

## ASSIZE SEMINAR

NOVEMBER 2021

### SUMMARY OF PRESENTATION BY FRANCIS FITZGIBBON QC ON WHETHER 'SAFETY' IS AN ADEQUATE TEST FOR REMEDYING WRONGFUL CONVICTIONS, WHETHER BY A JURY VERDICT OR A GUILTY PLEA

1. In this presentation I set out difficulties in the unitary 'safety' test used by the Court of Appeal (Criminal Division). It may not be reliable method for detecting wrongful convictions. The presentation is not the work of a legal scholar but a practitioner. It is intended to provoke debate, not to give a comprehensive survey of the subject, nor to prescribe definitive answers.
2. There is a short account of the development of CACD's jurisdiction from the foundational Criminal Appeal Act 1907 to the 1995 Act. The concept of 'safety' is considered. The rejected proposal by Lord Runciman's Royal Commission on Criminal Justice is considered – to add the words '**or may be**' to the provision that the Court 'shall allow an appeal against conviction if they think that the conviction **is** unsafe.'
3. The focus is on the very small number of appeals based on guilty pleas. Why so few? The law is not entirely clear about the circumstances in which a conviction can be quashed when the defendant has pleaded guilty.
4. Heavy reliance is placed by the courts on the voluntary nature of pleas, as representing a public true confession to the crime charged. Subject to further empirical research beyond the scope of this paper, here may be reasons for thinking that a statistically significant number of guilty pleas are entered for other reasons.
5. If so, and they are not being detected and are not recognised as potentially appealable, there is a problem.
6. Questions of agency, rationality, fear and external pressures can be overlooked. Cases involving people who are found to be victims of modern slavery post-

conviction put the issue into focus. They may plead guilty through fear of reprisals on them and their families by the traffickers; they may not disclose their true status until they have been convicted. That will deprive them of a defence under Section 45 of **Modern Slavery Act 2015**. The limitations on receiving fresh evidence in such cases, together with the difficulties of going behind a plea of guilty, put this group at risk of wrongful conviction. It may lead to deportation, potentially back into the hands of their traffickers.

7. Whether the difficulties faced by this group are to be found more widely among appellants is a matter for discussion. It may be that the narrow supervisory role that the Court has given itself filters out meritorious cases.
8. Cases in which the Court has expressed or eschewed a 'lurking doubt' about the safety of convictions are considered.
9. The cautious but reasoned approach of the Northern Ireland Court of Appeal in such cases is considered.
10. The proposal in the presentation is that the CACD can and should be more willing to act on what it regards as injustice, rather than confining itself to a review-type jurisdiction based on a narrower concept of safety. While it is inevitable that jury verdicts have primacy, they should not be treated as a shibboleth. Guilty pleas may be less authentic than they seem.