

## **Lord Kerr gives the Justice Scotland International Human Rights Day Lecture 2013**

### **Miscarriage of Justice - When should an appellate court quash conviction?**

**10 December 2013**

Ladies and gentlemen, law has arguably no function more important than that of ensuring that the fundamental rights of everyone within its scope are protected from any form of illegitimate interference. But it is perhaps right to remember, even on international human rights day, that such fundamental rights are also protected by a deep-thrown seam of law that does not bear the name ‘human rights’.

My theme tonight, when should an appellate court quash a conviction, therefore draws primarily on that seam of law. The issue, when should the verdict of a trial court be set aside, can be cast as one of human rights *per se*. But it may also and, at least no less importantly, be founded on more traditional grounds for allowing a criminal appeal. Those are the grounds on which tonight’s talk will be principally focused.

Before embarking on my theme, however, I would like to thank Tony Kelly for inviting me to give this lecture; for his support in the endeavour; and for his leadership of JUSTICE Scotland—a truly important undertaking. I also wish to thank Lady Scott for agreeing

to chair the event; the Law School of the University of Edinburgh for hosting it; and the Faculty of Advocates for supporting it. Finally, although he is not here to make sure that I do not go too wildly off message, my thanks are due to my judicial assistant, Stephen Donnelly, for his invaluable help in the preparation of tonight's talk.

This lecture takes as its starting point what many might wearily describe as yet another of my dissenting judgments. Or at least it builds on a judgment of mine that, although a dissent as to outcome, at least, for once, tried to find common ground with my colleagues and to reconcile in a harmonious way various different approaches to the question of when an appellate court should quash a conviction.

The principal legal issue in that case, *Taylor v The Queen*<sup>1</sup>, was what should be the test for an appellate court when invited to reverse a finding of guilt. In Scotland you would address that question as one of whether there had been a miscarriage of justice.<sup>2</sup> In Northern Ireland<sup>3</sup> and England and Wales<sup>4</sup> we approach it as a question of whether the conviction was safe.

1. *Taylor (Bonnett) v The Queen* [2013] UKPC 8, [2013] 1 WLR 1144.
2. Sections 106(3) and 175(5) Criminal Procedure (Scotland) Act 1995.
3. Section 2(1) Criminal Appeal (Northern Ireland) Act 1980.
4. Section 2(1) Criminal Appeal Act 1968 in England and Wales.

I would like to suggest that it is possible to view miscarriage of justice and safety of conviction in a unified and orderly way. To make good that claim, it is logical to start with my reasons for saying that the miscarriage of justice and safety of conviction standards can be equated. Then I should say something about the test that should be adopted in order to decide whether the requisite standard of injustice has been reached that would justify quashing the conviction. After that I need to say something of how I think the test should be applied.

Finally, I want to end by asking whether the test that has been applied in recent JCPC cases is compatible with—indeed, is ultimately the same as—the test traditionally used in Scots law to determine whether there has been a miscarriage of justice. (In parentheses I should say that I leave aside cases where the miscarriage alleged is that the jury has returned an unreasonable verdict. I am aware that Scots law by statute sets a different – and arguably higher - standard for review from that in other jurisdictions, namely that the jury had ‘returned a verdict which *no* reasonable jury, properly directed, *could* have returned’<sup>5</sup>.)

5. Section 106(3)(b) Criminal Procedure (Scotland) Act 1995. Cf. *R v Pollock* [2004] NICA 34 at [32], where I said, ‘The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal.’

## Miscarriage of Justice and safety of conviction

My aim of showing the common ground between the Scottish test and that operating in common law countries does not spring from what some might regard as the unhappy—although, over the years, not unknown<sup>6</sup>—desire to assimilate all the UK's legal systems to one another in the cause of convenience or simply for the sake of it. Rather, I start from the simple premise that each of our respective criminal trial processes has the same goal, and the same conception of justice: to render safe convictions. It should therefore be axiomatic, (and there is not much more to say on the point than this), that a miscarriage of justice in Scots law terms must be regarded as producing an unsafe conviction in English or Northern Irish law terms. To put it plainly, if prosaically, if justice miscarries, an unsafe verdict will be the consequence and if a verdict is unsafe, how could it be said that that is other than a miscarriage of justice?

