NETWORKED KNOWLEDGE

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Submission to the Honourable Members of the Parliament of Tasmania

Wrongful Convictions and the case of Susan Neill-Fraser

18 October 2021

Dear Honourable Members:

There has been much discussion and debate in recent times concerning the issue of wrongful convictions and the adequacy of the conviction of Ms Neill-Fraser.

It is clearly important for our political leaders to be properly informed on these matters.

In 2014-15 Adjunct Associate Professor Bibi Sangha and I were invited to provide briefings to members of the Tasmanian Parliament in relation to a new statutory right of appeal in criminal cases and which had been established in South Australia in 2013.

Initially, there were some members who had concerns about the numbers and merits of the cases which might arise and the extent to which this initiative would place undue burdens upon the criminal appeal system. We were able to explain the South Australian experience and the reasons for this change to the appeal laws.

It was gratifying to find that when the matter arose for debate, not a single member spoke against the Bill or voted against it – reflecting the previous and similar experience in South Australia. A significant number of those who spoke thanked us for our contributions to their deliberations.

It is that experience which has motivated my approach to you on this occasion. My interest is not as an advocate for or against any party, but merely as an independent legal academic who believes in the importance of a properly functioning legal system.

As a young man, prior to undertaking my law studies, I came within 90 seconds of being killed in the first daylight bombing in Belfast. I do appreciate the serious consequences which can follow if people should lose confidence in the 'rule of law'.

I also believe that if people of good will get together and are properly informed of the relevant issues, there is a very high probability that they will reach agreement; just as was done in relation to the new right of appeal, and despite the initially contentious appearance of the issues involved.

Whilst there has been some polarisation of views about the rights and wrongs of the Neill-Fraser case, I am confident that a carefully considered approach to a correct understanding of the legal and factual issues involved can lead to a consensus as to the correct outcome.

In considering this issue, we should perhaps bear in mind that in the US in recent years, the Innocence Projects there have led to the overturning of some 2,800 wrongful convictions which had otherwise exhausted all avenues of appeal. In the UK the figure is now around 480. That includes over 100 murder convictions and four cases in which the people were hanged after their convictions.

Apart from Innocence Projects, some states in the US are now developing Conviction Integrity Units within their prosecution departments to help identify potential wrongful convictions. The UK has had a Criminal Cases Review Commission since 1997, with similar bodies being established in Scotland and Norway. New Zealand introduced one last year.

The Canadian Prime Minister has now directed a Commission to assist the Canadian government in setting one up there. I, together with my co-researcher, Bibi Sangha, were invited to provide a report to that Commission. It is available here.

We have worked with the Hon Michael Kirby AC CMG, former Justice of the High Court of Australia, in developing the view he set out in the Criminal Law Journal, that Australia should also adopt a Criminal Cases Review Commission in addition to the new appeal rights in all states and territories.

Sadly, wrongful convictions will occur in all systems, and the obvious test of the maturity of our legal systems is the extent to which they are able to acknowledge them and to

rectify them when they occur. It has been a common experience, that denial, delay and obfuscation have been present in all systems in such cases.

If we can agree that vigilant scrutiny and timely responses are preferable, then we should expect that prosecutors, defence lawyers, judges, scientific advisors, academic lawyers and politicians would wish to work together to achieve just outcomes in all cases.

With that objective in mind, I respectfully submit for your consideration the following documents. In considering them, it should be borne in mind that the issue on any appeal is not to make an independent assessment of the guilt of the accused. That has already been done by the jury at trial. The first task for an appeal court is to assess the adequacy of the proceedings at the trial – to ensure that the accused received a 'fair trial' in accordance with the rule of law and our international human rights obligations.

If the trial was unfair for any reason, then the conviction must be set aside. This is sometimes done in cases where there is said to be a 'strong case' and occasionally even where there is overwhelming evidence of guilt. The integrity of the trial process is an essential pre-condition for any finding of guilt against the accused.

In this case it will be necessary to assess the effect of any inadmissible evidence put forward by the Crown and any inappropriate submissions by the prosecutor. The test on an appeal is whether there is a 'reasonable likelihood' that such evidence or submissions influenced the jury in arriving at their verdict. If there is such a likelihood, then the verdict 'must' be set aside. The underlying principle is whether it is sufficient to give rise to a reasonable doubt. If so, then the pre-condition for a finding of guilt has not been established.

The first briefing paper provides an overview of the claim that inadmissible evidence and submissions were used by the Crown in this case. More detailed references to the trial transcript are set out in the subsequent documents.

2014 Bibi Sangha, Bob Moles: Briefing Paper in the Trial of Susan Neill-Fraser (2010)

The second report was submitted to the Forensic Science Centre (FSC) in Hobart setting out the concerns specifically about the forensic evidence which had been used in this

case. The hope was that the FSC would appreciate the opportunity to reconsider these issues. Such evidence and the reports on which it was based should have been 'peer reviewed' prior to being used in court. It is difficult to see how it could have been used if it had been the subject of such a review.

Sadly, the only response received was a letter from the Assistant Commissioner of Police who simply stated that she had confidence in the FSC. This was most unfortunate, because previous Royal Commissions (Splatt and Chamberlain) had emphasised the need for the forensic services to be operationally independent of the police.

