THE CHIDIAC CASE

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Another miscarriage of justice?

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On 25 March 1997 the *Witness* program on Channel 7 screened a story about the conviction of Neil Chidiac in February 1989 for conspiracy to import a trafficable quantity of heroin in NSW. The program questioned the justice of Chidiac's conviction and filmed his recent release from prison on parole after serving over eight years in prison, still protesting his innocence. *Witness* featured an interview with the chief Crown witness against Chidiac, Alfred Oti, in which Oti completely repudiated the testimony he gave at the trial and admitted to lying at the behest of the police in order to secure advantages for himself.

This was not the first intimation of doubts about the safety of the conviction. An earlier statement by Oti to similar effect made to a private inquiry agent in 1994 was submitted to NSW Chief Justice Murray Gleeson in early 1995. He directed Justice Dunford to review the new evidence with a view to an inquiry under s.474 of the *Crimes Act* (NSW). A subsequent challenge to any inquiry was apparently made by both State and federal law officers on the ground that as Chidiac had been convicted under Commonwealth legislation (s.233B of the *Customs Act 1901),* s.474 was not applicable. Further submissions were considered in the office of the Commonwealth Attorney-General. The matter proceeded no further and Chidiac remained in prison for a further two years.[1] Activists and Chidiac's wife had for some years been attempting to have the case reopened as a potential miscarriage of justice.

The judge at the trial at which Chidiac was convicted and sentenced to 20 years in prison, launched an extraordinary attack on the Crown case in his address to the jury, saying:

> I have been sitting on these courts for something like eight years and I have never heard two witnesses so readily admit that they lied on oath. Now, that does not mean to say that they may not be telling the truth, but what I am saying to you is that you will look very carefully at what they said before you would hang a dog on their evidence. Really, it is appalling and you heard it as much as I did. [Smyth J, trial transcript, 14 February 1989, p.12]

This article is based on a reading of the transcripts of the committal hearing, the trial, the appeals before the NSW Court of Criminal Appeal and High Court, and various supplementary documents. It is not so much concerned with the detail of the case against Neil Chidiac, a good account of which is provided in a paper by Robert Brook[2] and in the *Witness* program. My concern is more with the legal processes through which the case proceeded and the extent to which these have been found lacking in various ways. In particular five key issues are considered:

- should a reasonable jury properly instructed have found Neil Chidiac guilty beyond reasonable doubt?

- should the NSW Court of Criminal Appeal and/or the Australian High Court have set aside the conviction on appeal on the ground that it was unsafe and unsatisfactory?
- do the actions of various criminal justice agencies in relation to the mysterious figure 'George', undermine confidence in the conviction of Chidiac?
- the absence of an established institutional mechanism in Commonwealth legislation for inquiring into alleged miscarriages of justice (such as s.474 in the NSW *Crimes Act 1900)*;
- the need for a Criminal Cases Review Authority along the lines established in the UK in 1995 following the Royal Commission into Criminal Procedure.

Jury verdict

The case against Chidiac rested almost entirely on the testimony of the Crown's two indemnified witnesses, Alfred Oti and Wilson Kwalu, who both admitted direct involvement as couriers in heroin importation and alleged that Chidiac was involved as a co-conspirator. Various other alleged co-conspirator principals were not charged. Oti's statement implicating Chidiac was made 14 months after he had been arrested and over six months after he had been convicted and imprisoned for a different heroin importation following his arrest in possession of 1.17 kilos of heroin. Five months after Oti made this statement Detective Sergeant Terry Venchiarutti visited Oti in prison, personally accepted a letter from Oti to Kwalu without declaring it to prison authorities and flew to Honiara in the Solomon Islands where he gave Kwalu the letter from Oti and interviewed Kwalu, a relative of Oti's. Kwalu then also implicated Chidiac. Oti and Kwalu were indemnified against prosecution by the Commonwealth DPP and Kwalu was later indemnified by the NSW, Queensland, Solomon Islands and Papua New Guinea authorities. Oti, who admitted to involvement in four drug runs, later had his ten-year minimum sentence reduced on appeal to seven years and was released in June 1991 after serving five and a half years.

