfactory’ are substituted for the words ‘it is unreasonable or cannot be supported having regard to the evidence; (b) the words ‘there was a material irregularity in the course of the trial’ are substituted for the words ‘on any ground there was a miscarriage of justice’; and (c) in the proviso the word ‘substantial’ in relation to ‘miscarriage of justice’ is omitted.

The Lord Chief Justice, Lord Parker, disputed the contention of the Lord Chancellor that providing the ‘unsafe and unsatisfactory’ ground was an addition to the Court’s powers as he had stated that on many occasions he had used the words ‘in all the circumstances of the case, the Court has come to the conclusion that it is unsafe for the verdict to stand.’ He went on to say that:

‘This is something which we have done and which we continue to do, although it may be we have no lawful authority to do it. To say that we have not done it, and we ought to have power to do it, is quite wrong. It is done every day and this is giving legislative sanction to our action.’³⁹

There was support for this contention from other Lords. Lord Morris, for example, stated:

³⁷ Citing *Wallace* [1931] 23 Cr. App. R. 32

³⁸ H.L. Debs, 12 May 1966, col. 812.

³⁹ H.L. Debs, 12 May 1966, col. 837.

‘It may well be that the wording is now improved as compared to the wording that previously existed, but I respectfully agree with the Lord Chief Justice that this is not a change in the approach of the Court.’⁴⁰

And also Lord Pearson:

‘It is true to say that the existing Court of Criminal Appeal would sometimes tend to act on that principle, but if they did it would not be easy to bring their action within the words of the existing section 4.’⁴¹

Therefore it appeared that the change in the law was supposed to encapsulate an approach that was already being adopted which begs the question of why the law needed to be changed at all.

The power of the Court to review convictions was in section 2 of the 1968 Criminal Appeal Act. As stated by JUSTICE (Miscarriages of Justice, 1989, p. 50) it would appear that Parliament intended in 1968 to impose on the Court a duty to form its own opinion about the correctness of a conviction, notwithstanding the fact that no criticism could be made of the conduct of the trial. The Court appeared to do this shortly after the enactment of the 1968 Act in the case of *Cooper*⁴² which interpreted the new ‘unsafe and unsatisfactory’ ground. The judgment of the Court was given by Lord Widgery who stated:

‘.....it is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this Court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this Court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966 it was almost unheard of for this Court to interfere in such a case.

However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe and unsatisfactory. That means that in cases of this kind the Court must ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.’⁴³

The effect of this judgment was that the test the Court applied was no longer an objective one as the Court now had to apply the subjective test of did the Court themselves feel a doubt about guilt, and if they did, the jury’s verdict should be set aside.

The powers of the Court and the reforms of the 1990s

⁴⁰ Ibid, col. 843.

⁴¹ Ibid, col. 824.

⁴² [1969] 53 Cr. App.R. 82.

⁴³ See also *Lake* [1977] 64 Cr. App. R. 172 where Lord Widgery espoused his ‘lurking doubt’ test again: ‘Once you have decided that the rules of procedure were followed and there remains the only residual question of whether there is a lurking doubt in the mind of the Court, such doubts are resolved not, as I say by rules of thumb, and not by arithmetic, but they are largely by the experience of the judges concerned and the feel which the case has for them.’

During a debate in the House of Lords in 1986, Lord Silkin made various pronouncements on the effect of the unsafe and unsatisfactory ground. Lord Silkin was a former Attorney General and had taken part in the debates on the 1966 Act. He stated:

‘I have no doubt that those of us who took part in the legislation in 1968 were of the view that this new wording would give to the Court of Appeal, and would be seen to be giving to the Court of Appeal, a very wide power indeed to look at the evidence upon which a jury had convicted and to ask itself whether that evidence was safe and satisfactory or unsafe and unsatisfactory. I have taken the view in various cases that the Court of Appeal has taken a narrower view of those words than I would wish it to take.’⁴⁴

However, he went on to say:

‘I am not criticising the Court of Appeal’s view of the law. I am criticising, if anything, what Parliament did in producing a formula which has led to a somewhat restricted form of words. If the Court of Appeal’s view is correct, then it seems to be there is a very wide gap between the powers of the Home Secretary, as he sees them, and the powers of the Court of Appeal, as it regards those powers.’⁴⁵

During the same debate, Lord Pagett was more scathing about the Court’s approach to its powers. He stated:

‘Under a series of Lord Chief Justices, the original function of the Court of Criminal Appeal, which was to correct miscarriages were forgotten. The Court confined itself to points of law. Unfortunately, guilt and innocence is not a point of law.’⁴⁶

The reluctance of the judges to usurp the role of the jury clearly inhibited their use of the ‘lurking doubt’ ground of appeal. In their 1989 report on miscarriages of justice, JUSTICE stated that in their experience of assisting with appeals against conviction, the lurking doubt power had made very little difference to the way in which the Court decided appeals. In giving evidence to the Committee, the Registrar of the criminal division of the Court of Appeal, Master Thompson, said that the ‘lurking doubt’ principle was not implicit in the term ‘unsafe and unsatisfactory’ and that the Court had to have regard to the language of the statute, which did not speak of a ‘lurking doubt.’ He said that some of the senior judges did not regard Lord Widgery’s interpretation as authoritative (JUSTICE, Miscarriages of Justice, 1989, para. 4.16).

Schiff and Nobles have argued (Understanding Miscarriages of Justice, 2000, p. 81) that the combined effects of the 1964 and 1966 Acts (which were consolidated into the Criminal Appeal Act 1968) appears not to have had any profound impact on the Court’s exercise of its jurisdiction. They state that perhaps this merely confirmed the view of the Lord Chief Justice that in introducing the ‘unsafe and unsatisfactory’ ground the legislature would be merely authorizing an already existing practice. Their conclusion was that in the realm of convictions which are deemed ‘unsafe’ on the sole basis of the jury verdict being wrong, there is little evidence to suggest that reforms achieved through redrafting the Court of Appeal’s jurisdiction and powers have marked a substantive change in its practice post 1966.

This was also the conclusion of the JUSTICE Committee in 1989, who stated that in their experience:

⁴⁴ H.L. Debs, 9 April 1986.

⁴⁵ Ibid, col. 294.

⁴⁶ Ibid, col. 279.

‘the common attitude of the Court of Appeal is that where all the discrepancies and weaknesses of the prosecution evidence have been canvassed before the jury, and the judge has summed up fairly and correctly, then it must not interfere with the jury’s verdict, as this would amount to a retrial of the merits of the case, which is not its function’ (para. 4.17).

They went on to say:

‘We have come to the conclusion that the present legislation does not sufficiently spell out the duty of the Court when deciding an appeal on the basis that the conviction is a miscarriage of justice’ (para. 422).

They recommended that section 2 should be redrafted which would enable the Court to quash a conviction where it had doubts about its correctness. Just as the cases of Adolf Beck and George Edalji had proved to be the catalysts for change with regard to the 1907 Act, the reforms which finally led to the 1995 Criminal Appeal Act were sparked off by the Court’s decisions to quash the convictions of the Birmingham Six and the Guildford Four. Both groups of prisoners had previously appealed unsuccessfully to the Court and people began to ask themselves why the Court had not experienced a lurking doubt in these cases at the first appeal. The Royal Commission on Criminal Justice was announced on the day on the Birmingham Six were freed.

Although the Royal Commission was set up as a direct response to the perceived crisis in the appeal process, the terms of reference did not just relate to the appeal and post appeal process but included the whole criminal justice system. Initially the terms of reference with regard to the appeal process were very narrow and were just ‘the role of the Court of Appeal in considering new evidence on appeal, including directing the investigation of allegations.’ However, the Commission extended this view to consider all of the Court’s powers and practices, stating that it had not confined itself to the issues set out in the terms of reference since they could not be readily separated from the role of the Court of Appeal in hearing appeals against conviction in general (RCCJ, 1993, Ch. 10). The Commission’s conclusions overall were (RCCJ, ch. 10, para.3):

‘In its approach to the consideration of appeals against conviction, the Court of Appeal seems to us to have been too heavily influenced by the role of the jury in Crown Court trials. Ever since 1907 commentators have detected a reluctance on the part of the Court of Appeal to consider whether a jury has reached a wrong decision... We are all of the opinion that the Court of Appeal should be readier to overturn jury verdicts than it has shown itself to be in the past.’

The main findings of the Commission in relation to the Court of Appeal were:

Consideration of appeals

The Commission stated that much of the difficulty in deciding which ground the Court of Appeal was applying under section 2(1) seemed to be due to the confusing way the section was drafted and the Court seldom seemed to distinguish between ‘unsafe and unsatisfactory.’ The Commission doubted whether there was any real difference between the two. They stated that either of the grounds set out in paragraphs (b) and (c) – the error of law or a material irregularity during the course of the trial, may cause the Court to think that original conviction was unsafe and unsatisfactory. Thus there was an overlap between the three grounds of appeal (ch. 10, para.29).

The Commission also stated that there was also potential confusion as to the scope of the proviso. They stated that its use may be appropriate where there was a material irregularity during the course of the trial but the wording seemed difficult to reconcile with the unsafe and unsatisfactory ground or the wrong decision on a question of law ground. They stated that it seemed from the decided cases that the court did consider whether the unsatisfactory nature of a conviction under either of those two grounds is nevertheless outweighed by the consideration that no miscarriage of justice appears to have occurred (ch. 10, para.30).

The majority of the Commission recommended that the grounds should be redrafted to a single ground of appeal. This single ground was whether a conviction ‘is or maybe unsafe.’ If the court is satisfied that the conviction is unsafe it should allow the appeal but if the court felt it may be unsafe then it should quash the conviction but order a retrial unless a retrial was not possible. The majority saw no need for the proviso because if the court was not convinced the conviction ‘is or may be unsafe’ it simply dismisses the appeal (ch 10, para. 32).

The debates on the 1995 Criminal Appeal Bill

Although the circumstances surrounding the enactment of the 1995 Criminal Appeal Act were uncannily similar to those which gave rise to the creation of the Court in the first place, there was one major difference which was that the judges supported the enactment of the 1995 Act. As Schiff and Nobles have noted (Understanding Miscarriages of Justice, 2000, p. 84) the task that faced those who drafted and debated the latest Criminal Appeal Bill was similar to that which must have faced those undertaking the same tasks in the 1960s. They were concerned to encourage the Court to take a more liberal approach to appeals by the use of statutory language, against a background of existing statutory language that already empowered it to take such an approach.

The Bill was introduced into the Commons by the then Home Secretary, Michael Howard who stated that part 1 clarified and strengthened the powers of the Court of Appeal in England and Wales, and Northern Ireland; part 2 established the new criminal cases review commission; and part 3 extended the powers of magistrates courts to reopen cases to rectify mistakes. On the subject of the amendments to the grounds of appeal, he stated:

‘The present formula involves three overlapping grounds and is widely felt to cause confusion. Under the Bill, the Court of Appeal will allow any appeal where it considers the conviction unsafe and will dismiss it in any other case. That simple test clarifies the terms of the existing law. In substance, it restates the existing practice of the Court of Appeal and I am pleased to note that the Lord Chief Justice has already welcomed it.’⁴⁷

This declaration that the Bill was simply restating the existing practice of the Court was not new as this was exactly what the Lord Chief Justice had declared during the debates on the 1966 Criminal Appeal Bill. In the early 1990s it was thought that under the stewardship of Lord Chief Justice Taylor, the Court was already acting in accordance with the *Cooper* standard, and being more willing to order retrials so the problem facing Parliament was to devise a form of words which ensured that the Court would continue to do what it was (apparently) already doing. But again, this begs the question that if the law was already producing a more liberal approach why did it need to be changed at all.

Although the provisions in the 1995 Bill were the result of recommendations by the RCCJ, the Government had not adopted the full test for quashing convictions as set out in the RCCJ report. The Government had rejected the words ‘is or maybe unsafe,’ preferring the test to be simply ‘is unsafe.’ Baroness Blatch, Minister for the Home Office had stated ‘We have made it clear throughout the passage of the Bill that our intention is to consolidate the existing practice of the Court of Appeal. The ‘lurking doubt’ test will be maintained, as will the possibility for appeals to be allowed on the grounds of errors of law or material irregularities at trial. In each case, the issue for the court to decide is whether the conviction is unsafe...I believe there are considerable advantages in providing a broad ground for allowing an appeal. It allows the court flexibility to allow an appeal on any ground which it considers renders the conviction unsafe. There are numerous factors which can render a conviction unsafe. There is no need to spell them out in

⁴⁷ H.C.Debs, 6 March 1995, col. 24. Similarly the Minister of State for the Home Department, David Maclean, had stated ‘the Lord Chief Justice and members of the senior judiciary have given the test a great deal of thought, and they believe that the new test restates the existing practice of the Court of Appeal.’ Ibid, col. 110.

statute because whatever words are used, in the end there is only one question for the court to answer: whether or not the conviction is unsafe.’⁴⁸

The new statutory test for quashing convictions was set out in section 2 of the Criminal Appeal Act 1968 as amended by the Criminal Appeal Act 1995 which stated that the Court of Appeal (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case. The proviso was now repealed as it was not considered necessary under the amended test.

But despite these changes in the law, the problems associated with the Court have continued. The former head of the Criminal Cases Review Commission, Professor Graham Zellick, has recently stated that appeal judges are failing to correct miscarriages of justice where they suspect the jury has come to a wrong verdict.⁴⁹ He has argued that the Court of Appeal (Criminal Division) ought to be more active in quashing convictions even though there has not been any irregularity in the trial process and that ‘the Court of Appeal is even more reluctant in 2008 than in the 1990s to quash convictions because they think they are unsafe’ as ‘we are more deferential to a jury now than in the 1990s when things were going wrong.’ He stated that ‘we know from bitter experience that juries get things wrong’ and that when he had raised this argument with members of the judiciary he had been admonished for asking judges to second-guess the jury. He stated ‘they tell me that in this country we have trial by jury, so who are they to go behind the verdict of the jury which has seen all the evidence?’