If I am wrong in my elementary premise I should be very interested to hear it explained how a miscarriage of justice (in the sense in which that term has been used in Scots law) in a criminal trial can do other than produce an unsafe verdict or in a trial which has resulted

6. Perhaps the most infamous example was Lord Cranworth's *dictum* in *Bartonshill Coal Co v Reid* (1858) 3 MacQ 266, 285: '[B]ut if such be the law of England, on what ground can it be argued not to be the law of Scotland?' See further Hector Macqueen & Scott Wortley, 'Life with the Supremes: where did our love go?' (2010) 14(3) EdinLR 357.

in a conviction which is unsafe, the conclusion that justice has miscarried can be avoided. It seems to me to be inconceivable that the criminal justice systems of various jurisdictions the United Kingdom do not share the common goal of ensuring that convictions which are the product of those systems should be safe.

In any event, if my primary premise is accepted then the different labels that we adopt—miscarriage of justice or safety of the conviction—turn out not to be decisive. They are not tests in themselves but are better understood as standards. The real work in proofing the reliability of the criminal trial process is done by the test that we employ to establish *whether* justice has miscarried or a conviction is unsafe. I will turn to that test in a moment. But for now the point is that the same standard of injustice has to be reached whatever formulation one chooses, and the aim of an efficacious system of review of convictions must be to identify a test that tells us whether we have reached that standard or not.

### **The ‘reasonable possibility’ test**

If quashing a conviction requires the same level of injustice to be reached in every case, whatever label is given to that level of injustice, it seems only sensible that ultimately a single test should be applied to the situation before the court to determine whether that level of injustice is reached. I say ‘ultimately’ because it may prove helpful in particular situations to express the test in a way that more precisely

fits the circumstances of the case. But that does not detract from the fact that the test is at its foundation asking the same question.

Formulating a test flexible enough to accommodate such a wide array of circumstances as criminal appeals may give rise to, while getting to the nub of what makes a situation sufficiently unjust, is not easy. Mr Justice Kirby of the High Court of Australia observed that the relevant test ‘seeks at once to uphold the high standards of legal accuracy expected in trials of offenders for criminal offences whilst at the same time recognising that mistakes of varying degrees of significance are difficult or impossible to eliminate completely in any system of criminal justice’<sup>7</sup>. Lord Hope’s judgment in *McInnes v Her Majesty’s Advocate*<sup>8</sup> shows the level of precision required to express a test that captures all of this. At paragraph 24 he said:

“The test which [the Lord Justice-General] identified was whether there was a real risk of prejudice to the defence. These remarks, I would respectfully suggest, need some explanation. They invite questions as to how robust the test must be and how the real risk is to be identified. They need to be taken just one step further to indicate more precisely the test that should be applied. The question which lies at the heart of it is one of fairness. The question which the appeal court must ask itself is whether after taking full account

7 *Festa v The Queen* (2001) 208 CLR 593, 653.

8. *McInnes v HM Advocate* [2010] UKSC 7, 2010 SC (UKSC) 28.

of all the circumstances of the trial, including the non-disclosure in breach of the appellant's Convention right, the jury's verdict should be allowed to stand. That question will be answered in the negative if there was a real possibility of a different outcome—if the jury might reasonably have come to a different view on the issue to which it directed its verdict if the withheld material had been disclosed to the defence.”