The jury found Chidiac guilty. This is surprising given the strength of the trial judge's comments about the credibility of the two key Crown witnesses, Oti and Kwalu. Such judicial comments are highly unusual and immediately put the case in a special category. The trial judge made clear in no uncertain terms his view of the credibility of these witnesses: 'They are down and out villains, not only are they drug smugglers themselves but they are self confessed perjurers and liars'.[3]

Evidently the jury was more impressed. Like the trial judge I find it difficult to see how the jury could have been convinced of the guilt of Chidiac beyond a reasonable doubt. The evidence against him was thin:

- there were major doubts cast over the credibility of the two principal Crown witnesses;
- as McHugh J in the High Court notes, two of the three items of corroboration relied on by the Crown were very weak (*Chidiac v R* (1991) 171 CLR 432 at 464);
- the third item of corroboration (Oti's knowledge of a pager number) seen as much stronger by McHugh J (at 465-6) could be explained simply by Oti being told the number by another party or a member of the Australian Federal Police (AFP);
- all items of corroboration were consistent with Chidiac's claim of innocence;
- one might have supposed that the jury would be concerned about why 'George' who seemed so central to the case had not been charged, was not called as a witness, and why the AFP sought to prevent his name being mentioned, especially given Chidiac's defence that he was being framed.

Nonetheless, the jury did enter a guilty verdict as is their constitutional right, and there seems little purpose in second guessing the jury. The jury had the benefit not enjoyed by those simply reading the transcript of seeing and hearing the evidence unfold. If their verdict was against the weight of the evidence the resolution lies with the appeal courts and it is to them we now turn.

The appeals

The key problems highlighted in this case, but common to the whole criminal justice appeals process are:

- the narrow focus of the appeal process;
- the strong judicial reluctance to overturn a jury verdict;
- the requirement to form an independent assessment of the evidence and pragmatic limits on the ability to do this; and
- a lack of sensibility to the possibility of miscarriage of justice.

The narrow focus of the appeal process

The essence of Chidiac's defence was that he was entirely innocent and was being framed. That defence was consistently and vigorously put by way of cross-examination by his counsel Jim McCrudden, throughout the committal hearing and the trial. From the comments of the trial judge it was clear he thought an acquittal was the appropriate verdict. Chidiac's chief complaint then is simply that the prosecution was based on falsehoods and therefore the verdict was wrong. The appeal process works best when some clear cut point of law such as misdirection by the trial judge can be shown. The appellate courts are well versed in scrutinising legal error. Here the summing up and in particular the comments about the credibility of the key Crown witnesses was in general highly favourable to the accused.

Paradoxically then, Chidiac was in a worse position (as was Lindy Chamberlain) once the jury had returned a verdict of guilty, than he would have been with a summing up generally unfavourable to the accused. This can be seen clearly in the judgment of the NSW Court of Criminal Appeal where the clear formal deficiencies in the corroboration warning (the failure to specifically identify the items of potential corroboration, and to explicitly say the two co-conspirators Oti and Kwalu cannot corroborate each other) are set against the fact that the 'summing-up was strongly in favour of the accused' (*R v Chidiac* unreported NSW CCA, 15 December 1989, per Gleeson CJ at 7). The members of the High Court and McHugh J in particular gave rather more detailed consideration to the weaknesses in the corroboration directions, but ultimately they noted the increasing tendency not to require a set form of words in corroboration warnings and to pitch them to the individual case. This seems to me both correct in law and desirable in practice.

The point is that the effective substance of Chidiac's complaint (he had been framed) is not dealt with by finding technical fault in a judicial direction which is in general highly favourable to the accused.

Judicial reluctance to overturn a jury verdict

Appellate courts have traditionally been reluctant to overturn a jury verdict on the ground that the verdict was 'unreasonable or cannot be supported having regard to the evidence', usually referred to as the 'unsafe and unsatisfactory' ground. This reluctance is based in part on the separation of functions of judge and jury and is clearly expressed by Mason CJ in *Chidiac* (at 443-4):

> The constitutional responsibility of the jury to decide upon the verdict and the advantage which the jury enjoys in deciding questions of credibility by virtue of seeing and hearing the witnesses impose some restraints upon the exercise of an appellate court's power to pronounce that a verdict is unsafe . . . It is not the function of the court to substitute itself for the jury and re-try the case. Nor is it for the court to decide whether the verdict is against the weight of evidence. Rather, it is for the court to determine whether there is a significant possibility that an innocent person has been convicted because the evidence did not establish guilt to the requisite standard of proof.