This was also the conclusion of the House of Commons Justice Committee whose report on the Criminal Cases Review Commission was published in March 2015. The report stated: ‘While it is important that the jury system is not undermined, properly-directed juries which have seen all of the evidence may occasionally make incorrect decisions. The Court's jurisprudence in this area, including on 'lurking doubt', is difficult to interpret and it is concerning that there is no clear or formal mechanism to consider quashing convictions arising from decisions which have a strong appearance of being incorrect. Any change in this area would require a change to the Court of Appeal's approach, which would itself require a statutory amendment to the Court's grounds for allowing appeals. We are aware that this would constitute a significant change to the system of criminal appeals in this country and that it would qualify to a limited extent the longstanding constitutional doctrine of the primacy of the jury. Neither of these things should be allowed to stand in the way of ensuring that innocent people are not falsely imprisoned (para. 27).

We recommend that the Law Commission review the Court of Appeal's grounds for allowing appeals. This review should include consideration of the benefits and dangers of a statutory change to allow and encourage the Court of Appeal to quash a conviction where it has a serious doubt about the verdict, even without fresh evidence or fresh legal argument. If any such change is made, it should be accompanied by a review of its effects on the CCRC and of the continuing appropriateness of the 'real possibility' test’ (para. 28).

Michael Gove has recently stated that he will not be asking the Law Commission to review the Court's powers.

Summing Up the Problems associated with the Court

The problems associated with the Court are well documented. The first is its deference to the jury which is based on the judge's views that the jury are the arbiters of fact and they decide on guilt and innocence. The judge's also take the view that the jury sees and hears all the witnesses and the judges do not therefore the jury are in a better position to judge than the judges are. There has also been a prevailing view that jury trial properly conducted does not convict innocent people. The second main problem is the judge's reverence for the principle of finality which is reflected in its reluctance to hear fresh evidence and this has also caused problems for the post-appeal procedures of the Home Secretary's reference and its successor, the Criminal Cases Review Commission. The third main problem is the underfunding of the appellate process. The Court is continually being given more

⁴⁸ Ibid, col. 1493.

⁴⁹ *The Independent*, 27 September 2008.

powers but there is a distinct lack of resources as the appeal process is the most underfunded part of the criminal justice system. The lack of funding impacts on waiting times and its decision-making as appeals based on errors of procedure are cheaper and quicker than appeals based on factual innocence which require more investigation. The fourth main problem is that decision-making process whereby judges review the case on paper outside of their normal working hours. It is also a Court of review which prevents it delving too deeply into the merits of the case. The burden of proof is also confusing on appeal in terms of who has to prove what and to what standard. While there is no tried and tested formula for determining that appeal judgments are wrongly decided, the evidence of a restrictive approach is demonstrated by the judges imposing their own restrictions on their role which were not set out in legislation and it can also take a number of visits to the Court before the conviction is overturned. This doesn't necessarily mean the Court is getting the initial decision wrong because there may be new evidence at this stage or developments in forensic science, but some of those second and third visits will be a result of the Court not making the correct decision initially.

Conclusions

This history of criminal appeals in England and Wales reveals a similar pattern of crisis and reform. The proposals to change the Court's powers have been in response to the perceived restrictive approach of the Court but the evidence does not suggest that these legislative changes have made any difference to the Court's approach. This is somewhat understandable given the confusion around the aims of the changes being to encapsulate an approach the Court is already taking which suggests in itself, that the law does not need to be changed. The failure of the changes in law to change judicial attitudes suggests that it is not the law that is the issue, but the approaches the judges take to their role which has remained the same over the last hundred years. This approach is summed up by the Court reviewing whether the jury *could* have convicted rather than whether it *should* have convicted. I would argue that the time has now come to acknowledge that the initial experiment of creating the Court as one of review has not worked and changing the legislative powers is not the answer to the problems. The time has now come to review the function of the Court as it seems to me this is the only way to change the Court's approach because its review function allows the judges to adopt a restrictive approach. If the function was changed to rehearing in the civil sense, this would allow them to come to a different decision than the jury. This would not be without its own problems but without this major change, the Court will continue to adopt a restrictive approach.

To end, I would issue a word of caution to Jersey to not necessarily look to England and Wales to reform its appeal laws as arguably the test adopted by Jersey from the Criminal Appeal Act 1907 was the widest powers the Court in England and Wales was given; it is the interpretation by courts which was too narrow. So the lesson learned from the English and Welsh experience is that changing the law is not always the answer as a more fundamental change may be needed.

5. ANNEX B

Annex B reproduces an article by Advocate John Kelleher John Kelleher, which was originally published in the *Jersey and Guernsey Law Review* in October 2011. It is also available online at https://www.jerseylaw.je/publications/jglr/Pages/JLR1110_Kelleher.aspx

Jersey & Guernsey Law Review – October 2011**THE RIGHT OF CRIMINAL APPEAL ON THE
FACTS IN JERSEY AND GUERNSEY****John Kelleher**

In 1961, Jersey and Guernsey separately established by statute a right of appeal in criminal matters from their Royal Courts to an appellate court, known in each island as the Court of Appeal. In respect of the test to be applied to appeals against conviction, both statutes took as their template s 4(1) of the Criminal Appeals Act 1907 (“CAA 1907”) which was then applicable to England and Wales. That test remains today. However, even in 1961, this test on appeal had long been the subject of criticism and dissatisfaction in England and Wales because of the risk and in certain cases the reality of miscarriages of justice. In 1968, following a commission of inquiry into the law on criminal appeal, the CAA 1907 was amended so that the test is now quite different. Elsewhere in the Commonwealth, the courts of Australia, New Zealand and Canada have managed to give equivalent wording to the CAA 1907 a more modern and liberal interpretation. This article examines the options for Jersey and Guernsey and argues for a change to reflect current perceptions of the role of the appellate court in the criminal context.

1 Let us start with a simple proposition. In societies, like those of Jersey or Guernsey, which strive to be democratic and just, we would, surely, wish to ensure that those who come before the criminal courts receive fair and proper treatment, and that after due process the correct result is attained, whether a verdict of guilty or not guilty. We would also recognise, would we not, that criminal matters are often complicated, whether factually and/or legally, and that, as a matter of probability, and with the best will in the world, mistakes will happen.

2 The right of appeal from a decision maker of first instance recognises that probability. It is a fail-safe. In Jersey and Guernsey, in serious cases, that right provides for a detailed review of a decision by three senior and experienced judges. They are there to make sure that things did not go awry at trial or at sentencing. They are there to make us sleep easier in our beds at night in the knowledge that justice has been done.

3 However the fail-safe is only as protective as we allow it to be. The powers of the appellate court are defined by its jurisdiction. It can intervene only in circumstances where and to the extent that the law allows it to intervene. The power to intervene may be restricted by statute or by the practice of the appellate court as evolved by the common law. In Jersey and Guernsey, our respective legislatures have been involved in the former to a limited extent, but rarely if at all in the latter.

4 But when we settle down for that night's sleep, we would surely wish to be certain that if that panel of senior and experienced judges in the appellate court had a material concern about a guilty verdict reached at first instance, it would have the power to intervene, to bring experience and knowledge to bear, and right a wrong that had been occasioned.

Law Officers v Guest

5 Until recently, Guernsey's reporting of the decisions of its courts has been somewhat lacking. One could have easily missed the case of *Law Officers v Guest*.¹ It is a good place to start the analysis of the right of appeal in criminal cases in Jersey and Guernsey.

6 In 2002, Heather Guest was convicted in the Guernsey Magistrate's Court. Mrs Guest had been for 18 years the licensee of a public house, "The Helmsman", in Cornet Street, St. Peter Port. She was convicted of one count of being concerned in the management of "The Helmsman" whilst she knowingly suffered the smoking of cannabis resin, contrary to s 7(d) of the Misuse of Drugs (Bailiwick of Guernsey) Law 1974. She was sentenced to 6 weeks' imprisonment. She appealed unsuccessfully to the Royal Court. She was granted leave to appeal to the Court of Appeal.

7 The facts of the case, as recounted by the Court of Appeal (Clarke, JA presiding, sitting with Southwell and Rokison JJA), are these. Essentially, the offence charged concerned the allegation that Mrs Guest had permitted patrons to smoke drugs on her licensed premises. The police called two under-cover police officers from the UK (referred to somewhat mysteriously as "Ted" and "Ed"). Their evidence was that on a number of visits to "The Helmsman" they had smelled cannabis in the bar and toilets. In addition, they had witnessed cannabis being smoked in both locations. As to Mrs Guest's knowledge of this state of affairs, their evidence was that she must have been aware of the drug's use since the smell was so prevalent.

¹ 9 January, (2003) Cr App 290.

Mrs Guest, for her part, accepted that she knew the smell of the drug and that at times that smell was evident at “The Helmsman”, but she gave “strong evidence” that whenever she suspected its presence, she ejected the suspected users from the pub. This policy and practice was supported by witnesses. She denied ever saying otherwise to one of the police officers.

8 The Court of Appeal was particularly troubled by the following aspects of the case—

(a) The apparent implausibility of the alleged admission by Mrs Guest to one of the police officers on their first meeting that she permitted the smoking of cannabis at the premises.

(b) The fact that between 1998 and the date of the offence, the Guernsey police had for various reasons entered “The Helmsman” on 45 occasions and seen Mrs Guest on 34 of those visits without any complaint being made about cannabis.

(c) The strong evidence of Mrs Guest’s policy, supported by “a substantial number of witnesses”, as set out above.

(d) The unlikelihood of Mrs Guest putting her licence and livelihood at risk in the manner alleged.

9 At the outset, the Court of Appeal recognised that its powers under art 25(1) of the Court of Appeal (Guernsey) Law 1961 meant that it could not quash the verdict because the court would have reached a different conclusion on the facts, or would have attached a different significance to some parts of the evidence which had persuaded the Magistrate. The court concluded that, in its view, there was evidence before the Magistrate on which he could convict the defendant. However, it went on to say this—

“We do, however, think it right to say that, had our jurisdiction been the same as that of the Court of Appeal in England, our conclusion would have been different. In such circumstances the question would have been whether the conviction was unsafe. As which Widgery L.J said in *R v Cooper* (1969) 53 CAR 2:

‘That means that in cases of this kind the Court must in the end ask itself a subjective question whether we are content to let the matter stand as it is, or whether there is not some further lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may or not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences.’

In this case, the members of this Court do entertain a lurking doubt as to whether the conviction is safe but, on the law which we are bound to apply, this does not entitle us to set aside the decision of the Magistrate.” (paras 16 and 17)

10 And so it was that Mrs Guest’s conviction remained undisturbed. Notwithstanding that a panel of three senior and experienced judges retained a “lurking doubt” about the correctness of the finding of guilt, they considered themselves powerless to intervene.

11 In recent times, one Jersey States member has taken an interest in the nature of Jersey’s right of criminal appeal. The interest was first expressed as a question on 28 April 2009 which received the reply from the Chief Minister that “I do not regard this as a high priority at this time”.² The member persisted and six months later followed up his question with a request for an update. The answer he received included these words:

“It is not apparent to me that the cumulative effects of the grounds set out in the Jersey law are, in substance, very different from the United Kingdom position and I have seen no case to support the proposition that the English position which, in any event, was not as stated in the original question, is necessarily better than ours.”³

12 One assumes those advising the Chief Minister were unaware of the *Guest* case. That is perhaps understandable, for the reason already suggested. However that would not excuse their lack of awareness of Jersey case-law which, as we shall see, tends to the same conclusion as the Guernsey Court of Appeal in *Guest*. The reality is that there is a material difference between the Jersey and Guernsey tests on appeal when compared with the position in England and Wales and that the difference does restrict the power of the appellate courts of the Islands to intervene in relation to a conviction.

13 As will become clear from that which follows, this author is not suggesting that the laws of England and Wales should be viewed as some form of binding guide on what the laws of the Islands should be. Far from it. We should be justifiably proud of differences and have confidence in our own ability to operate as sophisticated jurisdictions. However, the position is obviously more complicated where the Islands have based their relevant statutes on an earlier English statute which, even at the date of the promulgation in Jersey and Guernsey, was the subject of widespread criticism and within a short time

² *States Official Report*, para 3.15.

³ *Official Report*, 13 September 2010, at para 2.12.

thereafter was repealed and replaced. To expand on these points, it is necessary to go into somewhat more detail.

The right of appeal in criminal matters

14 A convicted person's right of appeal to the Court of Appeal in Jersey is set out in art 24 of the Court of Appeal (Jersey) Law 1961 (the "1961 Jersey Law")—

"24 Right of appeal

(1) A person convicted on indictment by the Royal Court, whether sitting with or without a jury, may appeal under this Part to the Court of Appeal—

- (a) against the person's conviction, on any ground of appeal which involves a question of law alone;
- (b) with the leave of the Court of Appeal, or upon the certificate of the judge who presided at the person's trial that it is a fit case for appeal, against the person's conviction, on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court to be a sufficient ground of appeal; and
- (c) with the leave of the Court of Appeal, against any sentence passed on the person for the offence (whether passed on his or her conviction or in subsequent proceedings), unless the sentence is one fixed by law:

Provided that ..."

This goes on to set out specific provisions relating to the Inferior Number of the Royal Court which are not relevant for present purposes.

15 In Guernsey, a similar position pertains to that in Jersey. Section 24 of the Court of Appeal (Guernsey) Law 1961 (the "1961 Guernsey Law") is materially similar to art 24 of the 1961 Jersey Law save for the opening words which allow for differences in terminology and court structures between the Islands—

"24. A person convicted on indictment or summarily convicted in the Royal Court sitting as a Full Court on or after such day as shall be appointed in that behalf by Ordinance of the States may appeal under this Part of this Law to the Court of Appeal ..."