Of course, the test that has been applied in many of the common law systems of the United Kingdom and Commonwealth has been formulated in manifold ways, and phrased in as many permutations again. In my view, while uniformity would be welcome in principle, we should be relaxed about different wordings of the test that are adapted to the particular problem thrown up by the case. Relaxed that is so long as we recognise that the test, however articulated, at its core asks a simple question, the same question as the one at the heart of the test set out in *McInnes*: is there a reasonable basis for doubting the appellant's guilt? A system of criminal law which has, as its cornerstone, proof of a defendant's guilt beyond reasonable doubt, cannot permit any different formulation for retrospective review of whether a conviction can be allowed to stand. If that review discloses a reasonable basis for doubting the defendant's guilt, the conviction is sufficiently unjust that it should be quashed. And so, while, as I have said, different ways of expressing the test should not be a cause for alarm, there may be a case for eschewing formulations such as unsafe verdict or miscarriage of justice and

concentrating on the essential issue, the continued existence of doubt as to the defendant's guilt.

The editors of *Archbold*, demonstrating the problems that invariably attend different means used to express the test, pointed out that the formulation in *McInnes* could be misinterpreted as setting a higher standard than had previously been thought to prevail.<sup>9</sup> In particular, it could be read as inconsistent with Lord Bingham's speech in *R v Graham*, where he said:

“[I]f the court is satisfied, despite any misdirection of law or any irregularity in the conduct of the trial or any fresh evidence, that the conviction is safe, the court will dismiss the appeal. But if, for whatever reason, the court concludes that the appellant was wrongly convicted of the offence charged, or *is left in doubt* whether the appellant was rightly convicted of that offence or not, then it must of necessity consider the conviction unsafe.<sup>10</sup>”

9. On this see *Taylor*, n 1, [38]–[39].

10. [1997] 1 Cr App R 302, 308 per Lord Bingham of Cornhill CJ..

The critical words in that passage are, “is left in doubt whether the appellant was rightly convicted”. Those words provided the underpinning for Archbold’s criticism of what Lord Hope had said in *McInnes*. Requiring an appellant to show that there was a real possibility that the jury would reach a different verdict might at first sight be thought to be more onerous than leaving the court in doubt as to whether the appellant was rightly convicted. But the two tests can be reconciled if one regards the recognition of a real possibility as signifying no more than an acceptance that when one is left in doubt as to the safety of the conviction it is, by definition, unsafe. That is how in *Taylor I* I interpreted the enunciation of the test in the *McInnes* case.

*Taylor* was a Privy Council case from Jamaica. Another Privy Council case, *Lundy v The Queen*<sup>11</sup>, came later in the year and from New Zealand. In *Lundy* we looked at the test as applied to a case where so called fresh evidence was relied on to suggest there had been a miscarriage of justice. It was a case of striking tragedy in which the appellant’s wife and daughter were found murdered in their home. The evidence in the case was of great complexity, covering multiple techniques for analysing tissue fragments, the contents of the victims’ stomachs, and the most advanced techniques for manipulating personal computers and for detecting such manipulation.

11. [2013] UKPC 8.

Mr Lundy was convicted of the murders, amid great publicity, after a trial involving a substantial cast of expert witnesses. Before the Board, the entirety of the scientific evidence that had come to light before, during and after the trial was reviewed in minute detail. We considered authorities from New Zealand, England and Wales, Canada, Trinidad & Tobago, Scotland, and Australia and after the most anxious scrutiny concluded that Mr Lundy's conviction was unsafe. The test, as we formulated it in that case in light of the authorities from New Zealand, England and Wales, Australia, and elsewhere, at paragraph 150, was as follows:

“... the Board is satisfied that the proper test to be applied by an appellate court in deciding whether a verdict is unsafe or [that] a miscarriage of justice has occurred, where new evidence has been presented, is *whether that evidence might reasonably have led to an acquittal.*”

We could see no difference between this formulation and the test expressed by the Supreme Court of New Zealand which was: whether the defect in the proceedings was capable of affecting the verdict. The Board, in deciding that there was no discernible difference, was comforted and reassured by the presence on the panel of Dame Sian Elias, the distinguished president of the New Zealand Supreme Court.

## **A More Detailed Look at the ‘reasonable possibility’ test and how it is to be Applied**

In *Taylor* we explored in more detail what was meant by saying that there was a reasonable possibility that the jury might have reached a different verdict. By way of preamble I should say that that case also involved the introduction of, if not fresh, at least new evidence. But that consideration is incidental. The test remains the same whatever the context of the review of the justness of the conviction. It is, I think, worth taking a few moments to consider, exactly what we meant by the notion of a reasonable possibility that the jury might have reached a different verdict.