There is little point here in rehearsing the exact formulations of the test to be applied. In my view there are three weaknesses in the applications of the tests. One is the tendency to portray the overturning of a jury verdict as an attack on the jury system. The answer to this tendency is provided by Deane J in *Chamberlain* (1984) 51 ALR 225 at 305-6):

> The principle that no person should be convicted of a serious crime except by a jury on the evidence has no corollary requiring that every person who is found guilty by a jury's verdict should remain so convicted. The safeguard provided by trial by jury is not dependent on any assumption of the infallibility of the verdict of the jury. It would be foolish to deny that a jury may be prejudiced, perverse or wrong. Any notion that a jury's verdict of guilty should be given the degree of finality which the principle against double jeopardy requires to be accorded to a verdict of acquittal has long been rejected: it is, for example, quite inconsistent with the existence of the 'common form' ground of appeal that the verdict of the jury 'is unreasonable or cannot be supported having regard to the evidence'. Nor is the cause of the continued acceptance of jury trial likely to be served by treating a jury's verdict of guilty as unchallengeable or unexaminable. To the contrary, so to treat a jury's verdict of guilty could sap and undermine the institution of trial by jury in that it would, in the context of modern views of what is desirable in the administration of criminal justice, be liable to be seen as a potential instrument of entrenched injustice.

The jury can only make a judgment in relation to the evidence before it. To that extent the appeal courts were in a better position here in that they could consider issues not directly before the jury such as the relationship between the police and prosecution and the mysterious 'George' and the suppression of his identity.

Forming an independent assessment of the evidence and its pragmatic limits

The second weakness in the application of the unsafe and unsatisfactory test is the tendency to obscure the basic fact that the proper exercise of the appellate jurisdiction requires the appeal court to form its own independent assessment of the evidence against the applicant. I agree with McHugh J (at 463) that on the Chidiac appeal the NSW Court of Criminal Appeal:

> did not carry out the duty imposed on it by s.6 of the Act in that it failed to make its own assessment of the evidence for the purpose of determining what a reasonable jury would have made of the relevant evidence.

Of course for the appeal court to form its own assessment requires it to undertake a review of *all* the evidence, and clearly there are limits to which this is possible given heavy court workloads. This limitation in the appeal process is not often acknowledged by the judiciary. One such acknowledgment came from Justice Michael Kirby in 1991 when as President of the Court of Appeal of NSW and Chairman-Elect of the International Commission of Jurists, he said:

> Honesty requires me to say that the strongest argument for a separate Tribunal (a Criminal Cases Review Commission) is the extreme difficulty which Appellate Judges face in finding time to reconsider all, and I mean all, of the evidence of the trial in order to decide whether a conviction can safely stand or must be set aside and a new trial ordered.[4]

A lack of judicial sensibility to the possibility of miscarriage of justice

A third weakness is the tendency to focus narrowly on the formal appeal or special leave to appeal points at the expense of the residual question of miscarriage of justice. The appellate function is to determine 'whether on any (other) ground whatsoever there was a miscarriage of justice' (s.6(1) *Criminal Appeal Act 1912* (NSW). The English courts have formulated a 'lurking doubt' test which arguably gives better expression to the breadth of this function, but unfortunately this test has been rejected by Australian courts. The failure of vision and the lack of a sharpened sense of disquiet in exercising the appellate function with an eye to possible miscarriages of justice is well illustrated in the majority judgments in both the *Chamberlain* (1984) 51 ALR 225 and *Alister* (1984) 154 CLR 404 cases. In both these cases the legislature was ultimately forced to step in and set up inquiries which established the unsatisfactory nature of the convictions, a function that might have been carried out much earlier by the High Court if the more robust attitude to potential miscarriages of justice and the appellate function adopted in both cases by Murphy J (and Deane J in *Chamberlain*) had been adopted by other members of the court. It hardly needs remarking that the costs of this limited view of the appellate function were high, most obviously for the applicants, but also in the longer term for the criminal justice system in the form of loss of public confidence in the ability of the appellate process to remedy miscarriages of justice, not to mention the very substantial costs of the subsequent inquiries.

It is clearly desirable that potential miscarriages of justice are picked up in the normal criminal process itself rather than left to the vagaries of building sufficient political pressure to force an inquiry, often long after the event and often after the wrongfully convicted person has served out their prison term. This is an ad hoc process, the success or failure of which is often contingent on access to resources and media interest. This is even more evidently the case where, as here in relation to Commonwealth offences, no proper statutory institutional mechanism, short of passing a piece of special legislation setting up an inquiry, exists for reviewing claims of miscarriage of justice once the appeals process has been exhausted.