Questions of law/Questions of fact

16 As the reader will have observed, art 24 and s 24 distinguish between where leave may or may not be required. Leave is required where the appeal against conviction involves a question of fact or a question of mixed fact and law. No leave is required where the appeal

against conviction involves a question of law. A question of law refers to any question within the province of the judge and not the jury. In *Att Gen for Northern Ireland's Reference (No. 1 of 1975)*⁴ the definition of a “point of law” was considered in the judgment of Diplock LJ:

“I know of no other satisfactory definition of a ‘point of law’ arising in a criminal case than that it is a question that under this mode of trial would fall to be decided by the judge, not by the jury. Apart from questions of admissibility of evidence, it is a function of the judge to decide what are the constituent elements, both physical (*actus reus*) and mental (*mens rea*), of an offence with which the accused is charged and to instruct the jury accordingly. It is the function of the jury to decide whether each one of those elements has been proved to have been present in the conduct or mind of the accused. This is because the definition of a crime is always a question of law ...” (p 132)

17 The passage from Lord Diplock’s judgment above was cited by the Privy Council in *Smith v The Queen*⁵ and it was observed that the passage did not deal directly with the distinction between questions of mixed law and fact and questions of law alone, which is the test for whether leave is required in relation to the relevant ground or grounds of appeal. In *Smith*, the Privy Council considered that a similarly worded section to art 24(1)(a) and s 24, which allowed the Attorney General of Bermuda to appeal an acquittal on a “question of law alone”, applied only to a pure question of law, and observed—

“It is now possible to apply this view to the type of situations which may arise on a no case submission. Counsel for a defendant may invite a ruling on a no case submission that a statutory offence contains an ingredient of *mens rea* and that there is no evidence of *mens rea*. The prosecution may dispute the legal question. That would be a pure question of law which may be appealed under [an equivalently worded section to art 24(1)(a) and s 21] by the Attorney General. On the other hand, most no case submissions will simply involve an assessment of the strength of the evidence led by the prosecution. A certain amount of weighing of evidence is unavoidable at this stage because the trial judge has to form a view whether the evidence could potentially produce conviction beyond reasonable doubt: Zuckerman’s *The Principles of Criminal Evidence* (1989), p. 54. The present case is in this category. It is clear that the judge accepted an argument that the circumstantial evidence was an

⁴ [1977] AC 105.

⁵ [2000] 1 WLR 1644.

insufficient basis for a jury to convict the defendant. It was no doubt a surprising view for the judge to have taken but it was nevertheless a view as to the quality of the evidence against the defendant. It was a decision arrived at on matters of fact and degree, namely the inferences which could be drawn from the evidence before the jury. The argument, the decision of the judge and the ground of appeal did not involve a question of law alone.” (p 1653)

18 Both of these decisions would be of persuasive assistance in interpreting the Jersey and Guernsey appeal statutes.

The jurisdiction of the Jersey and Guernsey Courts of Appeal

19 The jurisdiction of the Jersey Court of Appeal in a criminal appeal is set out in art 26 of the 1961 Jersey Law:

“26 Determination of appeals in ordinary cases

(1) Subject to the following provisions of this Part, on any appeal against conviction, the Court of Appeal shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that, on any ground, there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the 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.

(2) Subject to the following provisions of this Part, the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered.”

20 The jurisdiction of the Guernsey Court of Appeal in a criminal appeal set out in s 25 of the 1961 Guernsey Law is in materially similar terms.

The law of England and Wales on criminal appeal

21 Article 26(1) of the 1961 Jersey Law and s 25(1) of the 1961 Guernsey Law reflect s 4(1) of the Criminal Appeals Act 1907 (“CAA 1907”) which was applicable to England and Wales. The CAA 1907 was first amended by s 2(1) of the Criminal Appeals Act 1968, only seven years after its terms had been adopted in Jersey and Guernsey,

then by s 44 of the Criminal Law Act 1977, and then by s 2(1) of the Criminal Appeal Act 1995.

22 The Criminal Appeals Act 1968 (as originally enacted) allowed the Court of Appeal under s 2(1)(a) to allow the appeal if “the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory”. The two further limbs of s 2(1) allowed the Court of Appeal to allow the appeal on the grounds of error of law and on the basis of a “material irregularity” in the course of the trial. The proviso in the 1968 Act (as enacted) was identically worded to the proviso in the CAA 1907, save for the deletion of the word “substantial” in the reference to miscarriage of justice.

23 Section 44 of the Criminal Law Act 1977 modified s 2(1)(a) by substituting the word “conviction” for the words “verdict of the jury”.

24 The test on appeal was again modified by the Criminal Appeal Act 1995. This saw the removal of the three limbs of the test under s 2(1) and of the proviso. It appears that the 1995 reformulation was not intended to change the existing practice of the Court of Appeal (see for example *Davis, Johnson and Rowe*⁶). Following the amendment to the wording by the Criminal Appeal 1995, the wording under s 2(1) of the Criminal Appeals Act 1968, which is the current wording, became:

“(1) Subject to the provisions of this Act, the Court of Appeal—

- (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and
- (b) shall dismiss such an appeal in any other case.”

The Jersey jurisprudence

Introduction

25 There is a body of Jersey case-law on the interpretation of art 26(1) of the 1961 Jersey Law. Following established practice in the Jersey jurisdiction, where a Jersey statute is based on an English statute, recourse has been had to English jurisprudence on s 4(1) of the CAA 1907 as an interpretive guide to art 26(1). Some of the Jersey case-law has focused on the differences between art 26(1) and the now different position in England and Wales.

⁶ (2001) 1 Cr App R 8.

26 Article 26(1) comprises three (alternatively four) grounds on which a verdict “should be set aside” (and the same applies to s 25(1) of the 1961 Guernsey Law):

(a) the verdict is unreasonable or cannot be supported having regard to the evidence;

(b) a wrong decision of any question of law; and

(c) on any ground there was a miscarriage of justice.

27 The first ground can, grammatically at least, be read as two separate and distinct grounds. A conclusion on any of these grounds that the verdict should be set aside is subject to the proviso contained in the last paragraph of art 26(1) (again the position is the same for s 25(1) of the Guernsey Law 1961).

The test on criminal appeal applied in Jersey

28 There are a number of Jersey Court of Appeal decisions which have focused on the language of art 26(1). Several of these have addressed the threshold that must be reached in order for an appeal to be successful. That analysis has included discussion of the test in Jersey as compared with that which now prevails in England and Wales which is perceived as setting a lower hurdle or, at least, one which allows a more interventionist approach by the appellate court. However it cannot be said that the Jersey Court of Appeal has provided any expansive explanation as to the test it will apply on a criminal appeal.

29 The position under Jersey law as to a criminal appeal was described by the Court of Appeal in *Barette v Att Gen*⁷ as “more robust in regard to the upholding of a jury’s verdict than the law which now exists on the mainland” (p 434, para 87). Observing that the language of the relevant provisions of the Jersey statute is “not altogether happily drafted”, the Court of Appeal defined the appeal threshold by reference to the proviso in art 26(1): “notwithstanding some error in the conduct of the trial, a verdict will only be set aside if the miscarriage of justice consequent upon that error can properly be described as ‘substantial’” (p 434, para 88).

30 The same court described *R v Haddy*⁸ as the *locus classicus* of the English Court of Appeal on the operation of the proviso (p 434, para 89) *Haddy* cited *R v Cohen*⁹—

⁷ 2006 JLR 407.

⁸ [1944] 1 KB 442.

⁹ (1909) 2 Cr. App. R 197, at 208.

“If, however, the court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso.”

31 *Haddy* continues—

“That statement of the law has stood for thirty-five years and, so far as we are aware, has never been the subject of adverse comment, though Judges in giving the decisions of the Court of Criminal Appeal have used varying language and many different expressions.” (Cited at *Barette*, p 434, para 89)

Verdict unreasonable or cannot be supported having regard to the evidence

32 There has been a particular focus on the ground which enables a verdict to be set aside if it is unreasonable or cannot be supported having regard to the evidence. In *Bell v Att Gen*¹⁰ the Court of Appeal stated—

“On any view, a jury verdict is not lightly to be displaced; and a contention that a jury verdict admittedly unaffected by misdirection of law or other material irregularity is unreasonable or unsupported by evidence is no easy one for an appellant to sustain.” (p 403, para 9)

33 The Jersey court’s position on this ground is encapsulated in the following citation in *Evans v Att Gen*¹¹ which, having cited *R v Hopkins & Husson*¹² with approval, turned to extracts from *Halsbury’s Laws* on appeals to the Privy Council—

“In dealing with evidence from the Court below or questions of inferences to be drawn from such evidence, the Judicial Committee as a general rule considers that the Court below before whom the witnesses appeared is a better judge than itself and the conclusion of a jury on matters of fact should be upheld although different from that which the judge of a Court of Appeal might have reached.” (p 531)

34 In *McGuffie v SG*,¹³ the court gave some insight into how it may assess whether a jury could have reached an unreasonable verdict or

¹⁰ 2001 JLR 400.

¹¹ 1965 JJ 527.

¹² (1950) 34 Cr App R 47.

¹³ 1968 JJ 955.

one unsupported by the evidence. On the facts, the court concluded there was ample evidence that the accused could have committed the crime, but not sufficient evidence to satisfy the heavy burden which lies with the prosecution. There was grave suspicion, nothing more. *McGuffie* does not appear to have been followed.

35 More recently, the Court of Appeal in *Waite v Att Gen*¹⁴ stated—

“The form of appellate jurisdiction which exists in Jersey confers what has been described by the Privy Council as a ‘limited right of appeal which precludes the court from reviewing the evidence and making its own evaluation thereof’: *Aladesuru v R* [1956] AC 49 at 54–55. The Court of Appeal may allow an appeal if there was no case to answer or if there was no evidence which a reasonable jury could have accepted. Otherwise, it may allow an appeal only on the ground of error of law or miscarriage of justice.” (p 1, para 2)

Wrong decision on any question of law

36 As to an appeal on the ground of a wrong decision on any question of law, such appeal will turn on the nature and effect of that wrong decision, subject always to the proviso.

Miscarriage of justice

37 As to an appeal on the ground of a miscarriage of justice, reference has already been made to the comments in *Barette*. In *Simao v Att Gen*¹⁵ the Court of Appeal cited Bingham LJ in *R (Mullen) v Home Secretary*¹⁶—

“‘[M]iscarriage of justice’ is an expression which, although very familiar, is not a legal term ... and has no settled meaning. Like ‘wrongful conviction’ it can be used to describe the conviction of the demonstrably innocent. But, again like ‘wrongful conviction’, it can be and has been used to describe cases in which defendants, guilty or not, certainly should not have been convicted.” (p 385, para 32)

The Court of Appeal also repeated the statement in *Swanston v Att Gen*¹⁷ where the court said—

¹⁴ 2007 JLR 170.

¹⁵ 2005 JLR 374.

¹⁶ [2005] 1 AC 1.

¹⁷ Jersey unreported (25 November 1998) CA.

“the question as to whether or not there has been a miscarriage of justice should be determined by asking the question whether it can be said that no reasonable jury could have come to the conclusion it did, having regard to the totality of the evidence.” (p 3, pre-penultimate para)

The proviso

38 As to the proviso, reference has already been made to the observations in *Barette*. In *Ferguson v Att Gen*,¹⁸ the Court of Appeal defined “a substantial miscarriage of justice” within the proviso as meaning—

“where, by reason of a mistake, omission, or irregularity in the trial, the appellant has lost a chance of acquittal which was fairly open to him. The court may apply the proviso and dismiss the appeal if they are satisfied that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would have been one of guilty.” (p 7, pre-penultimate para)

Time for a contemporary interpretation

39 Beyond these statements in the local authorities, the Court of Appeal has not provided any further detailed analysis of the basis of appeal or of the terminology used in art 26(1), or the role of the appellate court in considering an appeal. This state of affairs reflects the judicial approach taken in England and Wales to the CAA 1907 between 1907 and 1968.

40 In *Swanston* the Court of Appeal opened the door to a more contemporary interpretation of statutory language that derived from the early twentieth century—

“For our part we consider that it may well be desirable, in an appropriate case, for this Court to consider carefully whether, and to what extent, the English authorities relating to the 1907 Act should remain to be applied uncritically in relation to the 1961 Jersey Law and to what extent, if at all, it is permissible to apply the approach of modern English Criminal Law, when it is interpreting and applying different statutory language, to the interpretation to be placed upon the provisions of the 1961 Jersey Law, having regard to more modern conditions and thinking on the operation of the criminal justice system.” (*op cit*, p 2)

¹⁸ Unreported (15 January 1998) CA.

41 *Swanston* was not considered an appropriate case for such a consideration, perhaps because the case was one “involving a simple question of fact in relation to an incident, depending largely on eye witness evidence.” (Swanston, who was found guilty of a grave and criminal assault, had “glasses” another party in a public house full of customers.) (p 3, pre-penultimate para)

42 In *Bayliss v Att Gen*,¹⁹ a differently constituted Court of Appeal rejected the suggestion that English authorities on the application of the “unsafe or unsatisfactory” test could be applied or utilised in relation to the Court of Appeal’s function under art 26 (1).²⁰ It did so on the basis that, firstly, the wording of art 26(1) did not admit of such an interpretation, secondly, the weight of the Jersey authority in *Hall v Att Gen*²¹ and *Bell v Att Gen*²² was against such an approach, as was Guernsey authority on the equivalent provision and, thirdly, the relevant changes in England and Wales had occurred by legislation and the same would be required in Jersey (p 415, para 21).

43 The case of *Att Gen v Edmond-O’Brien*²³ brought these different views to something of a head. Mr and Mrs O’Brien (the latter’s married surname took the prefix ‘Edmond’) had operated a number of Jersey-based businesses, including a butcher’s shop. Over a period of years he had trafficked in illegal drugs, importing the drugs in shipments of meat. For reasons which do not concern us, Mr O’Brien was, in the first instance, charged and convicted in England on a number of counts of conspiracy to supply drugs. He was subsequently charged and convicted in Jersey of related offences concerning the transfer of the proceeds of criminal conduct. Mrs Edmond-O’Brien was charged and convicted of assisting her husband to retain the proceeds of drug trafficking contrary to art 17(1)(a) of the Drug Trafficking Offences (Jersey) Law 1988.

44 Unusually, the Court of Appeal in its judgment²⁴ subjected the evidence against Mrs Edmond-O’Brien to a thorough forensic analysis (paras 34–65). In essence, that evidence was that she was the banker for her husband’s businesses and must have realised that the funds were coming from illegitimate sources given the increased quantum once he commenced his drug trafficking, the frequency of the

¹⁹ 2004 JLR 409.

²⁰ Then numbered art 25(1). See para 13 of the judgment.

²¹ 1996 JLR 129.

²² 2001 JLR 400.