First, in my opinion, it does *not* mean that the appellant has to establish as a matter of fact that the jury might have gone a different way. As I said earlier, the test is simply shorthand for whether there is a reasonable basis for the appellate court to doubt the appellant’s guilt. I tried to explain this at paragraph 40 of *Taylor*:

“The examination of whether a verdict is unsafe does not lend itself to the application of a burden of proving that a particular claim has been made out. Of its nature, the examination of whether a verdict is safe must be conducted in the round. It is not assisted by asking whether one side or the other has shown that a particular assertion is correct.”

Lord Hope, in the same case, cast the test somewhat differently. He took the view, expressed at paragraph 13, that:

“The court must have material before it which will enable it to determine whether the conviction is unsafe. So the appellant *must be able to show* what effect [the new evidence] would have had if use had been made of it at the trial. It is not enough to engage in speculation.”

It is necessary to dismiss immediately one possible misapprehension that might be prompted by consideration of this statement in isolation. That is that the appellate court should be concerned to examine what the actual jury at the trial might have made of the fresh evidence. I am confident that Lord Hope did not intend to convey that. The notion that the safety of conviction or whether a miscarriage of justice has occurred can be determined by reference to what the trial jury would have made of it has been firmly given its quietus in Australasia and in the United Kingdom. The highest courts of both Australia and New Zealand have deprecated too literal an inquiry into what the effect on the jury might actually have been in reality. In the Supreme Court of New Zealand, in a case of

*R v Matenga*<sup>12</sup> Mr Justice Blanchard summarised the law in both jurisdictions in this way:

“The High Court [of Australia]<sup>13</sup> said that the task was not to be undertaken by attempting to predict what a jury would or might do. The appellate court must itself decide whether a substantial miscarriage of justice had actually occurred. That was an objective task not materially different from other appellate tasks. It was to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial; it was not an exercise in speculation or prediction. The standard of proof to be applied was the criminal standard of guilt beyond reasonable doubt. Reference to the jury was liable to distract attention from the statutory task by suggesting that the appeal court was to do other than *decide for itself* whether a substantial miscarriage of justice had actually occurred.”

(As I shall explain presently, the reference to a ‘substantial’ miscarriage of justice owes its significance to the way the test for criminal appeals is formulated in the Australian jurisdictions, and is

12. [2009] 3 NZLR 145, [24].

13. *Weiss v R* (2005) 224 CLR 300.

in fact historically related to the current non-devolution test in Scotland.) Of more immediate importance in the present context is the express disavowal of a system of determining whether a verdict should be quashed by reference to what effect it might have on the minds of the original jury. As a means of testing the safety of the conviction or whether a miscarriage of justice has occurred, such an approach is wholly and rightly discredited.

It was also foreclosed by Lord Bingham, who at para 19 of his speech in *R v Pendleton*<sup>14</sup> said:

“The House of Lords in *Stafford v Director of Public Prosecutions* [1974] AC 878 were right to reject the submission of counsel that the Court of Appeal had asked the wrong question by taking as the test the effect of the fresh evidence on their minds and not the effect that that evidence would have had on the mind of the jury. It would, as the House pointed out, be anomalous for the court to say that the evidence raised no doubt whatever in their minds but might have raised a reasonable doubt in the minds of the jury.”

14. [2002] 1 WLR 72.

Lord Bingham added that the Court of Appeal might test its own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. But that was essentially a secondary, vouching exercise. It cannot and should not substitute for the appellate court's frank confrontation of whether *it* considered the conviction unsafe. That, as it seems to me, is even clearer if one approaches the question on the basis of an examination of whether there has been a miscarriage of justice. An answer to that question cannot be provided by speculating on how the original jury might have reacted to the perceived deficiencies in the trial process or the fresh evidence which is proffered to sustain the claim of miscarriage. It is a matter that must be determined by the appellate court. Whatever the formulation, however, the primary focus must be on outcome rather than process. Can the result, the guilty verdict, withstand the appellate court's scrutiny of its propriety and reliability – the emphasis is not on whether something went wrong or whether further evidence should have been received but on the *effect* of what went wrong or the effect, judged contemporaneously, of the new evidence.