The missing figure of 'George'

A most unsatisfactory feature of this case which was not clearly raised or dealt with as an appeal point is what effect the shadowy figure of 'George' had on the trial process and what exactly was George's relationship with various criminal justice agencies and in particular the Australian Federal

Police. These questions are even more pertinent given the essence of Chidiac's defence, which was that he was being framed by one or all of George, Oti, Kwalu and certain AFP officers. On the evidence at the trial it was clear that:

- George was the acknowledged leader of a group of people who had carried out a number of heroin importations;
- George's leading role in these importations did not appear to have excited the AFP sufficiently to charge him in relation to any of them;
- George was neither charged in relation to this particular importation nor was he called as a witness;
- indeed the AFP through counsel intervening in the case sought and obtained a suppression order on George's full name and identity being mentioned in the trial
- both George and George's girlfriend had visited Oti in prison prior to Oti giving evidence in the Chidiac trial.

In the context that Chidiac's defence involved assertions of impropriety on the part of the leading Crown witnesses and at least some AFP officers, the very solicitous attitude shown by various criminal justice agencies towards George's welfare raises suspicions that might bolster Chidiac's defence. These suspicions could not be fully pursued in the context of a claim for public interest immunity on the part of the AFP to suppress the identity of George. Was it appropriate for the Crown to take no interest in the suppression application (Mr Cowdery: 'it was an application in which the Crown had no role, played no part.' High Court transcript, 4 October 1990, p.101)? And if so, what does that say about the effectiveness of the role of the Crown and DPP in exercising independent scrutiny over the police investigation and prosecution of the case, against the backdrop of the general ethical duties of the prosecutor such as those contained in Rule 20 of the NSW Bar Association Rules ('his function is to assist the court in arriving at the truth')? Can it confidently be said that Chidiac obtained a fair trial in these circumstances? Is the public standing of the judicial process itself damaged where courts appear to demur in the face of highly selective prosecutorial practices that are placed beyond the reach of public scrutiny and accountability?

Such suspicions are not alleviated by either appeal court. There was some discussion in argument before the High Court (see especially Mr Coorey at 72-4; Mr Cowdery at 100-02) but such discussion tends to be subsumed under the corroboration issue. McHugh J seems to be the judge most alert to the dangers and suspicions here, as illustrated in his question (at 74):

> You see, I have got doubts whether there is any power in a trial judge of the district court to prohibit the name and address of a person who was not called as a witness and if that is so, it may throw a question as to whether or not these proceedings are not *fundamentally flawed by reason of a breach of the open justice rule.* [emphasis added]

However, that key question seems to be left hanging. Crown Counsel, Mr Cowdery QC, describes the course of events as 'irregular' (at 102), a description which might be regarded as somewhat of an understatement. Such a description also highlights the effective control police exercise over the prosecution process and the dangerous blurring of their investigative and accusatorial roles,[5] as well as the limited extent to which it can be said that the office of the DPP provides an independent check on police.

'Irregularity' might well be a pointer to 'impropriety', and as such call for more than an adversarial shuffle of responsibility. Prosecutors' duties tend to be framed in terms of the conduct of a case in court. But despite the high sounding rhetoric of the Bar Association Rules and DPP guidelines, commentators have noted that departure from these standards is unlikely to draw adverse comment or disciplinary action from professional disciplinary bodies. Similarly the sparse case law tends to show the superior courts reluctant to exercise supervision over prosecutorial duties of fairness and disclosure.[6] These problems are even more acute in relation to prosecution involvement in pre-trial processes such as the taking of witness statements, which are less visible than conduct of a case in court. Accordingly the need for the assertion of prosecutorial independence from police and the exercise of a professional forensic scepticism becomes even more vital, lest DPP officers be drawn into lending assistance to the construction of false or misleading statements by Crown witnesses.

At the broader level, we may fairly assume that the jury and the general public might be left in a state of some confusion as to this mysterious figure of 'George' and the nature of his evidently favourable relationship with law enforcement agencies and with the key Crown witnesses in this case. And in as much as the mystery surrounding 'George' might have appeared to have received the imprimatur of the Crown and the trial court, it is possible that the jury was affected by a 'higher reasons of state' approach to its task. All of which casts further doubt on the safety of the conviction.