²³ 2006 JLR 133.

²⁴ [2003] JCA 228.

payments and the nature and quantum of actual deposits. The Court of Appeal concluded—

“We have separately and together reviewed all the evidence against Mrs O’Brien. It is our judgment that on the totality of that evidence the Jurats could not properly decide that Mrs O’Brien knew or suspected (i) that her husband was trafficking in drugs, or (ii) that the moneys, or part of them, which she paid into the bank accounts were proceeds of drug trafficking. In our judgment the verdict ‘cannot be supported having regard to the evidence’. The prosecution did not ask the Court to apply the proviso in art 25(1), but in any event it could not be applied because a ‘substantial miscarriage of justice’ did occur. We add for completeness that if the English test applied in Jersey we would have concluded that the verdict was clearly not ‘safe’. Accordingly we set aside the conviction of Mrs O’Brien and acquitted her. We also set aside the confiscation order and the sentence in default.” (p 29, para 65)

45 The Attorney General appealed to the Privy Council which overturned the decision of the Court of Appeal.²⁵ Lord Hoffmann delivered the judgment of the court—

“23 Their Lordships were told that no other case had been found since the establishment of the Court of Appeal in Jersey in which a verdict of the Jurats had been set aside solely on this ground. In *Aladesuru v. R.* (1) ([1956] A.C. at 54–55), Lord Tucker, speaking of a Nigerian statute in similar terms to the Jersey Law, said that it conferred only the right to ‘a limited appeal which precludes the court from reviewing the evidence and making its own valuation thereof’ and added that the cases in England in which a verdict had been set aside ‘as one which no reasonable tribunal could have found’ were exceptional. As Lord Goddard, C.J. said in *R. v. Hopkins-Husson* (3) (34 Cr App R at 49):

‘. . . [T]he fact that some members or all the members of [this] Court think that they themselves would have returned a different verdict is . . . no ground for refusing to accept the verdict of the jury, which is the constitutional method of trial in this country. If there is evidence to go to the jury, and there has been no misdirection, and it cannot be said that the verdict is one which a reasonable jury could not arrive at, this Court will not set aside the verdict of Guilty which has been found by the jury.’

²⁵ [2006] UK PC 14, reported as *Att Gen v Edmond-O’Brien* 2006 JLR 133.

24 The reason why such an event in Jersey appears to have been not merely exceptional but previously unknown may be because the Jurats, unlike an English jury, are not chosen at random. As the European Court of Human Rights recorded in *Snooks v. United Kingdom* (4) (2002 JLR 475, at para. 19):

“19 Jurats are . . . elected by a special electoral college whose members include the Bailiff, the Jurats, advocates and solicitors of the Royal Court and members of Jersey’s legislature, the States Assembly. Jurats do not necessarily have a legal qualification but are usually individuals with a known history of sound judgment and integrity, which has been consistently demonstrated throughout a lengthy professional, business or civic life.”

25 In England, the test laid down in *R. v. Hopkins-Husson* (3) was found to be somewhat too restricted and was replaced (by s.2 of the Criminal Appeal Act 1968) with a duty to allow an appeal where ‘under all the circumstances of the case [the verdict] is unsafe or unsatisfactory.’ No such change has been made in Jersey but their Lordships would not exclude the possibility of a more liberal interpretation of the old statutory language.

26 In the present case, if the Court of Appeal was saying that there was no case to answer after the prosecution evidence, not only was that not the ground of appeal, it was without any basis; the prosecution’s evidence raised a compelling *prima facie* case, which could be dispelled only, if at all, by oral evidence from Mrs. O’Brien. If the Court of Appeal was (as its references to Mrs. O’Brien’s evidence suggest) looking at the matter after all the evidence, their Lordships consider that the Court of Appeal simply usurped the function of the Jurats. It tried the case on the written record and allowed the appeal because, on its own somewhat imperfect understanding of the prosecution’s case, it would not have convicted. Although it said that it had reviewed the evidence ‘separately and together,’ there is little indication that it had regard to the cumulative weight of the various items of evidence, to each of which it had, sometimes not altogether plausibly, assigned a possible innocent explanation. It is in the nature of circumstantial evidence that single items of evidence may each be capable of an innocent explanation but, taken together, they establish guilt beyond reasonable doubt. The Jurats also had the opportunity to see Mr. and Mrs. O’Brien and the police witnesses give evidence. They disbelieved Mr. and Mrs. O’Brien. The Court of Appeal did not have the same advantages and their Lordships consider that it was not entitled to disturb the

verdict (compare *Barlow Clowes Intl. Ltd. v. Eurotrust Intl. Ltd.* (2)).”

46 The Privy Council decision in *Att Gen v Edmond-O'Brien* is important for three reasons in the present context. The first is the apparent reliance on the nature and composition of the office of Jurat as distinct from the random composition of a jury and therefore, presumably, less likely to make mistakes on the evidence. We shall return to this point. The second is the recognition of the restrictions of the “old statutory language” of art 26(1). That language, according to the court, clearly did not allow for a detailed forensic analysis and the usurpation of the Jurats’ role as judges of fact. The third is the proposition that the Privy Council “would not exclude the possibility of a more liberal interpretation of the old statutory language.” It is clear from the judgment that the Privy Council did not consider that the facts of the case merited such an interpretation.

47 In *Att Gen v Bhojwani*,²⁶ the Court of Appeal considered Lord Hoffmann’s *obiter* statement that the time could be ripe for a contemporary interpretation of the statutory language in art 26(1), but declined to follow its lead—

“This Court has consistently and recently approached its role in a way which recognises the difference between the Jersey and the English statute: e.g. *Hall v Att Gen* 1995 JLR 102 (notably it has been observed that the ‘unsafe and unsatisfactory verdict’ is no part of Jersey Law, and *Baylis v Att Gen* 2004 JLR 409.” (para 204)

48 The court went on to cite from Guernsey authority which served to emphasise the difference between the Jersey and English tests on appeal—

“In principle, the difference in statutory language ought rationally to lead to different results and ought sensibly to be respected. If the States wished to align Jersey to mainland law in this area, they could have done so. Our researches suggest that the issue of reform has never been seriously raised: the record shows that, even if it had been raised, it was rejected.²⁷

Lord Hoffmann’s *dictum* was *obiter* and provisional (‘would not exclude the possibility’) and fell far short of a direction to this

²⁶ [2001] JCA 034.

²⁷ It is unclear what researches the Court of Appeal had undertaken. It is also unclear when reform has been rejected in Jersey. In any event, either the issue has been raised or it has not.

Court to abandon its long standing jurisprudence. Nor did Lord Hoffmann clarify precisely what liberal interpretation he would adopt.

The main thrust of Lord Hoffmann's remarks were to prevent this Court embarking on an exercise of evidential evaluation which was for the Jurats alone (once the trial Judge had decided that there was a case to answer).

...

We therefore direct ourselves by reference to the following propositions and principles, as set out in *Taylor v Law Officers of the Crown* 2007–08 GLR 207 at 214 [a Guernsey appeal]:

‘15 In an appeal against conviction it is necessary to bear in mind at all times the following matters:

(i) The jurisdiction of this court is defined by the 1961 Law (the material parts of which we have already recited).

(ii) The powers of this court are therefore more limited than those currently enjoyed by the Court of Appeal (Criminal Division) in England and Wales, which incorporates the concept of an “unsafe” verdict, and, by judicial gloss, that of a lurking doubt.

(iii) Where an appeal is from the verdict of Jurats, who are not “speaking,” i.e. do not disclose the reasons upon which the verdict is based, “if the summing up is sound the court may well not be able to interfere unless the verdict is obviously wrong” (*Guest v. Law Officers* (3)).” (paras 208–10, 217)

49 Thus the Court of Appeal declined the clear opportunity offered up by our most senior appellate body that the restrictions of the “old statutory language” of art 26(1) could be capable of “a more liberal interpretation of the old statutory language.” This means very simply that change is unlikely to be forthcoming in this respect from the Jersey Court of Appeal in the foreseeable future.

The Guernsey jurisprudence

The test on criminal appeal applied in Guernsey

50 In Guernsey a similar position pertains to that in Jersey. Article 25(1) of the Court of Appeal (Guernsey) Law 1961 is materially similar to s 4(1) of CAA 1907.

Unreasonable verdict

51 This ground has received some limited scrutiny in Guernsey case-law. In *Law Officers v Ogier*²⁸ the Court of Appeal declined to consider grounds of appeal which stated that the conviction was against the weight of the evidence and that the verdict was unsafe and unsatisfactory on the basis that those were not grounds under the Guernsey appeal statute. It was unwilling to entertain arguments based on the new wording embraced by s 4 of the Criminal Appeal Act 1968 and, subsequently, s 2(1) of Criminal Appeal Act 1968. Without expressly embellishing the test to be applied in Guernsey, the court did however refer to English jurisprudence on the CAA 1907: citing *R v Hancock*,²⁹ *R v Hopkins-Husson*³⁰ and *R v Chalk*.³¹

52 The unreasonable verdict ground was also considered, as we have seen, in *Law Officers v Guest*.³² Having approved the test as stated in *Ogier*, that is a recital of the words of the statute, the court added—

“Usually this Court is considering the verdicts of the Jurats in the Royal Court. Such verdicts are not ‘speaking’ verdicts, and it is not, therefore, possible to discern by what process of reasoning, or the lack of it, the Jurats have reached their conclusions. In those circumstances, if the summing up is sound, the Court may well not be able to interfere unless the verdict is obviously wrong. But where as here, the verdict is one of a legally qualified Magistrate it is a ‘speaking’ verdict because the Magistrate has to state reasons for his verdict in his judgment. In such a case it is possible for this Court to review the Magistrate’s process of reasoning, and to consider whether, by that process, the Magistrate has reached a verdict which is ‘unreasonable’, or one which ‘cannot be supported having regard to the evidence’ or whether ‘on any ground there was a miscarriage of justice’.” (p 6, para 12)

53 As we have also seen, the Court of Appeal concluded that it could not quash a verdict simply because the court itself would have reached a verdict different from that of the Magistrate, notwithstanding the lurking doubt each member of the court felt as to the safety of the conviction.

The law of England and Wales

²⁸ 6 April 1989 (No. 27).

²⁹ 1913 8 CAR.

³⁰ *Op cit.*

³¹ (1961) 326 Crim LR.

³² 9 January 2003 (No 2).

The test on appeal under the Criminal Appeals Act 1907: English authority

54 A ready way to test whether the basis of criminal appeal is fit for purpose is to examine its statutory provenance, the CAA 1907, and discover why it is that UK Parliament decided to amend that law in 1968.

55 A useful introduction to the test on appeal which had evolved under the CAA 1907 until its amendment in 1968 may be drawn from *Archbold* (1966 Edition). Under the heading of “Grounds of Appeal”, it categorises the case-law under the following headings—

- (a) defects in the indictment;
- (b) wrongful admission of evidence;
- (c) wrongful exclusion of evidence;
- (d) absence of corroboration;
- (e) misdirection (as to law and evidence);
- (f) no case to go to the jury;
- (g) verdict unreasonable;
- (h) construction of the verdict;
- (i) on any ground there was a miscarriage of justice;
- (j) any other ground which appears to the court to be a sufficient ground of appeal.

56 We shall examine a few of these in more detail. We turn first to “verdict unreasonable”.

Verdict unreasonable or cannot be supported having regard to the evidence

57 Discerning the test that was applied here is not straightforward since there is not one defining case. However it is clear that the threshold for a successful appeal on this ground is not easy to achieve. Thus in *Aladesuru v R*,³³ a case referred to above, the Privy Council emphasised the necessity for strict adherence to the wording of the statute. It was not a sufficient ground to allege that the verdict is against the weight of the evidence (p 55). Not dissimilarly, in *R v McNair*³⁴ the Court of Criminal Appeal stated that an appeal would not

³³ 1956 AC 49.

³⁴ (1909) 2 Cr App R 2.

succeed merely because the case against the appellant was a very weak one—

“This is an extraordinary case, but it falls within the rule which we have stated,³⁵ that we are not here to re-try cases which have been heard by a jury . . . An appeal cannot be allowed solely on the ground that the story is extraordinary. This case is one of oath against oath, and there is no middle course open, although it was suggested that the verdict was one which no twelve reasonable men could have found.” (p 3)

As put in *R v Simpson*³⁶—

“The case [against the appellant] was not a strong one. It would have been open to the jury to acquit, and no one could have called the verdict perverse. But the verdict which the jury has given must stand.” (p 130)

58 Thus, even when the appellate court concluded that it would have possibly come to a different conclusion or expressed surprise at the verdict, it would not interfere: see also *R v Graham*,³⁷ *R v Chalk*.³⁸

59 *R v Hancox*³⁹ appears to have set the bar even higher, namely that the court would set aside a verdict on a question of fact—

“only where the verdict was obviously and palpably wrong. Such cases are rare. This case turned on the manner in which the witnesses gave their evidence; there was a proper direction to the jury, and the Court does not see that it can interfere with the verdict without substituting itself for the Jury, which was the proper tribunal to decide the matter. It is not necessary to say whether we should have given the same verdict.” (p 197, final para)

60 There are a few cases which appear to suggest a more interventionist approach. Thus in *R v Chadwick*⁴⁰ and *R v Hall*⁴¹ the Court of Criminal Appeal was prepared to examine the evidence before the jury. According to one case, it did so to enable it to assess the need for the jury to be satisfied “with that certainty which is

³⁵ The report does not state which “rule” was stated. One presumes it was the unreasonable verdict ground.

³⁶ (1909) 2 Cr App R 128.

³⁷ (1910) 4 Cr App R 218.

³⁸ *Op cit.*

³⁹ (1913) 8 Cr App R 193.

⁴⁰ (1917) 2 Cr App R 247.

⁴¹ (1920) 14 Cr App R 58.

necessary in order to justify a verdict of guilty”, *per R v Wallace*.⁴² In addition, the ground of unreasonable verdict could be satisfied not only for a specific and identified reason, but also where it was “just one of those cases where it is difficult to say what is the exact piece of evidence that leaves an unsatisfactory impression on the mind”, *per R v Barnes*.⁴³ However such cases do not sit well with the general tenor of the authority.