The essential question, therefore, is whether the new evidence or the revelation of some deficiency in the trial process *might reasonably have affected* the outcome. This question is to be answered, I believe, by theoretical rather than deductive analysis. In other words, a detailed forensic examination of how the material might or might not have

been treated by the jury is not appropriate. Much less is it appropriate to hypothesise on challenges that might have been made to the evidence or on explanations that might have been given to diminish its apparent inconsistency with evidence that had actually been given at trial. The inappropriateness of a detailed forensic examination of how the material might or might not have been treated by the jury is the point on which I must, with regret, part company with Lord Hope in his suggestion that it was for the appellant in *Taylor* to show what effect the new evidence in that case would have had on the safety of his conviction. If it is the appellate court's duty to satisfy itself that the conviction is safe, it cannot avoid that obligation by asking whether the appellant has shown that the new evidence would have had a particular effect. Charged with the responsibility of being satisfied of the safety of the conviction, the appellate court's task must surely be to examine *for itself* the impact of the new evidence or the effect of the demonstrated defects in the original trial.

As a matter of first principle if the foundation of the criminal justice system is that only those who can be confidently said to be guilty beyond reasonable doubt are to be convicted, those convictions over which the shadow of reasonable doubt remains must be set aside. The decision whether that looming shadow is present cannot depend solely on the capacity of an appellant to reveal it but on the appellate court's clear sighted quest for its presence.

So that, in very short compass, is the situation that prevails in England and Wales, in Northern Ireland, in much of the Commonwealth, and in devolution appeals from Scotland.

### **Non-devolution appeals**

It would be unforgivably presumptuous of me to seek to pronounce on the approach that should be adopted by the High Court of Justiciary to the disposal of non-devolution criminal appeals on the basis of a miscarriage of justice. The few observations that I have to make on are made from the standpoint of an interested, and probably not especially well-informed, observer. Please forgive me if I stray unwittingly into tactless, non-conversant comment.

By way of preamble, it seems to me that much of the debate about the distinctions to be drawn between appeals which involve a devolution issue and those which do not are unsurprisingly pre-occupied with the dissimilarity of the examination of whether an accused person has received a fair trial under article 6 of ECHR from the less confined and arguably more flexible approach to be followed where what lies at the heart of the inquiry is whether there has been a miscarriage of justice – as Lord Hodge put it in *Brodie v HM Advocate*<sup>15</sup>:

“... the concept of miscarriage of justice offers protection to an accused beyond the requirements of an

<sup>15</sup> [2012] HCJAC 147, 2013 JC 142

impartial court, a public hearing and fair rules of evidence which Art 6(1) of the European Convention on Human Rights and Fundamental Freedoms imposes and the procedural rights which it and Art 6(3) confer in order to achieve a fair trial. Article 6 does not address the substance of the verdict of the court or a jury. A trial may be fair but the verdict open to challenge as a miscarriage of justice, for example, where the verdict is not supported by the evidence or where new evidence is discovered which calls that verdict into question.”

In para 34 of the *Brodie* case the Lord Justice Clerk had referred to what he described as Lord Hope’s acknowledgment in *Fraser v HM Advocate*<sup>16</sup> that the test applied by the Supreme Court in appeals from Scotland under Article 6 was different from that which the High Court of Justiciary applied under Scots domestic criminal law. Lord Hope had expressed the wish that the High Court of Justiciary might “find it possible to resolve the differences of view that have emerged as to the use that may be made of the *McInnes* test”. Those differences of view were to be found in judgments of the High Court of Justiciary in *Conbrough’s Executrix v HM Advocate*<sup>17</sup> and *Black v HM Advocate*<sup>18</sup>. For reasons given by the Lord Justice-Clerk

<sup>16</sup> [2011] SC (UKSC) 113 at para 29

<sup>17</sup> [2010] HCJAC 32, 2010 SLT 755, para 47

<sup>18</sup> [2010] HCJAC 126, 2011 SLT 287

and Lord Hodge, in *Brodie* the submission that the High Court of Justiciary should apply what was described as the *McInnes* test in all cases of miscarriage of justice was rejected.