This skewing of the trial through the influence of a central yet absent figure needs to be set against evidence from a number of inquiries about the context of police-informer relationships in the period during which these events occurred. This evidence has led to greater scepticism about the role of informers, greater knowledge about corrupt practices including 'process corruption' within the AFP, especially in relation to drug matters. On top of all this, in 1994 Alfred Oti retracted his earlier evidence and admitted it was false.

A greater scepticism about the role of informers

In the years since Chidiac's conviction, much more information has come to light through inquiries such as those conducted by the NSW Independent Commission against Corruption on Informers.[7] In addition the High Court in *Pollitt v R* (1992) 174 CLR 558 has since given special consideration to the need to protect accused people from the danger of wrongful conviction brought about by unreliable informer testimony. The NSW DPP has also moved since the 1993 ICAC *Report* to strengthen the existing guidelines in the *Prosecution Policy of the NSW DPP* on the use of informers. The amended guideline 11 proclaims full disclosure as the 'guiding principle'. That guideline would require the Crown to disclose to the defence, at least in relation to Oti and Kwalu, a range of issues such as criminal record, motivation, favourable treatment, monetary or other benefit, and whether an indemnity or sentence discount has been granted.

A number of issues in this case give rise to concern against the background of what we now know about abuses in relation to informer witnesses:

- the ease with which police had access to Oti in prison and the number of times they visited him;
- the discussions between Oti and the police/prosecution through which Oti's statement was revised;

- the contact between Oti and Kwalu by way of letter informally carried by a police officer;
- the extent to which Oti may have been influenced by promises or threats in relation to:
  - — sentence considerations (he later lodged a successful appeal against sentence at which it is unclear whether the full extent of his role in heroin importations was put before the court: *R v Oti* (1990) 19 NSWLR 561);
  - — other charges that might have been brought against him;
  - — movement within the prison system;
  - — the prospect of deportation to the Solomon Islands where he had family and other connections.

Subsequent evidence of corruption within the AFP

Since these events took place a volume of information has arisen from the hearings of the NSW Royal Commission into the Police (Wood Inquiry). The *Final Report* of the Commission (May 1997), while covering aspects of the conduct of the Commonwealth–New South Wales Joint Drug Task Force on Drug Trafficking (JTF) which was established in 1979 and wound up in 1988 and which included members of the AFP, does not mention names and goes into little detail, presumably because 'evidence suggestive of criminality . . . has been disseminated both to the AFP and to the Harrison Inquiry' (an inquiry into corruption in the AFP) (1997, Vol. 1, p.19). Nevertheless the Commission reports in general in relation to the JTF that:

- many of its members were involved during this period in seriously corrupt practices;
- connections between corrupt officers were formed which continued well after the conclusion of the Task Force. [1997, Vol. 1, p.63]

Forms of corruption included 'process corruption in its many facets where in more than one instance people were convicted on the basis of evidence which was improperly obtained or fabricated' (Vol. 1, p.185). The Commission noted alarmingly:

> That so many of the former JTF members went on to achieve rank in both the NSW Police Service and the Australian Federal Police, raises the very real prospect that for many years the methodology they employed, with so much apparent success (in terms of arrest and conviction rates), was preached and practised in drug law enforcement long after the JTF was disbanded. [Vol. 1, p.187]

The various heroin importations admitted by Oti, including the importation that Chidiac was allegedly involved in which took place in June/July 1985, come squarely within the period in which the Wood Commission describes the JFT as being 'seriously corrupt'. It would be interesting to know if any of the AFP officers involved in the Chidiac investigation came to the notice of the Royal Commission, have 'rolled over', been dismissed, retired, recommended for prosecution or referred to the Harrison Inquiry.

This subsequent knowledge of corruption in the AFP is of even greater significance given that Chidiac's basic claim in defence was that he was being framed. Such a claim is less implausible in the light of what we now know from the Royal Commission hearings. Significantly, in relation to the later argument concerning the inadequacy of current mechanisms for reviewing claims of miscarriage, such information is peculiarly within the knowledge of police and prosecution authorities and is not readily apparent to interested individuals or members of the public.

