

Guilty

Do wrongful convictions plague our legal system?

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A decision by Justice Elizabeth Fullerton is due imminently in the case of malicious prosecution brought by Gordon Wood against the State of NSW and the Director Public Prosecutions (through Mark Tedeschi SC), over his 2008 murder conviction, set aside on appeal in 2012. It is just one of the cases of wrongful convictions that are infecting Australia's criminal justice system.

A man convicted of murder is still in jail after 33 years, 11 years after he was eligible for parole, because he will not relent on his claim of innocence. He has always maintained that he was wrongly convicted so he is not in a position to apologise, show remorse or state that he won't re-offend. The prison authorities take the view that he is in denial, because he has been convicted. The key evidence against him is an eyewitness account given by a person suffering psychosis and hallucinations at the time, and forensic evidence that has been discredited. His previous appeals failed and he has appealed again, under new legislation. The decision of the Court of Appeal is also expected soon (at time of writing).

In another case, a woman was convicted of murder on threadbare circumstantial evidence – despite the absence of the body, a murder weapon or a motive. The prosecutor speculated to the jury as to what might have happened; she was found guilty.

Dr Bob Moles, a legal academic specialising in wrongful convictions who studied the case concluded that: 'The evidence given to the court by the forensic scientist was totally inadmissible. The evidence given to the court by the forensic pathologist was totally inadmissible. The prosecution address to the jury was in breach of the legal rules and prosecution guidelines, and was seriously prejudicial. The judge's summing up was in breach of the legal rules and was seriously prejudicial. These errors each, alone, warrant the conviction being set aside.'

Her appeal failed. She has been in

custody for eight years but is trying again under new legislation.

Dr Moles maintains that 'Australia still continues to pretend that things do not go wrong with the legal system, and that if they do, then the appellate system can fix that up – when that is self-evidently not so.'

Innocent people – at least 71 known*, the total unknowable – have been held or are stuck in Australian jails on lengthy sentences for murders or rapes they did not commit. The public is largely unaware of these and other such cases, as is much of the media, resulting in an absence of scrutiny. Revelations of wrongful convictions may – and should – undermine public confidence in our system of justice, and such scrutiny should urge reform.

The wrongfully convicted have little or no chance to speak out, even through their lawyers, who are muzzled by professional ethics, especially if an appeal is before the courts. Appeals can take years to resolve. Media is restricted in reporting on such matters and some cases mentioned here are not identified for that reason. Besides, these are usually complex matters, not suited to the superficiality of modern media. Simpler 'law and order' issues get the attention, like lenient sentencing, easy bail for violent criminals and terrorists.

After more than four years of investigating wrongful convictions, it is clear to this writer that the criminal justice system continues to make mistakes – even those identified so publicly over 30 years ago (notably police investigation errors, forensic evidence failures) through the national trauma of the Lindy Chamberlain trial, her wrongful conviction and the subsequent 1986/87 Royal Commission.

In one recent case, police sought for two years to find the killer or killers in a violent multiple murder. Eventually, although they did not find any physical or forensic evidence to link him to the crime, they charged a neighbouring family member with the murders, citing circumstantial evidence. The man insists on

his innocence and even has a pretty good alibi for the entire night of the murders.

At the bail hearing, the magistrate stated: 'It was effectively conceded by the prosecutor that there was no evidence of motive.' And the prosecutor conceded that the prosecution case 'may not be an overwhelming one'.

The case went to trial anyway. The prosecution speculated to the jury as to what might have happened; the man was convicted and jailed for life. The hunger for a conviction was satisfied. He is destroyed but hoping to appeal.

In 1995, Henry Keogh was convicted of the murder of his 29 year-old fiancée Anna-Jane Cheney. They were soon to be married and on March 18, 1994, they had had a pleasant evening out, over some wine and potato wedges. While he went to visit his mother, Anna-Jane relaxed in her bath. When he returned she was dead.

Keogh tried CPR after calling an ambulance, but Anna-Jane could not be revived. He has always protested his innocence and claimed to have not received a fair trial. On December 19, 2014, the Supreme Court of South Australia (Court of Criminal Appeal) agreed.

The prosecution had speculated that Henry Keogh murdered Anna-Jane Cheney by grabbing her by the ankle as she was lying in the bath, forcing her head under water. Forensic pathologist Dr Colin Manock gave evidence that marks on her legs were grip marks that supported the prosecution's speculation – or drove it.

Professor Vernon-Roberts' crucial 2004 report, which clearly showed the grip marks to be a false finding, was withheld for almost 10 years – against all the rules of due process. No-one has been held accountable. Since his original conviction, Keogh had petitioned the Governor for mercy on five occasions.

By December 2014, Keogh had served almost 20 years of his life sentence, when newly introduced legislation (on May 5, 2013) allowed him to make yet another appeal, which was heard in December 2014, resulting in his conviction being set aside. Keogh would not have faced trial at all without Dr Manock's evidence. He would not have spent the best part of his life behind bars. Rush to convict and bad science helped put him there, legal errors kept him there.

* *Dr Rachel Dioso-Vila, Griffith University Innocence Project, Flinders Law Journal*

Andrew L. Urban is editor of pursuedemocracy.com and is writing a book, Murder by the Prosecution, on his experiences over four years, covering cases of wrongful convictions.