I hope that I am not insolent in suggesting that there is a debate to be had which is entirely free-standing of the question whether (what I might describe as) the article 6 approach is more suitable than the miscarriage of justice inquiry. Indeed, I make so bold as to ask whether there is not a more pertinent question. That is whether there is in truth any real difference between the miscarriage of justice inquiry and the investigation of the safety of a conviction. In tentatively suggesting that there is not, I point to the fact that pre-devolution Scottish cases on miscarriage of justice have been drawn on to illuminate the scope of the ‘safety of the conviction’ test in other jurisdictions. In *Taylor*, the case that I have referred to earlier, an appeal from Jamaica, the majority opinion drew on dicta of Lord Justice-General Clyde in *Manuel v Her Majesty’s Advocate*<sup>19</sup> and of Lord Justice-General Emslie in *Wilson v HM Advocate*<sup>20</sup>.

From a historical point of view, this is unsurprising. The current statutory formulation in Scotland derives from an older one, common to most of the jurisdictions from which we hear appeals. This found its first statutory expression in the Criminal Appeal Act

19. 1958 JC 41, 47–48.

20. 1987 JC 50, 53.

1907 in England and Wales, and was commonly known as the proviso. It asked not whether there had been a miscarriage of justice but whether there had not been one. The reason was that in those days it was a limiting mechanism on criminal appeals rather than a positive basis for granting them. Whatever aberration had afflicted the trial proceedings, the appeal would fail if it could be shown that there had not been a resulting miscarriage of justice.

The formulation survives today in several jurisdictions, including Trinidad and Tobago<sup>21</sup> and the Australian jurisdictions except the Capital Territory.<sup>22</sup> And it was the formulation expressed by section 254(1) of the Criminal Procedure (Scotland) Act 1975. The history of the miscarriage of justice standard and the safety of conviction standard therefore share a common ancestry. As I said at the outset, I see no basis for believing that ‘miscarriage of justice’ and ‘safety of the conviction’ should be interpreted differently.

Although, as the Lord Justice-Clerk in *Brodie* pointed out, in *Fraser* Lord Hope had expressed the wish that the differences of view as to the use to which the *McInnes* ‘test’ might be put would be resolved, I am not entirely sure that he had wished to imply that the use of the

21. Section 44(1) Supreme Court of Judicature Act 1980.

22. See Catherine Penhallurick, ‘The proviso in criminal appeals’ (2003) 27(3) MULR 800.

*McInnes* approach would lead to a different result from the miscarriage of justice inquiry, for in *McInnes* Lord Hope said at [23]:

“The threshold which must be crossed [in a non-devolution case] is the same as that which applies in any case where it is maintained that, because there was a violation of Art 6(1) that affected the way the trial was conducted, there has been a miscarriage of justice. I also agree that, in a case of that kind, the question whether there has been a miscarriage of justice and the question whether the trial was unfair run together. It is axiomatic that the accused will have suffered a miscarriage of justice if his trial was unfair.”

In other words, a breach of article 6 was a sufficient but not a necessary condition for a miscarriage of justice. It seems to me that what Lord Hope was saying in that passage was that the investigation of whether there had been a violation of article 6 and the inquiry whether there had been a miscarriage of justice were means which were geared to the same ultimate goal *viz* whether there remained doubt as to the appellant’s guilt. Viewed in that way, the two so-called tests are in fact no more than methods or means of deciding whether an overarching test has been met, namely, whether the

conviction of the appellant is free from the taint of doubt as to its correctness. This is, in effect, a reasonable possibility of unsafety test. (I know that this is a brutally clunky way of expressing it but I can't for the moment think of a more euphonious phrase). Let me for shorthand purposes refer to it as 'reasonable possibility' test. What about its substance?