Oti's 1994 and 1997 retractions

Included in the transcripts I examined was a handwritten statement and a longer record of interview between Alfred Oti and a private investigator, taken in Honiara, in the Solomon Islands, on 23 November 1994. The substance of this interview was repeated in an on-camera interview broadcast by *Witness* in March 1997. Suffice to say that these statements constitute a complete repudiation of the account of events given at the committal and trial. Oti now asserts he was approached by police while he was in prison and pressured to include Chidiac in his account of a particular importation of narcotics and that he complied with this strategy 'because of pressure' over additional charges. Oti agrees with Chidiac's account that they did indeed meet in Honiara, but that this was entirely innocent and had nothing to do with drugs. In short Oti now appears to say that his previous evidence was a fabrication, induced by the police, precisely the scenario suggested by Chidiac all along.

Oti is now evidently a much reformed character (having given up a heavy drinking habit and become a Christian) and clearly troubled by the evidence he gave at the Chidiac trial and its effect. The very least that might be said is that his subsequent statements strengthen the case that Chidiac's conviction is unsafe. Were Oti to have offered this account at the trial it is inconceivable that Chidiac would have been convicted, indeed that he would even have been charged. While the NSW Chief Justice seems to have acted promptly on Oti's statement being brought to his attention the same cannot be said of the Commonwealth Attorney-General.

No institutional mechanism for reviewing alleged miscarriages of justice in relation to Commonwealth charges

Were Chidiac to have been convicted under NSW law he could have exhausted the appeal process and then taken action to petition for a review of the conviction under the provisions of s.474 of the *Crimes Act 1900* (NSW). Section 474 replaced the long-standing s.475 in 1993 (*Crimes Legislation (Review of Convictions) Amendment Act 1993)* and provides a number of institutional routes through which applications for a review of a conviction might flow, including the Governor, the Minister, the Minister to the Court of Criminal Appeal, or direct to the Supreme Court which can act of its own motion. By way of contrast there appears to be no similar statutory provision in relation to Commonwealth legislation. Presumably an applicant can petition the Governor General; the legislature can pass a special Act setting up an inquiry or Royal Commission, or the prerogative of mercy might be exercised. Nevertheless, it hardly needs to be said that such procedures are difficult to invoke. There is no reason to suppose that miscarriages of justice are confined solely to convictions obtained under State legislation. The lack of a regular statutory mechanism for reviewing convictions in the Commonwealth arena is a significant oversight that should be remedied urgently. An administrative decision reached in the privacy of the Attorney-General's office is hardly a satisfactory substitute. Nor is the failure to provide a proper mechanism for review of convictions an excuse for formalism ('is the statement in the proper form?'), delay and disinterest.

The case for a Criminal Cases Review Commission

While the NSW legislation might serve as a model for Commonwealth legislation there are still significant problems.[8] One is the lack of a proper statutory system for compensation for miscarriages of justice and wrongful imprisonment. Compensation payments are generally made ex gratia, depend heavily on a media profile and are frequently stalled for years, compounding the original injustice. There is an urgent need for a proper statutory entitlement to compensation (see *Criminal Justice Act 1988* (UK) s.133; The International Convention on Civil and Political Rights, Article 14(6): victims of miscarriages 'shall be compensated according to law').

Other problems include the material ones of obtaining investigative assistance and legal aid to prepare petitions for inquiries. Another is the need for procedures to actively seek out cases in which police have fabricated evidence. In the aftermath of the Birmingham 6 case in the UK and the Royal Commission on Criminal Justice (1993) the British Government set up a new body, the Criminal Cases Review Commission, independent of the courts and the Executive. Established under the *Criminal Appeal Act 1995* (UK) the Commission has powers to direct a reinvestigation of cases and remit them to the appeal process.[9]

Such a body should be set up as a matter of urgency in Australia. Although submissions arguing for such a body were made to the Royal Commission into NSW Police[10] the Commission concluded that 'there is no need for the creation of such a body' as there is 'now a system available which presents a substantial opportunity for any applicant armed with fresh evidence or material which was insufficiently considered at trial or in an appeal to have a conviction reviewed on its merits'.[11] The flaw in this argument is apparent in the list of what are termed 'residual matters' — the lack of investigators to carry out investigations to produce the fresh evidence, difficulties with legal aid and the lack of a system of statutory compensation.

Summary

1. As was clearly the view of the trial judge the jury verdict of guilty is most surprising, given the thin nature of the evidence against Chidiac and the doubts cast on the credibility of the key Crown witnesses. Nevertheless the jury was constitutionally entitled to bring in such a verdict and the responsibility for evaluating the verdict and overturning it, if appropriate, lies with the appeal courts.

