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Is Our Criminal Appeal System Fit for Purpose?

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1. Introduction An overview: the strange structure of the current criminal appeal system, with two set of rules, one for appeals in relation to summary proceedings and another in relation to appeals in relation to proceedings on indictment, each resolving issues of basic principle differently:
    - a right of appeal, or appeal by leave only?
    - the nature of the appeal process: a rehearing, or a review of the procedure at first instance?
    - the burden of proof: on the Crown to justify the outcome at first instance, or the defendant to overturn it?
    - *nulla reformatio in peius* – or the possibility of a harsher sentence?
    - differential treatment, in each system, of Crown and defence.

    On these broader issues, see inter alia the Auld Review (Review of the Criminal Courts, 2001), ch. 12, and Spencer, "Does Our Present Criminal Appeal System Make Sense?", [2006] Criminal Law Review 677.

2. This presentation will briefly deal with four specific issues which seem particularly worrying: (i) indefensible anomalies in relation to interlocutory appeals; (ii) appeals in "change of law" cases; (iii) the limited powers of the Court of Appeal to deal intelligently with certain procedural irregularities; (iv) the reluctance of the State to compensate those whose appeals – against the odds – succeed.

3. Interlocutory appeals in proceedings on indictment
    By CJA 2003 s.58[1] the Crown now has a general right to appeal against what are usually called "terminating rulings". This enables the Crown to appeal, inter alia, against a trial judge's ruling of no case to answer (e.g. FNC [2015] EWCA Crim 1732 [2016] 1 WLR 980) and rulings staying prosecutions as an abuse of process (e.g. B [2008] EWCA Crim 1144). But strangely, the Crown has no right to challenge a judge's decision, under section 51 and Schedule 3 of the Crime and Disorder Act 1998, to allow a defence application to dismiss for want of evidence. (For the unsatisfactory consequences, see the Evans saga: [2014] 1 WLR 2817, [2015] 1 WLR 3526, [2015] EWHC 263 (QB), [2015] EWHC 3803 (QB).)

    The defence, by contrast, can appeal against an interlocutory ruling where there is a "preparatory hearing" (CJA 1987 s.9, s.35 of the CPIA s. 1995), but not otherwise.
    Is this fair?

4. Appeals in "change of law" cases
    In Jogee [2016] UKSC 8, [2016] UKPC 7, [2016] 2 WLR 681 the Supreme Court approved earlier case-law saying that leave to appeal out of time should only be given in a

[1] Supplemented by a further right in s.62, which has not been brought into force.

"change of law" case where "substantial injustice" would result from its refusal. A series of recent Court of Appeal decisions have now given this concept a narrow interpretation, the effect of which is to make appeals in change of law cases extremely difficult: Johnson and others [2016] EWCA Crim 1613, [2017] 1 Cr App R 12; Ordu [2017] EWCA Crim 4, and now Garwood [2017] EWCA Crim 59.
Is this fair?

5. Limited powers of the Court of Appeal to deal intelligently with procedural errors
A creature of statute, the CA's powers are those conferred on it by the CAA 1968, which (in essence) mean that it can only
dismiss the appeal: "conviction not unsafe"
quash the conviction: "the conviction is unsafe" [or annul the conviction if the proceedings were completely void]
substitute a conviction for a different offence (CAA s.3 and 3A)
quash the conviction and order a retrial (CAA s.7)

This limited menu does not always enable it to deal sensibly with (inter alia) cases where D was rightly convicted, but of the wrong offence (see inter alia Walker and Coatman [2017] EWCA Crim 392).

It is also questionable whether it enables the CA to deal efficiently with appeals grounded on misdirections in law, and incorrect decisions to admit or reject evidence, in those cases where the error might or might not have made a difference to the verdict.

6. Reluctance to award compensation
Because in this country the execution of sentences is not usually suspended pending an appeal, a prison sentence has usually been served (at least in part) before the CA rules that it should not have been imposed. Compensation in such cases was unusual in the past, and a series of changes (abolition of "ex gratia" payments in 2006, and more recently, amendments to CJA 1988 s.135) have now virtually abolished it – even for cases where the appellant's innocence is obvious (e.g. Nealon [2014] EWCA Crim 574, [2016] EWCA Civ 355, [2016] CrimLR 77).

7. Conclusions
If any of these problems are grave enough to deserve solving, what in practice could be done about them?