Recall that the test asks ultimately whether there is a reasonable basis for doubting the appellant's guilt, so that the injustice is serious enough to warrant quashing the conviction. This has resonances in Scots law. Here is what Lord Dunpark had to say in *McAvoy v Her Majesty's Advocate*:

“But if the appeal is based, for example, upon a misdirection by the trial judge or the admission by the judge of inapplicable evidence and either of these grounds is established, then I am of the opinion that the court is empowered to consider the materiality of that misdirection, or of the evidence which ought not to have been admitted, in relation to all the other factors relevant to the verdict of guilty. If, having done that, the court is satisfied that neither the misdirection nor the admission of the inadmissible evidence, whatever it may

be, was sufficiently material to cast doubt upon the guilty verdict, then the appeal should be dismissed.’<sup>23</sup>

I struggle to detect any difference between this formulation and the ‘reasonable possibility’ test. Likewise, *McCluskey and McBride on Criminal Appeals* asks whether ‘the error was likely to have influenced the jury to reach a material judgment adverse to the appellant’.<sup>24</sup>

Quite apart from its consonance with established case-law, the ‘reasonable possibility’ test has the advantage of helping to eliminate an apparent circularity in the application of the miscarriage of justice ‘test’. The term ‘miscarriage of justice’ is at present used—in Scotland as in Australia—as both the standard of injustice to be met and the test for determining whether it is met. To solve this problem the courts have had to qualify ‘miscarriage of justice’ in its sense as a test so as to be able to make it useful in determining whether the *standard* is met. Accordingly, *Renton and Brown* notes that the courts have asked whether the miscarriage of justice is in a particular case ‘serious’<sup>25</sup>, ‘substantial’<sup>26</sup>, ‘weighty’<sup>27</sup>, or, as we saw in *McAvoy* a moment ago, ‘sufficiently material’. And to give a more recent

23. 1982 SCCR 263, 274.

24. *McCluskey and McBride on Criminal Appeals* (2nd ed) (Tottel, 2009), para 7.11.

25. *Sandlan v HM Advocate* 1983 SCCR 71, 91.

26. *Mackenzie v HM Advocate* 1983 SCCR 220, 223.

27. *Burns v HM Advocate* 1983 SLT 38.

example, in *Kearney v Her Majesty's Advocate* the High Court said of a misdirection:

“With some hesitation, since it is plainly a mistake which might amount to a misdirection, we have come to the conclusion that in the overall context of the circumstances given in evidence surrounding this charge it is not sufficiently material to constitute a miscarriage of justice.”<sup>28</sup>

By way of final comment, may I offer three – not so much conclusions as – observations? The first is that the primary focus of an appellate court, faced with a claim that a conviction should be quashed, should be on outcome rather than process. In other words, the court should concentrate on the ultimate destination, whether the conviction is free from the reasonable possibility that it is unsafe, rather than the route by which that destination is reached. Secondly and relatedly, the reasonable possibility test is probably the best check on whether that final goal has been achieved. It avoids the distraction of a debate as to whether one means of arriving at the ultimate conclusion is to be preferred over another. Thirdly, the ‘reasonable possibility’ test, while not avoiding all pitfalls, helps to clarify the distinction I have drawn in this lecture between the *standard* of injustice required for an appeal to succeed and the *test* for determining whether that standard is reached. The use of ‘miscarriage of justice’ to refer to both elides that crucial distinction.

28. [2007] HCJAC 3, [14].

## **Conclusion**

I can do no more than commend the 'reasonable possibility' test to you. It is certainly far from perfect, and it can be expressed in ways that give rise to unintended interpretations. But it does have the advantage of targeting directly the objective that the criminal law should be as successful as it possibly can in ensuring that no-one remains convicted in a case in which there is genuine doubt of his guilt.