2. The appeal process in both the NSW Court of Criminal Appeal and the High Court did not address the essence of Chidiac's complaint that he had been framed. The process focused on the relatively narrow point of whether the trial judge's corroboration direction had been sufficient in a direction generally highly favourable to the accused. The broader issue of whether the conviction was unsafe or unsatisfactory was approached in the context of a strong tradition of reluctance to overturn a jury verdict (similar to that shown by the majority in *Chamberlain*). There was a lack of evident concern with the real possibility that Chidiac was innocent, and that he has suffered a miscarriage of justice.

3. Serious issues are raised by the absence of the mysterious figure of George. His exact relationship with police authorities, his apparently charmed life in relation to a number of narcotic importations, his relationship and access to the key Crown witnesses, the decision not to call him as a witness, the successful application to suppress his name and identity at trial — all these issues were skirted over in the appeal process. These issues had considerable significance given Chidiac's basic defence that he had been framed. We are left wondering what the jury might have made of all of this and whether some sort of 'important reasons of state' explanation came into play. The principle of the general public interest in open justice seems to have been accorded little weight.

4. A range of events and evidence which has emerged since the time of the investigation, prosecution, trial and appeal process, all give greater plausibility to Chidiac's defence (remembering that it is not up to him to prove his innocence). Among these are:

- greater awareness of and scepticism towards the evidence of informers, especially those susceptible to inducements or threats;
- evidence arising out of the Royal Commission into NSW Police concerning corruption in the Australian Federal Police in the relevant period;
- the subsequent retraction by Oti of earlier evidence and his assertion that he was pressured to implicate Chidiac falsely.

This change in context since the conviction lends weight to the view that the conviction is unsafe.

5. The absence of regular, formal, statutory institutional mechanisms for prosecuting a review of Chidiac's conviction and others placed in a similar position in relation to Commonwealth charges is highly unsatisfactory, to put it at its mildest.

6. A Criminal Cases Review Commission should be set up along the lines of the model in the UK to remedy wrongful convictions.

7. On the transcript record I have reviewed and with the benefit of hindsight, I do not regard the conviction of Neil Chidiac as safe. Or in Mason CJ's words, I think there is:

> a significant possibility that an innocent person has been convicted because the evidence did not establish guilt to a requisite standard of proof. [at 444]

Conclusion

In addition to the 'significant possibility' that the Chidiac case constitutes another miscarriage of justice to add to the growing list of prominent cases in Australia in recent decades, the case also highlights a number of more general deficiencies in the criminal justice system. The first is the contradictory nature of the police role in the pre-trial process. That role requires police both to investigate a crime and formulate a case against a suspected person at the moment when, as Devlin puts it, suspicion becomes accusation.[12] Not only is this moment difficult to pinpoint, but as Hogg notes, the two roles require different aptitudes and states of mind, one 'questioning, open, and dispassionate' the other 'partisan, selective, committed to a particular outcome'. The police are thus placed 'both inside and outside the adversarial process' and, in practice, decisions as to probable guilt are made early on and evidence is then gathered to support that particular case theory.[13] In short, the accusatorial role infuses and directs the investigation. Such a process may well have been exemplified in the Chidiac case, illustrating also the second major deficiency — the control police exercise over the prosecution process.

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challenge in co-ordinating services and ensuring that the needs of people with intellectual disability are addressed at each stage.

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14. Those who have been found unfit to be tried, but in the special hearing conducted by the MHRT have been found guilty on the limited evidence available and are sentenced to a limiting term. Such a term is based on the sentence which the MHRT believes would have been imposed if the matter had been heard by a court. However, culpability is not determined and the forensic patient cannot receive the benefit they would have received if they had pleaded guilty to the charges before a court.
15. See 'Statewide Forensic Program: A Specialist Service Model for Intellectually Disabled Offenders', Department of Human Services, Victoria, 1996.
16. Wood, H.R. and White, D.L., 'A Model for Rehabilitation and Prevention of Offenders with Mental Retardation in Lancaster County (PA) Office of Special Offenders Services', in R. Lickasson and G.N. Borthilet (eds), *The Criminal Justice System and Mental Retardation: Defendants and Victims*, Brookes, Baltimore, 1992, pp.153-65.
17. NSW Government, NSW Government Disability Policy Framework, 1997, pp.2, 3.
18. NSW Government Disability Policy Framework, p.69.
19. NSW Government Disability Policy Framework, p.71.
20. NSW Government Disability Policy Framework, p.47.
21. Case management is a direct relationship between persons with disabilities, their families and carers to ensure that services are accessible and co-ordinated to meet the individual's needs, including planning and linking the person with services and monitoring the ongoing appropriateness of the service plan (ADD 1997 Case Management Feasibility Study, Phase 2 Report)