61 More consistent with the tenor of the leading cases such as *Aladesuru*, *supra*, are those decisions which emphasize the advantage vesting in the jury which had seen the relevant witnesses give evidence and were able to judge their demeanour and integrity. As it was put in *R v Perfect*⁴⁴—

“Substantially, the only evidence given was that of the prosecutor and that of the appellant. It was for the jury to say which they believed, and to decide accordingly, bearing in mind that a doubtful case must result in a verdict of acquittal. In these circumstances it seems to us that we must accept the decision of the jury on the facts, and that we are not in a position to quash this conviction, unless we substitute ourselves as a tribunal of fact when we do not have, as had the jury, the opportunity of hearing and seeing the witnesses.” (pp 274–75)

62 The same point was made in *R v Hopkins-Husson*⁴⁵ (a case which has found favour before the Jersey and Guernsey Courts of Appeal)—

“. . . it has been held from an equally early period in the history of this Court that the fact that some members or all the members of the Court think that they themselves would have returned a different verdict is again no ground for refusing to accept the verdict of the jury, which is the constitutional method of trial in this country. If there is evidence to go to the jury, and there has been no misdirection, and it cannot be said that the verdict is one which a reasonable jury could not arrive at, this Court will not set aside the verdict of Guilty which has been found by the Jury.” (p 49, penultimate para)

63 The unreasonable verdict ground and appeal under the CAA 1907 was also the subject of comparative judicial comment following the statutory changes in 1968. The approach adopted by the Court of

⁴² (1932) 23 Cr App R 32 (p 35, final para).

⁴³ (1943) 28 Cr App R 141 (page 144, first sentence).

⁴⁴ (1917) 12 Cr App R 273.

⁴⁵ (1950) 34 Cr App R 47.

Appeal of England and Wales to s 21 of the CAA 1968 was stated by Widgery LJ in *R v Cooper*⁴⁶ to be as follows—

“However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.” (p 271, paras E–G)

64 In *Stafford v DPP*,⁴⁷ a House of Lords decision, Viscount Dilhorne, who cited the above extract from *Cooper* with approval, observed—

“This section [s 4(1) of CAA 1907] was amended in 1966. Under the Act of 1907 it might not have been possible to say that a verdict was unreasonable or not supported by the evidence or that a miscarriage of justice had occurred and so quash the conviction although considerable doubt was felt as to its propriety. So in 1966 a wider discretion was given to the court by Parliament and section 4(1) was amended. It is now replaced by section 2(1) of the Criminal Appeal Act 1968, a consolidation Act.”

65 In the same case, Kilbrandon, LJ took the view that the previous restrictive approach derived not from the words of the statute, but from judicial policy—

“The difference between these words and the phrase used in the Criminal Appeal Act 1907, ‘unreasonable or incapable of being supported’ is important as indicating the erection of a standard for the setting aside of convictions which, until the new phrase was introduced in 1966, it would not have been deemed possible to quash. This is not truly a consequence of a different form of words necessarily and from its own content demanding a standard different from that operative theretofore. It would have been possible for the courts, after 1907, to have said that if a verdict was unsafe or unsatisfactory it was not reasonable. But this line was not taken; more emphasis was laid on the concluding part of

⁴⁶ [1969] 1 QB 267.

⁴⁷ [1974] AC 878.

the phrase, and verdicts which were supported by evidence which in law the jury could accept—and it was for the jury to say whether they would accept—were held to be unassailable. A conviction depending solely on the fleeting identification by a single stranger could, for example, have been upheld, though on a different view of the statute of 1907 it would have been possible to condemn it as unreasonable, just as today it would very probably be thought unsafe or unsatisfactory, and be set aside on those grounds.” (p 911)

66 This view draws an interesting comparison with the diplomatically written *Report of the Interdepartmental Committee on the Court of Criminal Appeal* presented to the UK Parliament in August 1965, known as the *Donovan Report*. In February 1964, the UK Government appointed a Committee, chaired by Lord Donovan, to review certain aspects of the criminal appeal process including the then jurisdiction of the Court of Criminal Appeal.

67 In relation to the power of the Court of Criminal Appeal to interfere with a conviction, the Committee reported—

“From the outset the Court has acted upon the view that its functions are circumscribed in appeals which raise issues of fact. Thus in the first case which came before the Court (*R v Williamson* *The Times* 16/5/1908) the Lord Chief Justice in giving judgment said:

‘It must be understood that we are not here to re-try the case where there was evidence proper to be left to the jury upon which they could come to the conclusion at which they have arrived. The Appellant must bring himself within the words of section 4 (1). Here there was evidence on both sides, and it is impossible to say that the verdict is one to which the jury could not properly have arrived.’

Commenting in a leading article upon the first sitting of the Court, *The Times* said:

‘It will be the duty of the judges in the first few months of the life of the Act to make it evident that they mean not to interfere with the findings of juries unless where they are obviously unfounded.’

The Court has continued to act upon this general principle. It was expressed by Lord Chief Justice Goddard in 1949 in the following words:

‘Where there is evidence on which a jury can act, and there has been a proper direction to the jury, this Court cannot substitute itself for the jury and re-try the case. That is not

our function. If we took any other attitude it would strike at the very root of trial by jury.’ (*R v McGrath* [1949] 2 All E.R. 497)

The view that the Court cannot re-try cases is clearly correct. What has been questioned in this context however is whether the Court is, or should be, debarred from interfering with the jury’s verdict because there was some evidence to support it and because it cannot therefore be described as unreasonable.” (pp 31–32, paras 138–40)

68 In contradistinction to the observations of Kilbrandon LJ in *Stafford*, the *Donovan Report* inclined to the view that the interpretation of s 4(1) adopted by the court was not “open to serious doubt”, and if there was a defect in the prevailing basis for appeal on the facts, as suggested by “a large body of informed opinion”, the defect lay in the language of the statute (p 32, paras 141–42). Oddly, the *Donovan Report* provides no details as to this “large body of informed opinion” other than to note that it considered that there was a defect, as observed above, and that such could be illustrated by references to cases of disputed identity—

“where a crime has been committed, and the proof that a particular person committed it rests solely upon his identification by a witness or witnesses for the Prosecution, then if the Jury accepts that evidence, and rejects the evidence of an alibi tendered by the Defendant, the latter would have little hope of successfully appealing against his conviction in face of the construction of Section 4(1) of the Act adopted by the Court. Yet the verdict could be wrong, and the Defendant innocent.” (paras 142 and 143)

69 Nonetheless, the *Donovan Report* observed that the court had sometimes acted as though the test to be satisfied was in fact whether the verdict was “unsafe or unsatisfactory” in spite of there being some evidence to support it. It cited *R v Wallace*⁴⁸ to this effect. There, the court—

“while quoting section 4 of the Act and purporting to act upon it, did not go to the length of saying that the jury’s verdict of guilty could ‘not be supported having regard to the evidence’, but that the case was not proved with that certainty which was necessary to justify a verdict of guilty.”

However in the view of the *Donovan Report*, such evaluation was—

⁴⁸ (1932) 23 Cr App R 32.

“not easily reconcilable with the view that the weight to be attached to evidence is a matter for the jury, who alone see and hear the witnesses. It is more consistent with the view that, although the Court did not expressly say so, it found the verdict to be unsafe or unsatisfactory.” (para 147)

70 Citing in addition on this point *R v McGrath*⁴⁹ and *R v Parks*,⁵⁰ and observing that these cases were “examples only”, the *Donovan Report* concluded that the test they had adopted meant—

“the Court has acted as a jury and come to the conclusion that on the totality of the evidence, some of which was one way and some the other, it would be unsafe to allow a verdict of guilty to stand.”

Recognising the argument that the court’s approach in these cases, and the other uncited examples, might be said to come within the words of s 4, the *Donovan Report* noted that such an argument would be at odds with other pronouncements of the court as to its powers, and the better approach would therefore be to remove all possibilities of doubt by the express use of the words “unsafe or unsatisfactory” as the relevant test in the statute (*ibid*, para 149; p 72, para 13) This was indeed the course adopted by the legislature in the UK in the form of the Criminal Appeals Act 1968.

71 Kilbrandon LJ’s comments in *Stafford* are echoed in an article by an academic, Michael Dean, entitled “Criminal Appeal Act 1966” in *The Criminal Law Review* [1966] 535. Referring to s 4(1) of the CAA 1907 and writing of the position before the change in the law, he observes—

“It was not the practice of the Court of Criminal Appeal to base its decisions on close analysis of this formula [i.e. the wording of the grounds of appeal]. The terms of the statute might have been construed to allow a far ranging inquiry into the jury’s verdict (1),⁵¹ but from the start, the court declined to do this. The broad picture that emerged was a court concerned, in appeals against conviction, with the judge’s direction, evidence and procedure and the occasional point of substantive law rather than the ‘merits’ of the case. An appellant who could point to a clear

⁴⁹ *Op cit*.

⁵⁰ (1962) 46 Cr App R 29.

⁵¹ Adding as a footnote (1) “Especially ‘miscarriage of justice’ for, even if a distinction is to be made between the ‘verdict of the jury’ and the ‘judgment of the court’, if the latter proceeded on a false finding by the former there is surely a miscarriage of justice.”

misdirection, the wrongful admission or exclusion of evidence or some procedural irregularity, had better prospects of success than the appellant claiming simply that he was innocent and that the jury had come to the wrong decision.”

72 Analysis to the same effect may be found in Rosemary Pattenden, *English Criminal Appeals 1844–1944*.⁵² In her view, notwithstanding the intention of Sir John Walton, the Attorney General who guided the 1907 Bill through the House of Commons, the absence of anything in the wording of the CAA 1907 which compelled such a narrow approach or the fact that the same words were interpreted elsewhere in the Commonwealth on wider grounds, the Court of Criminal Appeal elected not to focus on upsetting dubious verdicts. During the Parliamentary debate on the 1907 Bill, Sir John Walton sought to rebut the argument that s 4 (then in draft) would mean that an appellant was required to undergo a second trial before the appellate court. He said—

“It was only proposed here to give to the Court of Appeal a similar power of review to that given to the Court of Appeal in civil cases. The appeal in a civil case was a re-hearing, and he had himself examined and cross-examined before a Court of Appeal witnesses whom that Court had summoned for the purpose of elucidating some obscurity in the case under investigation, and all that was intended here was that the same functions should be discharged by the Court of Criminal Appeal in the same method and with almost identical powers.” (p 141)

As Pattenden notes—

“In language reminiscent of the modern ‘lurking doubt’ test he envisaged that the new Court would set aside a conviction ‘where there was some element of doubt, where there was some disturbing factor’.” (p 141)

But it was not to be—

“The rationale for the Court of Criminal Appeal’s interpretation of section 4 lay in its belief that the task of determining the accused’s guilt and innocence belonged constitutionally to the jury and to tamper with jury verdicts would undermine public confidence in the jury and ultimately the judicial system.” (p 143)⁵³

⁵² Oxford (1996).

⁵³ See also the analysis of the many failed attempts to establish the right of appeal in criminal cases between 1844 and 1907 (pp 6–33) including the subsection entitled ‘The attitude of the Judges to reform’ (pp 22–25) where

Wrong decision on a question of law

73 The Court of Criminal Appeal more readily allowed appeals where the grounds concerned points of law. As an overview of appeals on points of law, reference is again made to *Archbold*.⁵⁴

Miscarriage of Justice

74 According to *Archbold*, the general words “On any ground there was a miscarriage of justice” in the CAA 1907—

“cover cases where there has been a misdirection as to the evidence, or where the court allows further evidence owing to insufficient time to call it at the trial, or other sufficient reason, or where the trial was conducted unfairly.”

75 This is indicative of a ground of appeal which overlaps with other grounds and also provides something of a catch-all. Such an interpretation is reflected in the Jersey case-law cited above: *Simao v Att Gen*; and *Swanston v Att Gen*. See also the similar interpretation placed on this ground by the Commonwealth jurisdictions *post*.

Pattenden writes—“During the 19th Century the criminal law became steadily more merciful . . . The one area in which there was scarcely any progress was that of appeals”. There were a number of obstacles to such reform, but one was the “attitude of the judges. The bulk of the judiciary opposed an appeal on the facts up to the very day the Court of Criminal Appeal was created [by CAA 1907]” (p 22).

⁵⁴ 1966 ed.

The proviso

76 As set out above, the proviso granted a discretion to the appellate court whereby, even though it had formed the view that a particular point raised in the appeal could be decided in favour of the appellant, it could dismiss the appeal “if it considers that no substantial miscarriage of justice has actually occurred.” In practice, it appears that the proviso in the 1907 CAA was mainly applied where the ground of appeal was misdirection as to law or wrong admission or rejection of evidence: see for example, *R v Oster-Ritter*,⁵⁵ *R v Parker*,⁵⁶ and generally *Archbold*.

77 What test did the courts apply? Reference has already been made to *R v Haddy* and its approval of the statement in *Cohen*. This is reflected in the summary in *Archbold*, that a “substantial miscarriage of justice” occurred where by reason of a mistake, omission or irregularity in the trial the appellant had lost a chance of acquittal which was fairly open to him. The court could apply the proviso and dismiss the appeal if it was satisfied that on the whole of the facts and with a correct direction the only proper verdict would have been one of guilty (*op cit*, para 939). The Donovan Committee identified two conflicting views in English cases about the way in which the proviso should be operated. It concluded that it was important to distinguish between a test which refers to the trial jury and a test which refers to any reasonable jury. It concluded that the debate between the alternatives had been resolved in England by the decision of the House of Lords in *Stirland v Director of Public Prosecutions*⁵⁷ in favour of the “reasonable jury” test. Certainly *Stirland* states—

“When the transcript is examined, it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken.” (p 46)

However there is no analysis of this particular aspect.

The law of Commonwealth jurisdictions*The test on criminal appeal in selected Commonwealth jurisdictions*

78 The jurisdictions of Australia, New Zealand and Canada currently have criminal appeal provisions which set the tests on appeal in materially similar terms to that of the CAA 1907 and therefore of the

⁵⁵ (1948) 32 Cr App R 191.

⁵⁶ (1961) 45 Cr App R 1.