2014 Bob Moles: Forensic Science Issues in the Trial of Susan Neill-Fraser (2010)

The following document addresses some concerns raised publicly by the Assistant Police Commissioner in response to a Channel 9 program in which I had been involved. It was thought appropriate to place on record the responses to her comments to show how they failed to address the substance of the concerns about the evidence at trial.

2014 Bob Moles: Responses to Assistant Commissioner of Police

The following is a more detailed research report which was prepared to cover the full range of problems at trial. It provides detailed references to the trial transcript for each of the points which were raised – and the references to the legal principles which were relied upon.

2014 Bibi Sangha, Bob Moles: Full Research Report in the trial of Susan Neill-Fraser

Why we should reach a consensus.

The legal principles referred to are clear and non-contentious - as are the references set out from the trial transcript. The incompatibility between them cannot sensibly be denied. It is also clear that if any one of the substantive points is sustained, it will satisfy the test for the overturing of the verdict at trial.

As mentioned in our reports, the preferred position is to conduct 'post-appeal' reviews on a collaborative rather than an adversarial basis. Prosecutors, police, forensic services and academics (as well as politicians) should all have a mutual and shared interest in identifying and rectifying any potential wrongful convictions at the earliest opportunity.

At the same time, we must acknowledge the evident embarrassment and 'cognitive dissonance' which arises when facing the possibility of the serious consequences of a wrongful conviction. The former Chief Justice of the UK said once when visiting Sydney that it would amount to a 'catastrophic failure' of the legal system.

It is only sensible to acknowledge, that in the most serious cases of such failures, those who have participated in the system giving rise to such catastrophes, may not be the first to identify them or to bring them to public attention. In such cases, the final and most important opportunity to provide the required scrutiny, is through the parliament; the body which has ultimate responsibility in all cases for not just making the law, but also ensuring that it is effectively and fairly applied to all citizens. As a law student, I always had in mind the words of a well-known English judge of the day (Lord Denning) who would say 'be you ever so high the law (the parliament) is always above you'.

As an example of recent reticence, I can point out that we first expressed concerns about the wrongful conviction of Mr Keogh in South Australia in 2001. It took another thirteen years, numerous submissions, petitions, complex legal procedures, books, articles, television programs and an historic change in the law on criminal appeals to get his conviction overturned.

Most of that was entirely unnecessary as the basis of his wrongful conviction had been clearly explained at the outset all those years earlier. Similarly, in the UK, in each of the wrongful convictions in which people were hanged, it took an average over 40 years to accept that they were in fact wrongfully convicted. Yet the evidence which clearly demonstrated the nature of the wrongful convictions had been available since the trials all those years earlier.

In recent years, we have written and published leading textbooks on the subject of wrongful convictions.

Forensic Investigations and Miscarriages of Justice (2010) is an international review of the law and cases on wrongful convictions. It was favourably referred to by a Canadian Supreme Court judge in a lecture he gave in Edinburgh when he mentioned the importance of our critique of forensic errors. It just happened to include the same error

which was taking place in the Neill-Fraser case at that time. It was this book which led to our submitting a Bill to establish a Criminal Cases Review Commission in South Australia and which in turn led to the establishment of the new right of appeal.

Miscarriages of Justice: Criminal Appeals and the Rule of Law (2015) set out the development of the arguments for the new right of appeal. It also has chapters on the role and rules governing expert witnesses, prosecutors and the identification of wrongful convictions in the new appeal framework.

It is clear that our work has had the support of eminent jurists and forensic experts in Australia and overseas. The Hon Michael Kirby AC CMG, our well-respected former justice of the High Court, was kind enough to write the Foreword to each of the above two books.

The Hon Justice Stephen Goudge, a Court of Appeal judge for Ontario, and Commissioner in a leading inquiry into baby deaths had retained myself and Bibi Sangha to provide an expert report to his inquiry. In launching the above book, he said we were 'eminently qualified experts' who were able to elucidate thoughtful recommendations to policy-makers in all three jurisdictions of Canada, the UK and Australia.

It is clear that the errors identified in the wrongful conviction of Ms Neill-Fraser would be instantly recognised as such by many of the leading forensic experts, prosecutors and specialists in wrongful convictions across each of those jurisdictions. Indeed, it is the common practice in Canada for their judicial inquiries to reach out to experts in other jurisdictions to assist them.

It would be quite simple and inexpensive to subject our reports to such scrutiny.

In the event that we were able to reach a consensus that appealable error had occurred in this case, the procedure for its correction is simple and readily available.

There have been over 20 cases in the UK where the Crown has conceded that appealable error has occurred – sometimes in cases where they had every intention to proceed with a retrial. Once the Crown concedes that the appeal should be allowed, then with the agreement of Neill-Fraser's legal team, they could make a joint application to the

intermediate appeal court for a further appeal. The new legislation allows for a 'second or further appeal'.

In the Australian case of Farah Jama, the prosecutor, having realised that an appealable error had occurred, applied to the appeal court for an urgent hearing of the appeal. The court sat the next working day. The judgment consisted of a single sentence:

> The Court, having read the materials filed by the parties and having considered the submissions and concessions of the Crown, is satisfied that it is appropriate to order that the conviction relating to the applicant be set aside and a verdict of acquittal be entered.

We see no reason why the same approach cannot be adopted for Ms Neill-Fraser.

We would be most grateful if you would give careful consideration to these reports and the issues which they raise.

If we can be of further assistance to you or your staff in any further consideration of this, or any other related matters, please do not hesitate to contact us.

Yours sincerely,

Dr Robert Moles

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