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In theory at least, the DPP operates as an independent check on the propriety of the police investigation and accusation. In practice, such scrutiny tends to focus on the evidentiary products of police pre-trial conduct, rather than the assumptions and processes productive of such evidence. In the Chidiac case the complaint goes beyond the structural difficulty of adequately scrutinising police conduct given its largely hidden nature, to encompass active DPP involvement in the taking of Oti's statement in prison, the statement in which he implicated Chidiac, the statement he now says was false.

Finally, the case illustrates once again the narrow and limited nature of the appellate process. There is a striking absence of judicial scepticism and sensitivity to miscarriage on the part of the NSW CCA and the High Court, a scepticism and a sensitivity that one might have thought even more than usually appropriate in a case in which the trial judge had made such forthright and unusual comment. The lack of adequate mechanisms for reviewing cases alleging wrongful conviction at Commonwealth level, and the dilatory, technical, and private responses of the Federal Office of Attorney-General to Oti's retraction and Chidiac's request for an inquiry, further compound the deeply unsatisfactory nature of this case.

References

1. Anderson, T., 'Federal Attorney-General offers "Star Chamber" to frame-up victim', (1977) 33 *Framed* 11.
2. Brook, R, 'The Conviction of Neil Chidiac: Verdict Unsatisfactory', Unpublished paper for CEFTAA, 1992.
3. On Brook's analysis Oti admitted lying at the trial on 15 occasions, admitted suppressing evidence on 11, could not recall on 59 and did not know on 28. Kwalu admitted lying on 12 occasions.
4. Kirby, M., 'Miscarriages of Justice — Our Lamentable Failure?', *Commonwealth Law Bulletin* July 1991, 1037 at 1049.
5 See Hogg, R., 'Identifying and Reforming the Problems of the Criminal Justice System', in Carrington, K. and others (eds), *Travesty! Miscarriages of Justice*, Pluto Press, 1991, pp.232-70, esp. 243-54.
6. See for example, Brown, D. and others, *Criminal Laws,* 1996, Vol. 1, pp.182-6; Hunter J. and Cronin, K., *Evidence, Advocacy and Ethical Practice*, The Federation Press, 1995 chapter 4.
7. ICAC, 'Report on the Investigation Into the Use of Informers', Vols 1 and 2, 1993; ICAC, 'A Discussion Paper on the Nature and Management of the Relationship between Police and their Informants', 1993; ICAC, Investigation into the Relationship Between Police and Criminals, *First Report,* February 1994, *Second Report,* April 1994; Brown, D. and Duffy, B., 'Privatising Police Verbals: The Growth Industry in Prison Informants' in K. Carrington and others (eds) *Travesty! Miscarriages of Justice,* 1991 pp.181-223; Settle, R., *Police Informers*, The Federation Press, 1995.
8. See generally Brown, D. and others, *Criminal Laws,* Vol. 1, 1996, pp.294-315.
9. See Justice (The British Section of the International Commission of Jurists), *Remedying Miscarriages of Justice,* 1994; Mansfield M. and Taylor, N., 'Post Conviction Procedures' in C. Walker and K. Starmer (eds), *Justice in Error*, Blackstone Press, 1993; Malleson, K., 'The Criminal Cases Review Commission: How Will it Work?' (1995) *Criminal Law Review* 929.
10. For example, O'Gorman, T., 'Remedying Miscarriages of Justice — A New Approach is Overdue', paper delivered to the Criminal Law Conference of South Australia, 1996 and submitted to the Wood Commission on behalf of the Australian Council for Civil Liberties.
11. Royal Commission into the NSW Police Force, 'Final Report', Vol II, 488.
12. Devlin, P., *The Criminal Prosecution in Englan*d, OUP, 1960, p.26 quoted in Hogg, above, ref. 5.
13. Hogg, above, p.244; on the 'case theory' see McConville, M., 'Weaknesses in the British Justice System', in *Times Higher Education Supplement*, 3 November 1989.