⁵⁷ [1944] AC 315.

relevant provisions in the equivalent Jersey and Guernsey statutes. Their jurisprudence interpreting these provisions is enlightening and on normal principles may be of persuasive effect upon the Jersey Court of Appeal's interpretation: see *Mesch v Housing Cttee*.⁵⁸

79 Space does not allow, in relation to the cases I cite below from the Commonwealth, a full analysis of the history of the consideration by the superior courts of the relevant appeal provisions. I shall draw some points together in overview at the end of this article. However, suffice it to say, I hope, that the history of this consideration has been controversial and reveals a tension, in the main drawn from the wording of the statutes, but also from the judicial view of the role of an appellate court, as to the extent and degree with which a court can interfere with a decision of a jury which has had the advantage of seeing the witnesses and hearing the evidence in the charged context of a trial. It also reveals a tension, which has reared its head in Jersey and Guernsey, arising from attempts to stretch the wording of the statutes to include the "unsafe or unsatisfactory" threshold introduced in England and Wales in 1968.

Australia

80 Judicially, Australia operates on a federal system. Each State has its own statute which permits a right of criminal appeal. The criminal appeal provisions are in common form.⁵⁹

Verdict unreasonable or cannot be supported having regard to the evidence

81 The High Court of Australia has not infrequently found itself seized of consideration of the statutory language as to this ground of appeal. That consideration currently rests with the decision of the High Court in *M v R*⁶⁰ (*per* the majority decision), a case on appeal from the appellate court of New South Wales.⁶¹

82 The facts of the case illustrate the position the court found itself in as it applied the strictures of the statutory language. The appellant had been convicted on several counts of sexual offences against one of his juvenile daughters. There were discrepancies in the evidence of the

⁵⁸ 1990 JLR 269 at 278.

⁵⁹ *M v R* (1994) HCA 63 181 C.L.R. 487, at 492.

⁶⁰ (1994) 181 CLR 487.

⁶¹ The relevant statute being s 6(1) of the Criminal Appeal Act 1912 (NSW) which is near identical in wording to the relevant Jersey and Guernsey statutes.

daughter and her evidence was uncorroborated. He denied the offences both in an interview with the police and in evidence which he gave at trial. The appellant and the mother of the child had divorced amicably it seemed, and he had remarried. There were also children of the second marriage. Fortnightly, the children of the first marriage spent the weekend with the appellant, his wife and the two children of the second marriage. They occupied a smallish house. The first incident complained about occurred late evening in the house when all but the appellant and his daughter were said to be in bed. The complainant said she did not speak to anyone about the events until two days afterwards when she told a friend at school. She then subsequently told her twin sister. The second offence took place in a bedroom at the house. The following day the family held a barbeque to which a number of friends were invited. The complainant had participated normally in the events of the day. Two days after, the complainant told her school friend what had occurred. She did not tell her mother until she saw the school counsellor about a month later. The appellant had co-operated with the police investigating the complaint and consistently denied the allegations against him. His evidence had not been discredited in any way by cross-examination. The evidence of one of the medical practitioners called by the prosecution was inconsistent with the complainant's account of sexual intercourse. There were some other discrepancies in the evidence.

83 The crux of the matter, in the view of the majority, were two apparently inconsistent positions. First, there was the—

“improbability of the Appellant acting as he was alleged to have done in the circumstances prevailing on that night, namely, on a squeaky bed in an unlocked bedroom which was only a short distance from, and within hearing distance, of, another bedroom occupied by the Appellant's wife, in a fully occupied, small house.”

Second, the Jury had no doubt preferred the evidence of the complainant over the appellant, having seen them both. However there was no corroboration and, as the court observed, an innocent man could have done no more than the accused did in conducting himself at interview with the police or in giving evidence. What was to be the test on appeal?

84 Mason, CJ gave the decision of the majority. He observed—

“ . . . the criminal appeal provisions which are in common form in this country allow a verdict that is unsafe or unsatisfactory to be set aside, notwithstanding those words do not appear in the legislation . . .

Where a court of criminal appeal sets aside a verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence, it frequently does so expressing its conclusion in terms of a verdict which is unsafe or unsatisfactory. Other terms may be used such as ‘unjust or unsafe’ . . . or ‘dangerous or unsafe’. In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s. 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, ‘nonetheless it would be dangerous in all the circumstances to allow the verdict of guilty to stand’. But a verdict may be unsafe or unsatisfactory for reasons which lie outside the formula requiring that it be ‘unreasonable’ or incapable of being ‘supported having regard to the evidence’. A verdict which is unsafe or unsatisfactory for any other reason must also constitute a miscarriage of justice requiring the verdict to be set aside.” (pp 492–93)

85 The High Court indicated the question it must ask itself in determining whether the verdict is unsafe or unsatisfactory—

“Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty . . . But in answering that question the court must not disregard or discount either the consideration that the jury as the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations . . .” (p 493, penultimate para)

86 Thus, according to the High Court, the unreasonableness ground does not turn on whether as a matter of law there was some evidence to support the verdict. Rather, the court is to make its own assessment of the evidence and determine whether upon the whole of the evidence the jury could properly have been satisfied to the required standard that the accused was guilty.

87 As to application of the test—

“In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury’s advantage in seeing and hearing the evidence is

capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and set aside a verdict based upon that evidence.” (p 494, final para)

88 The appellant was acquitted by a majority decision. The majority of four judges subscribed to the view set out by Mason, JA, the relevant extracts of which are set out above. A further judge agreed with the test set by the majority, but would have ordered a retrial on lesser charges. Two other judges also dissented and did so, in no small part, on the basis that they did not accept the test as elucidated by Mason, JA. As one of them, Brennan JA, put it—

“In my opinion, when a CA is faced with an appeal against conviction in which no more appears than a conflict between evidence that is sufficient in law to support the conviction and evidence tending to show that D is not guilty, that Court has but one function to perform. That function is to determine whether a Jury, acting reasonably in appreciating the burden and standard of proof, could have convicted on the evidence available to support the conviction.” (p 504, para 2)

Miscarriage of justice

89 For completeness, I undertake a brief review of the Australian position on the appeal ground of miscarriage of justice and on the proviso.⁶²

90 Australian case-law is indicative of an overlap in practice between the miscarriage of justice ground and the grounds of unreasonable verdict and wrong decision on question of law. Focus on this ground in the main has been on cases where something, whether or not falling

⁶² I am grateful for the assistance of John McCormick in relation to the consideration of miscarriage of justice and the proviso in the Common-wealth jurisdictions.

within the other grounds, has rendered a verdict unsafe or suspect or the trial unfair.

91 The overlap was highlighted in *M v R*⁶³—

“But a verdict may be unsafe or unsatisfactory for reasons which lie outside the formula requiring that it not be ‘unreasonable’ or incapable of being ‘supported having regard to the evidence’. A verdict which is unsafe or unsatisfactory for any other reason must also constitute a miscarriage of justice requiring the verdict to be set aside. In speaking of the Criminal Appeal Act in *Hargan v The King*, Isaacs J said ‘If [the appellant] can show a miscarriage of justice, that is sufficient. That is the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance’.” (p 493, first para)

92 *Whitehorn v R*⁶⁴ observes to similar effect—

“Although the third ground [of statutory appeal] speaks of miscarriage of justice specifically, each of the first and second grounds is also concerned with the occurrence of such a miscarriage. For an error of law or a verdict which is unreasonable or cannot be supported on the evidence will amount to a miscarriage of justice.” (p 685, second para)

93 As the court observed in *Davies and Cody v The King*⁶⁵ the duty imposed on a Court of Appeal to quash a conviction when it thinks that on any ground there was a miscarriage of justice covers—

“not only cases where there is affirmative reason to suppose that the Appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the Court’s view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the Jury may have been mistaken or misled.”

The proviso

94 The operation of the proviso in the Australian context was subjected to an extended analysis in *Weiss v R*⁶⁶—

⁶³ (1994) HCA 35.

⁶⁴ (1983) HCA 42; 152 CLR 657.

⁶⁵ (1937) HCA 27; 57 CLR 170.

⁶⁶ (2005) HCA 81.

“The fundamental task committed to the appellate court by the common form of criminal appeal statute is to decide the appeal. Insofar as that task requires considering the proviso, it is not to be undertaken by attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do. Rather, in applying the proviso, the task is to decide whether a ‘substantial miscarriage of justice has actually occurred’.” (para 35)

“By hypothesis, when the proviso falls for consideration, the appellate court has decided that there was some irregularity at trial. If there was not, there is no occasion to consider the proviso. In cases, like the present, where evidence that should not have been adduced has been placed before the jury, it will seldom be possible, and rarely if ever profitable, to attempt to work out what the members of the trial jury actually did with that evidence. In cases, like the present, where the evidence that has been wrongly admitted is evidence that is discreditable to the accused, it will almost always be possible to say that the evidence might have affected the jury’s view of the accused, or the accused’s evidence. And unless we are to return to the Exchequer rule (where any and every departure from trial according to law required a new trial) recognition of the possibility that the trial jury might have used wrongfully received evidence against the accused cannot be treated as conclusive of the question presented by the proviso.” (para 36)

“Three fundamental propositions must not be obscured. First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Secondly, the task of the appellate court is an objective task not materially different from other appellate tasks. It is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial; it is not an exercise in speculation or prediction. Thirdly, the standard of proof of criminal guilt is beyond reasonable doubt.” (para 39)

“It is neither right nor useful to attempt to lay down absolute rules or singular tests that are to be applied by an appellate court where it examines the record itself, beyond the three fundamental propositions mentioned earlier.” (para 42)

“There are, however, some matters to which particular attention should be drawn. First, the appellate court’s task must be undertaken on the whole of the record of the trial including the fact that the jury returned a guilty verdict. The court is not ‘to speculate upon probable reconviction and decide according to how the speculation comes out’ [58]. But there are cases in which

it would be possible to conclude that the error made at trial would, or at least should, have no significance in determining the verdict that was returned by the trial jury. The fact that the jury did return a guilty verdict cannot be discarded from the appellate court's assessment of the whole record of trial. Secondly, it is necessary always to keep two matters at the forefront of consideration: the accusatorial character of criminal trials such as the present and that the standard of proof is beyond reasonable doubt." (para 43)

"Next, the permissive language of the proviso ('the Court . . . may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal . . .') is important. So, too, is the way in which the condition for the exercise of that power is expressed ('if it considers that no substantial miscarriage of justice has actually occurred'). No single universally applicable description of what constitutes 'no substantial miscarriage of justice' can be given. But one negative proposition may safely be offered. It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty." (para 44)

95 Thus the appellate court must form its own view, to the standard of beyond a reasonable doubt, about whether or not a substantial miscarriage of justice has actually occurred in order to apply the proviso. While the case-law has shied away from providing a universal description or definition of what constitutes "no substantial miscarriage of justice", the negative proposition adopted in para 44 of *Weiss* above has also been endorsed in other cases. The proviso cannot be applied unless the appellate court is affirmatively satisfied of the appellant's guilt beyond a reasonable doubt. However, it is also clear that this negative proposition is not necessarily sufficient for the proviso to be applied. In the judgment of Gummow and Haynes, JJ in *AK v The State of Western Australia*⁶⁷—

"In *Weiss*, the Court identified one circumstance in which the proviso to the common form criminal appeal statute cannot be engaged. The Court said that the proviso cannot be engaged 'unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of

⁶⁷ (2008) HCA 8 (p 17, para 53).

guilty'. This negative proposition (about when the proviso cannot be engaged) must not be treated as if it states what suffices to show that no substantial miscarriage has occurred. To treat the negative proposition in this way would be to commit the very same error which *Weiss* sought to correct, namely, taking judicial statement about aspects of the operation of statutory provisions as substitutes for the statutory language.”

New Zealand

96 Section 385(1) of the Crimes Act 1961 sets the basis on which a criminal appeal shall be determined in New Zealand and is in materially the same terms as art 26 of the 1961 Jersey Law and art 25 of the 1961 Guernsey Law.⁶⁸

Unreasonable verdict

97 In New Zealand, the most recent and leading authority on the unreasonable verdict ground is the decision of the Supreme Court in *Owen v R*.⁶⁹ *Owen* followed a comprehensive review of relevant authorities from New Zealand and other Commonwealth jurisdictions by the New Zealand Court of Appeal in *R v Munro*.⁷⁰

98 The facts of *Munro* were not, in general terms, dissimilar from those in *M v R*. *Munro* concerned an allegation of rape where two adults had arranged to meet after an evening out separately with friends. They had booked a hotel room at the last moment and had sex together. Both had been drinking. There was evidence to suggest the sex was consensual and evidence to show that it was not, in particular the manner in which the victim had left the hotel room and what she said to third parties immediately thereafter.

99 In determining an appeal on the basis that the verdict was unreasonable or cannot be supported, the Supreme Court in *Owen* found the “substance of the correct approach” to be encapsulated in the follow words drawn from *Munro*—

“A verdict will be deemed unreasonable where it is a verdict that, having regard to all the evidence, no jury could reasonably have reached to the standard of beyond reasonable doubt.”⁷¹ (para 14)

⁶⁸ Section 385 is set out at para 50 of *R v Haig* [2006] NZCA 226. The statute has an additional ground to art 26, namely “That the trial was a nullity.”

⁶⁹ [2008] 2 NZLR 37.

⁷⁰ (2007) NZCA 510.

⁷¹ *Munro* actually stated that “A verdict will be deemed unreasonable . . .”, but the Supreme Court found that “The word ‘deemed’ suggests a reluctance

100 The Supreme Court added—

“There is, in the end, no need to depart from the language of Parliament. The question is whether the verdict is unreasonable. That is the question the Court of Appeal must answer. The only necessary elaboration is that expressed earlier, namely that a verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty. We do not consider it helpful to employ other language such as unsafe, unsatisfactory or dangerous to convict. These words express the consequence of the verdict being unreasonable. They should not be used as tests in themselves.” (para 17)

101 As to the words “cannot be supported having regard to the evidence”, the Supreme Court stated—

“It is now appropriate to recognise that the ‘cannot be supported’ limb of Section 385(1)(a) has no practical significance. An ‘unsupported’ verdict must necessarily be an unreasonable verdict. An unreasonable verdict has insufficient evidence to support it. A verdict with no evidence to support it is simply at the outer end of a continuum. Henceforth it will suffice simply to apply the unreasonableness limb.” (para 12)

102 The Supreme Court also endorsed the principles set out in the following passage from the judgment in *Munro*⁷²—

“The Court must always, however, keep in mind that it is not the arbiter of guilt, and that reasonable minds might disagree on findings of fact . . . While we have rejected the English ‘lurking doubt’ approach, we consider, like the Canadian Supreme Court, that that concept provides a useful trigger for a fuller review. A lurking doubt or uneasiness experienced by the appellate court may be an important indication that the verdict was not reasonable or unsupportable on the evidence. However, by itself a ‘lurking doubt’ is not sufficient grounds on which an appeal court should deem a conviction to be unsafe. The law in New Zealand has always required an appellate court to recognise that reasonable minds might disagree on findings of fact and that the jury, not the appellate court, is the ultimate arbiter of fact. It is only where a jury’s verdict is unreasonable on all the evidence (in

to find a verdict actually unreasonable” and rejected the use of the word in that context (para 15).

⁷² Para 13 of *Owen*; paras 87–89 of *Munro*.

the sense described above . . .) that an appeal court may properly differ from it.

Finally, we note that an appellant must be able to point to a sufficient foundation for his or her submission that a ground of appeal under Section 385(1)(a) exists before the Court is required to embark on the exercise of reviewing all of the evidence.”

Miscarriage of justice

103 Like Australia, New Zealand case-law is indicative of an overlap in practice between the miscarriage of justice ground and the grounds of unreasonable verdict and wrong decision on question of law. The case-law in this area has been more concerned with the trial process rather than the outcome. As the Supreme Court put it in *Matenga v R*⁷³—

“Paragraph (c) appears on its face to be a residual provision. It applies where the Court is of the opinion that on any ground there was a miscarriage of justice. It is wide enough to be capable of overlapping the paragraphs (a), (b) and (d) but is properly used in situations which do not comfortably fit with the other paragraphs, often where, as in the present case, inadmissible evidence has been admitted. [Noting by way of footnote that ‘an incorrect ruling on the admissibility of evidence may also be able to be dealt with under paragraph (b) as an error on a question of law’.] It can potentially apply to anything falling outside the other paragraphs which has gone wrong with the substance or process of the case and has not been cured or become irrelevant to the verdict. That can include something which has occurred either before or during the trial. It includes prosecutorial or juror misconduct and failures of any kind by the judge which cannot accurately be described as a wrong decision on any question of law. It must also be taken to include situations where admissible defence evidence is wrongly excluded or where after the trial fresh and cogent evidence comes to notice and casts doubt on the guilty verdict.” (p 152, para 11)

⁷³ (2009) NZ SC 18 (p 152, para 11).

The proviso

104 In the already-cited *Matenga*, the Supreme Court reviewed the application of the proviso. It referred to *Owen* where the Supreme Court concluded that the proviso did not apply to para (a) (unreasonable verdict) as a finding that the verdict was unreasonable must always constitute a substantial miscarriage of justice. In respect of para (b), where the court is directed to allow the appeal if it is of the opinion that the verdict “should be set aside” on the ground of a wrong decision on any question of law, yet may dismiss the appeal under the proviso, the court observed that—

“in such a case it might be expected that the Court would not have formed the opinion that the conviction should be set aside on the ground of the wrong decision. Nevertheless, it has long been accepted that paragraph (b) is not to be read as having that literal effect and that the proviso can be applied in relation to an error of law falling within its scope. If it were otherwise, different approaches might be required as between paragraphs (b) and (c) which would add an additional complication to what is already a troublesome provision.” (p 151, para 10, lines 38–45)

105 Observing that para (c) (miscarriage of justice) is a residual provision which is wide enough to overlap with paras (a), (b) and (d) (the nullity ground which does not appear in the Jersey and Guernsey legislation) and could be used in situations which did not comfortably fit within the other paragraphs, it noted that the leading case in New Zealand for the last decade on this aspect had been *Mcl*.⁷⁴ In that case, the majority said that para (c) was primarily concerned with process and its effect on a hypothetical jury (as opposed to the actual jury in the case). The issue in *Matenga* was whether the court should go further and come to its own view of the evidence. In holding that it would substantially follow the Australian case of *Weiss*, it said—

“It is artificial to say that judges, while holding one view themselves, may ascribe a different view to the hypothetical Jury. Therefore, in reality, and this should be reflected in the test, the decision to confirm a Jury verdict despite something having gone wrong, depends upon whether the appellate court considers a guilty verdict was inevitable on the basis of the whole of the admissible evidence (including any new evidence) . . .” (p 157, para 28, lines 6–12)

“Following conviction, after a fair trial by jury, Parliament has given the appeal courts an ability to uphold the conviction despite

⁷⁴ (1998) 1 NZLR 696 CA.

there being a miscarriage of justice in some respects. 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 rule 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; and . . . considerable caution is necessary before resorting to the proviso when the ultimate issues depend, as they frequently will, on the assessment of witnesses.” (p 157, para 29, lines 19–29)

“The *Weiss* Court accepted that a miscarriage under our para (c) is anything which is a departure from applicable rules of evidence or procedure. We have hesitated about whether in its statutory context that is the meaning which should be given to the word, lest it might lead to the application of the proviso in a large number of cases . . . departing in this respect from *Weiss*, we consider that in the first place the appeal court should put to one side and disregard those irregularities which plainly could not, either singularly or collectively, have affected the result of the trial and therefore cannot properly be called miscarriages. A miscarriage is more than an inconsequential or immaterial mistake or irregularity.” (p 157, para 30, lines 30–41)

“Proceeding in this way and having 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. [adding by way of a footnote ‘A “substantial” miscarriage is one which in substance, that is, in reality, affected the result of the trial.’] 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 this 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.” (p 158, para 31, lines 1–12)

“It is not enough that a jury could reasonably have convicted on the basis of the admissible evidence. When, because of the miscarriage, the Crown needed to rely upon the proviso it had to

go further and satisfy the Court that a guilty verdict was not only reasonable but inevitable.” (p 159, para 35, lines 13–17)

Canada

106 The Canadian criminal appeal provisions are set out in s 686(1)(a) of the Canadian Criminal Code and are materially in the same terms as art 26 of the 1961 Law, with the exception of the proviso.

Unreasonable verdict

107 The test on the reasonableness of a verdict, as with the other commonwealth jurisdictions, has been the subject of analysis in a number of cases. In *R v Biniaris*,⁷⁵ the Supreme Court stated⁷⁶—

“The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *Yebe* as follows:

‘[C]urial review is invited whenever a jury goes beyond a reasonable standard . . . [T]he test is “whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered”.’

That formulation of the test imports both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyse and, within the limits of appellate disadvantage, weigh the evidence. This latter process is usually understood as referring to a subjective exercise, requiring the appeal court to examine the weight of the evidence, rather than its bare sufficiency. The test is therefore mixed, and it is more helpful to articulate what the application of that test entails, than to characterize it as either an objective or a subjective test.” (p 26, para 36)

“It is insufficient for the court of appeal to refer to a vague unease, or a lingering or lurking doubt based on its own review of the evidence. This ‘lurking doubt’ may be a powerful trigger for

⁷⁵ (2000) SCC 15.

⁷⁶ *Biniaris* concerned a murder arising from a vicious assault. The victim was attacked first by another, then by Biniaris. The key issue was whose actions lead to the fatality. The expert medical evidence was at odds on the issue.

thorough appellate scrutiny of the evidence, but it is not, without further articulation of the basis for such doubt, a proper basis upon which to interfere with the findings of a jury. In other words, if, after reviewing the evidence at the end of an error free trial which led to a conviction, the appeal court judge is left with a lurking doubt or feeling of unease, that doubt, which is not in itself sufficient to justify interfering with a conviction, may be a useful signal that the verdict was indeed reached in a non-judicial manner. In that case, the court of appeal must proceed further with its analysis.” (p 28, para 38)

“When a jury which was admittedly properly instructed returns what the appeal court perceives to be an unreasonable conviction, the only rational inference, if the test in *Yebe*s is followed, is that the jury, in arriving at that guilty verdict, was not acting judicially. This conclusion does not imply an impeachment of the integrity of the jury. It may be that the jury reached its verdict pursuant to an analytical flaw similar to the errors occasionally incurred in the analysis of trial judges and revealed in their reasons for judgment. Such error would of course not be apparent on the face of the verdict by a jury. But the unreasonableness itself of the verdict would be apparent to the legally trained reviewer when, in all the circumstances of a given case, judicial fact-finding precludes the conclusion reached by the jury . . . after the jury has been adequately charged as to the applicable law, and warned, if necessary, about drawing possible unwarranted conclusions, it remains that in some cases, the totality of the evidence and the peculiar factual circumstances of a given case will lead an experienced jurist to conclude that the fact-finding exercise applied at trial was flawed in light of the unreasonable result that it produced.” (p 29, para 39)

“When an appellate court arrives at that conclusion, it does not act as a ‘thirteenth juror’, nor is it ‘usurping the function of the jury’. In concluding that no properly instructed jury acting judicially could have convicted, the reviewing court inevitably is concluding that these particular jurors who convicted must not have been acting judicially. In that context, acting judicially means not only acting dispassionately, applying the law and adjudicating on the basis of the record and nothing else. It means, in addition, arriving at a conclusion that does not conflict with the bulk of judicial experience. This, in my view, is the assessment that must be made by the reviewing court. It requires not merely asking whether twelve properly instructed jurors, acting judicially, could reasonably have come to the same result, but doing so through the lens of judicial experience which serves as

an additional protection against an unwarranted conviction.” (p 30, para 40)

“It follows from the above that the test in *Yebe*s continues to be the binding test that appellate courts must apply in determining whether the verdict of the jury is unreasonable or cannot be supported by the evidence. To the extent that it has a subjective component, it is the subjective assessment of an assessor with judicial training and experience that must be brought to bear on the exercise of reviewing evidence upon which an allegedly unreasonable conviction rests. That, in turn, requires the reviewing judge to import his or her knowledge of the law and the expertise of the courts, gained through the judicial process over the years, not simply his or her own personal experience and insight. It also requires that the reviewing court articulate as explicitly and as precisely as possible the grounds for its intervention.” (p 31, para 42)

Miscarriage of justice

108 This limb, set out in s 686(1)(a)(iii) of Canadian Criminal Code, in similar manner to Australian and New Zealand jurisprudence, has been interpreted to encompass the fairness of the process used to obtain the verdict, that is, procedural defects in the conduct of the trial and the defendant’s entitlement to a fair trial, that do not fall within an error of law or lead to an unreasonable verdict. In *R v Morrissey*⁷⁷ the ambit of the miscarriage of justice limb was described in the following terms—

“I turn next to s. 686(1)(a)(iii). This subsection is not concerned with the characterization of an error as one of law, fact, mixed fact and law or something else, but rather with the impact of the error on the trial proceedings. It reaches all errors resulting in a miscarriage of justice and vindicates the wide jurisdiction vested in this court by s. 675(1). The long reach of s. 686(1)(a)(iii) was described by McIntyre J., for a unanimous court, in *R. v. Fanjoy* (1985), 21 C.C.C. (3d) 312 at 317–18 (S.C.C.):

. . . A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice

. . .

Fanjoy, like most cases where s. 686(1)(a)(iii) has been invoked, involved prosecutorial or judicial misconduct in the course of the

⁷⁷ (1995) 97 C.C.C (3d) 193.

trial: . . . Such conduct obviously jeopardizes the fairness of a trial and fits comfortably within the concept of miscarriage of a justice. Nothing in the language of the section, however, suggests that it is limited to any particular type of error. In my view, any error, including one involving a misapprehension of the evidence by the trial judge must be assessed by reference to its impact on the fairness of the trial. If the error renders the trial unfair, then s. 686(1)(a)(iii) requires that the conviction be quashed.” (pp 44–45, final para)

109 Actual prejudice resulting from the irregularity or error is not a prerequisite under the s 686(1)(iii) limb and it may be enough that there is an appearance of unfairness: *R v Cameron*⁷⁸ put it—

“*R. v. Masuda* was referred to with approval by this court, in *R. v. Hertrich* (1982), 67 C.C.C. (2d) 510, 137 D.L.R. (3d) 400 [leave to appeal to S.C.C. refused (1982), 45 N.R. 629n], where the accused had been charged with first degree murder. The court considered the effect of anonymous telephone calls received by jurors. In ordering a new trial, Martin J.A. stated at p. 543 C.C.C.:

‘I am, however, unable to accept (counsel’s) submission that the showing of actual prejudice to the appellants is essential to constitute a miscarriage of justice within s. 613(1)(a)(iii) of the Code (now s. 686(1)(a)(iii)). A miscarriage of justice within s. 613(1)(a)(iii) of the Code occurs where there is an appearance of unfairness in the trial of an accused: see *R. v. Masuda*.’

The reconciliation of these apparently conflicting approaches lies in identifying the concern raised by the offending circumstance. If, as in *Gilson and Labelle*, the offensive conduct is not such as to taint the administration of justice, then the concern is properly directed to whether actual prejudice was occasioned to the accused. Where the events in question are so serious as to affect the administration of justice, as they were in *Hertrich*, then the focus turns upon the justice system and the miscarriage of justice occurs whenever the confidence of the public in the system is shaken; that confidence is equally shaken by the appearance as by the fact of an unfair trial.” (p 5, penultimate para)

110 In *R v Guyatt*⁷⁹ arguments that the miscarriage of justice limb might be used by the court to set aside a verdict based on weak evidence was considered—

⁷⁸ (1991) 2 OR 633.

“... s 686(1)(a)(iii) is concerned with the impact of an error on the trial proceedings which results in an unfair trial. The focus of s 686(1)(a)(iii) is not the verdict itself, but the fairness of the process which produced the verdict.

I do not accept that s 686(1)(a)(iii) may operate to set aside a verdict which is based on weak evidence and for which a poor jury charge was delivered. Such a case presents two discrete areas of difficulty. The first is concerned with the weight of the evidence, the second with the law that the jury were told applies to their deliberations. The Code provides different mechanisms for dealing with these independent issues. Section 686(1)(a)(i) provides a means for an appeal court to set aside a verdict which rests on weak evidence, that is, a verdict which does not meet the test in *Yebe*s; s 686(1)(a)(ii) in combination with s 686(1)(b)(iii) permits the appeal court to set aside a verdict where an error or errors of law on the part of the trial judge might have affected the verdict; and finally s 686(1)(a)(iii) provides a basis for setting aside a verdict where the trial process has been contaminated resulting in an unfair trial.” (pp 13–14, paras 70–71)

The proviso

111 The proviso in the Canadian Criminal Code is expressed differently from art 26(1) of the local 1961 statutes. The wording of the equivalent to the Jersey and Guernsey proviso (s 686(1)(b)(iii)) is expressly restricted to the second limb, namely to a wrong decision on a question of law. A further proviso is provided in s 686(1)(b)(iv) and specifically refers to procedural irregularity at trial.

112 There is a degree of potential overlap between the types of errors dealt with in the case-law which are characterised as falling within the error of law limb of s 686(1)(a)(ii) of the Canadian Criminal Code, to which the miscarriage of justice proviso under s 686(1)(b)(iii); and those characterised as falling within the miscarriage of justice limb under s 686(1)(a)(iii), to which the s 686(1)(b)(vi) proviso might apply. In *Fanjoy v The Queen*⁸⁰ the trial judge’s failure to limit cross-examination was characterised as an error of mixed law and fact and considered under the miscarriage of justice limb (s 686(1)(a)(iii)). In *Khan*⁸¹ the majority judgment stated that an error of law was any decision that was an erroneous interpretation or application of the law. In *Khan* the jury had been inadvertently given a transcript of a *voir*

⁷⁹ (1997) 119 CCC 304.

⁸⁰ (1985) 2 SCR 233.

⁸¹ (2001) 3 SCR 823.

dire which revealed that the accused had made comments which had been ruled inadmissible. The mistake was discovered and the defendant's counsel sought an order for a mistrial. A declaration of mistrial was refused, and it is this decision that the appellant sought to challenge as an error of law. If the error in making the transcripts available to the jury had not been picked up until after the trial had concluded, and therefore there was no decision on a mistrial, then the appeal might have been brought under the miscarriage of justice limb.

113 Under Canadian jurisprudence there appear to be two categories of error that justify the application of the "no substantial wrong or miscarriage of justice" proviso. In *Khan*, these classes were described as—

"The first category is that of so-called 'harmless errors', or errors of a minor nature having no impact on the verdict. The second category encompasses serious errors which would justify a new trial, but for the fact that the evidence adduced was seen as so overwhelming that the reviewing court concludes that there was no substantial wrong or miscarriage of justice." (p 22, para 26)

114 The relevant test in terms of applying the proviso appears to be the inevitability of the verdict. If the verdict reached is found to be inevitable, absent the error of law, then the proviso will be applied. This is the same irrespective of which of the two categories the error of law falls under: *Khan* (para 90—*per* Lebel, J (in the minority; the majority deciding the case on error of law grounds)).

Wise words from the Commonwealth

115 In closing on the overview of the position in the jurisdictions of Australia, New Zealand and Canada, here are two closing quotations from the Commonwealth. Firstly, from the minority judgment of Hammond JA in *R v Munro*, we have the following wise words⁸²—

"My first concern relates to the proper approach to the interpretation of the relevant portion of s 385(1) of the Crimes Act 1961 . . . Now those are reasonably obvious words. They express principles; they are not prescriptive 'rule' type words, of a technical character. They would be understood by the person in the street. But what has happened around the common law world is that both the judges and the commentators have fallen upon them, bringing in their wake a confusing volume of judgments

⁸² A minority judgment which found with the majority on the merits but observed "in some respects my views differ on the law, or at least the articulation of it" (para 236).

and commentary. This brings to mind the insightful address delivered by Lord Shaw of Dunfermline to the American Bar Association in San Francisco on 9 August 1922. His Lordship said that in ancient times interpretation was afflicted by the obstacle of formality, but ‘in modern times it is authority’. Lord Shaw said this has produced a new obstacle, ‘thick as the jungle’.

The words have already been in the hands of the judicial commentators; and as is the way with commentators, the one refers to the other, and the third to the preceding two, till the text is obscured, and the vision of the interpreter cannot get through the thicket except at the risk of his being considered a rebel and iconoclast.

. . . A consequence of the judges falling upon a statute can be that there is the difficulty of trying to produce a seamless web of jurisprudence across dozens of appellate authorities. This bogs down courts in their day-to-day work and all too often deflects judges from their proper endeavour in an appeal of this character. Yet the appropriate principles are stated in the parliamentary language itself!

This leads to a second broad concern: that of context . . . In New Zealand, the state of the law is that convicted persons have no alternative but to look to the Court of Appeal or the Supreme Court as a safeguard against wrongful convictions and, at least in my view, in protecting the integrity of the system under which they were convicted . . . The short point is that, as a matter of context, in New Zealand the entire burden falls on the Court of Appeal or the Supreme Court of New Zealand, as the case may be. In such a context, the words of the statute should not be read down, because there is no other avenue of redress for the wrongly convicted person.

My third concern is that, approaching the words of the statute with the two concerns I have already voiced in mind, any constraints which are put on the words should only be constraints or explanations going to the respective roles which the various actors in this enterprise are to undertake. Apart from that, there is no need for any further exegesis on the statutory words.” (paras 237–42)

116 Secondly, and to illustrate the wise words of Hammond, JA, from the High Court of Australia in *Weiss* in construing s 568(1) of the Crimes Act, a State of Victoria statute which for our purposes is materially the same as the relevant statutes in Jersey and Guernsey, we have the following—

“The task of construing this section is not accomplished by simply taking the text of the statute in one hand and a dictionary in the other. Especially is that so when note is taken of some particular features of this provision. What is to be made of the contrast between the provisions in the body of this section that the Court ‘*shall* allow the appeal’ if certain conditions are met and the proviso that the Court ‘*may* . . . dismiss the appeal’ if another condition is met? What is to be made of expressions like ‘if it [the Court] *thinks* that the verdict of the jury *should* be set aside . . .’? What is to be made of the reference in the body of the section to ‘a miscarriage of justice’ compared with the reference in the proviso to ‘no *substantial* miscarriage of justice’? How is the proviso to operate when it is cast in terms that the Court ‘*may* . . . notwithstanding that [the Court] is of opinion that the point . . . *might* be decided in favour of the appellant . . . dismiss the appeal if it *considers* that no substantial miscarriage of justice has *actually* occurred’? What is the intensity to be given to the words ‘*may*’, ‘*might*’, ‘*considers*’? What, if anything, turns on referring, in the first kind of ground of appeal specified in the body of the section, to the verdict of the jury but referring, in the second kind of ground, to the judgment of the Court?” (para 10)

The Jersey and Guernsey tests revisited

117 As I have sought to show in the earlier part of this article, a major difficulty in assessing the test currently applied in Jersey and Guernsey to determine whether a verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence is that the test is unsatisfactory because it is unclear as to—

- (a) the threshold that must be achieved for the ground(s) to be made out;
- (b) the nature of the examination to be undertaken by the Court; and
- (c) the factors the Court will take into account in that examination.

118 English jurisprudence on the equivalent section of the CAA 1907 ended in 1968 and the tone of that jurisprudence was set soon after the promulgation of that statute and remained much the same for the 61 years of its existence. It is clear that the tone reflected the times.

119 In *Edmond-O’Brien*, as we have seen, Lord Hoffmann speaks of the possibility of a “more liberal interpretation of the old statutory language.” However, and with respect, one ought rather to speak of a more expansive and clear interpretation, and, indeed, of a more modern interpretation. The wording of the unreasonable/unsupported ground is not altogether happy. One can read it as two separate grounds, as alternative bases of the same ground or at different points

in the same continuum. One can read “unreasonable” as a word on its own or together with “having regard to the evidence”. If it is to be read alone, what does it mean and by what reference point is a court to assess unreasonableness? One can interpret the words “cannot be supported having regard to the evidence” as a stand-alone threshold or as the outer limit of “unreasonableness”, in which case “unreasonableness” is a lesser threshold.

120 On the wording, it is difficult to see how “cannot be supported having regard to the evidence” could be viewed as meaning “provided there was some evidence that a jury or the Jurats could accept” (that is, a bare sufficiency test) and, if so, that the verdict could not be viewed as unreasonable. For such an interpretation pays no regard to the need for a jury or the Jurats to be satisfied beyond reasonable doubt, gives no separate meaning or weight to “unreasonable” and potentially invites an analysis which focuses on the evidence which might found a guilty verdict without examining whether the whole of the evidence supports such a verdict.

121 To determine if a verdict is unreasonable on the evidence or whether it cannot be supported having regard to the evidence, the appellate court must surely review, analyse and weigh the evidence. Whilst the Jersey and Guernsey statutes do not expressly require that the evidence be viewed through the Jury’s or Jurats’ eyes, the appellate court is not mandated to re-determine guilt; it is mandated to assess the guilty verdict that was reached. The case-law shows that appellate courts in England (pre-1968) and elsewhere in the Commonwealth consider that the ultimate question is what a jury acting reasonably ought to have done. This no doubt explains the discussion in the Commonwealth case-law which seeks to interrelate the objective process of determining what verdict a reasonable jury, properly instructed, could judicially arrive at with the subjective analysis to be undertaken by the court to determine that objective question. It cannot be otherwise than that the court is required to undertake these tasks “through the lens of judicial experience” (*per Biniaris* para 42).

122 If the threshold is unreasonableness, it is not enough to disturb a verdict simply because the appellate court disagrees with the verdict; as has been said, reasonable minds may disagree. Rather it must be that a verdict shall be disturbed if the court concludes that no jury, acting reasonably, ought not to have had a reasonable doubt. And “reasonably” must properly mean, *per Biniaris*, acting dispassionately, applying the law correctly, adjudicating on the basis of the record, and arriving at a conclusion that does not conflict with that reached by a legally trained appellate judge. With two exceptions, it is hard to see how a doubt experienced by the appellate court will not result in a conclusion that a reasonable jury ought also to have experienced that

doubt and therefore cannot have been sure as to the defendant's guilt. The first exception is where the doubt may be overridden by the jury's advantage over the appellate court in hearing and seeing the witnesses; contrast a verdict based on documentary evidence and inferences where it is hard to see what advantage a jury might have over an appellate court. Indeed, as observed in *Munro*, the appellate court may have the advantage in that respect, derived from its legal training, the time available and the distance from the trial context. The other exception is that a judicial system must tolerate reasonable differences of opinion on factual issues. However this exception is easier to state than identify in a real context.

123 Obviously, it is a matter for the legislatures in both Islands whether the law needs to be reformed. But it is a peculiar, though sadly not unprecedented, position for the Islands to have adopted the wording of an English statute which at the time of promulgation in Jersey and Guernsey was already drawing heavy criticism in England and, shortly after, was repealed and replaced. Furthermore, it cannot be said, for Jersey at least, that a conscious decision to be different has been taken. As the Chief Minister's statement in 2009 reflects, in his view, at least then, there is no difference between the test under Jersey law and that prevailing in England and Wales.

124 One ought also to comment on the approach adopted by the Court of Appeal. The prohibition on taking a more liberal approach is said to be the wording of the statutes. Yet, as some (albeit the minority) of the pre-1968 decisions of the Court of Criminal Appeal and the contemporary Commonwealth decisions show, there is room within the statutory wording for a degree of flexibility. The Privy Council has invited submissions on a more flexible interpretation. However if *Bhojwani* represents the collective view of the appellate court, in Jersey at least, the gauntlet is unlikely to be taken up.

125 One cannot properly have recourse to the fact that no verdict of the Jurats in Jersey on a criminal matter has ever been overturned on the grounds of unreasonableness of the verdict,⁸³ if that is indeed a fact, as some form of justification for not reviewing the test on appeal. Indeed, in modern times, at least, Jury trials have a similar record. Our Jurats, our professional fact finders, of whom we are justly proud, would be the first to endorse the existence of what Pattenden calls the inherent probability of error in a human tribunal.⁸⁴ A fair-minded member of a Jury would be of similar mind. An alternative and sustainable interpretation of the lack of successful appeals would be

⁸³ The author does not know whether the same position prevails in Guernsey.

⁸⁴ *Op cit* p 5.

that, firstly, in a well-ordered judicial system, successful appeals on the grounds of unreasonableness of the verdict are likely to be rare and, secondly, if the threshold on appeal is set high, they will be virtually non-existent.

126 Absent an expression of reform from our legislatures, there remains the possibility of recourse to contemporary Commonwealth case-law. Although, it has to be observed that Australia, New Zealand and Canada do not present a uniform approach. Australia has pushed the boundary the furthest. Mason, JA's approach is not far removed from a full merits review, subject in reality only to due allowance for such advantage as the jury may have in seeing and hearing witnesses. But perhaps that test itself is the reality of a lurking doubt. New Zealand and Canada, ostensibly at least, have remained closer to a bare sufficiency test, but again emphasised the beyond all reasonable doubt threshold. The exact distance of the difference is not always easy to see.

127 But to avoid criticism for negative rather than constructive criticism, let this author at least venture a more liberal interpretation. The proper test on the first ground could be: a verdict of guilty will be unreasonable where it is a verdict that, having regard to all of the evidence, no jury or the Jurats could reasonably⁸⁵ have reached to the standard of beyond reasonable doubt.⁸⁶ The words "cannot be supported having regard to the evidence" ought to be interpreted as representing the extreme end of "unreasonable". Determining the test must involve the appellate court in reviewing, analysing and weighing the evidence and applying its judicial expertise to that process. Save where explained by the exceptions set out above, a doubt experienced by the appellate court ought to lead to a conclusion that a reasonable jury or bench of Jurats ought also to have experienced that doubt and therefore cannot have been sure as to guilt.

128 The application of such a test would, I suggest, have availed Mrs Guest in her appeal. Justice would surely have been done. And, I for one, would sleep better in my bed at night.

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⁸⁵ To include the meaning of "acting judicially" as used by *Biniaris*.

⁸⁶ Drawing specifically on the wording in *Owen*, which itself drew on *Munro*, for its clarity of expression.