SECTION 475 INQUIRY — THE LAST RESORT*

The Section 475 Inquiry is one of the most rewarding investigations in which a lawyer can be involved. By its nature a s475 Inquiry which comes into being "when after conviction ... doubt" it comes late in the judicial process. The inquiry is the end of the road for the convicted person. He has already proceeded through the judicial system from the committal or coronial inquiry, the trial, the Court of Criminal Appeal perhaps to the High Court and obviously these have all been relatively unsuccessful. The convicted person now finds himself or herself burdened with the task of proving that a real doubt lies in respect of his conviction. That burden is heavy.

The scenario in the cases I have dealt with involve a prisoner serving for a serious crime. He has no money. If he had any to start with it is gone by now. There is little hope that he will be able to undertake an inquiry without pro bono work or the assistance of legal aid, or both. Legal aid is scarcely overwhelming in its assistance — such cases we are told are outside the guidelines for which legal aid is available.

I would like to be able to report that having the carriage of an inquiry is financially profitable. Such is not the case. Preparatory stage work is largely for nothing and is very extensive.

I have said the section 475 Inquiry is available when the convicted person has reached the end of the road, to quote the motto of Mary Queen of Scots — "In my end is my beginning" is literally true.

However on the other hand to establish a right to seek such an inquiry is only the beginning of the road for the legal representatives. For investigating to be rewarding it must be meticulous. It is lengthy and expensive. It involves the rectification of cases where justice has miscarried and this is not easy to do. The petitioner virtually has to establish innocence.

I have been involved in two successful 475 Inquiries into convictions for murder, the first one that of Douglas Harry Rendell and the second one that of Arthur Joseph Loveday. Both persons had served years in gaol after their convictions. Both inquiries were legally aided and both covered years of work. Petitions to the Governor and the Attorney General were twice knocked back in Mr Rendell's matter. Finally, with some further investigation into ballistics evidence an approach was made to a Supreme Court Judge, who referred the matter to the Chief Justice. A Justice of the Peace, Mr Arthur Riedel, was appointed by the Chief Justice to hold an inquiry into Mr Rendell's guilt.

In both the Loveday and Rendell cases I was indebted to a high degree to the diligent preparation and assiduous and consistent effort of the petitioners themselves to prove their innocence.

In a recent book entitled *Travesty, Miscarriages of Justice*[1] a conclusion is drawn which quotes:

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* Presented at a seminar entitled "A Just Result: Extracurial Inquiries and Unsafe Verdicts" convened by the Institute of Criminology and held at the State Library of New South Wales on 28 October 1992.

> The overwhelming factors which we envisage as the major process involved in wrongful conviction are suspect police investigations inconclusive forensic evidence often presented in partisan fashion, unreliable police or prison informer evidence and prejudicial media".

I shall confine my remarks to the two cases Rendell and Loveday which illustrate clearly two of the factors named above:

1 Suspect police investigation suppression of evidence allied with inconclusive forensic evidence in the Rendell case, and

2 Prison informer evidence in the Loveday case.

THE RENDELL CASE

The scenario established by the police was that a young woman was shot, that she was shot while lying down, and that the rifle involved in the death was not prone to accidental discharge. The police ballistics expert Sergeant Musgrave and the scientific officer Detective Penman produced evidence which appeared to support this view. Both factors deprived Mr Rendell's alternative explanation that the deceased was shot while standing up and that the rifle discharged accidentally. Mr Rendell obtained after his conviction a reexamination of the rifle by Mr Bardwell, a former Chief Ballistics Officer of the Queensland Police Department. Using the equipment of the Sydney Police Centre and carrying out his investigations under the surveillance of a Sydney Police Officer, Mr Bardwell produced evidence that the rifle could discharge accidentally. This opinion opened the way to establishing a ground for an inquiry.

The Justice commissioned to conduct of the inquiry reported, concerning the weapon's testing, "The very nature of the tests depends on the skill experience *and motivation* of the expert." Mr Riedel thus noted the subjective element which enters into police investigation. He goes on to say: "As will be seen there is new evidence that the rifle is capable of discharge when dropped from heights of 14 inches and above."[2]

After the inquiry was afoot further police evidence became available through the process of discovery. This evidence *had not been presented* to the defence nor to the Court at the time of the trial. It showed that the gun had discharged at a drop of 14 inches and above. The police tests at the time noted that. The police ballistics officer *relying on his own expertise* had informed the Court that a rifle of the calibre of a Sako 222 would not discharge accidentally if it did not do so at a drop of 12 inches. He did not mention it would go off on a 14 inch and above drop. This decision set the scenario for what appears to be further suppressed evidence. The deceased's jeans and Ugg boots had been sent to the Lidcombe Government Laboratories for analysis. The analyst, Mrs Kuhl, observed that what appeared to be blood was visible on the upper surface of one or both boots and

1 Carrington, K, et al (eds), *Travesty, Miscarriages of Justice* (1991).

2 *Report of the Inquiry pursuant to s475 of the Crimes Act 1900 into the Guilt of Douglas Harry Rendell*, presented by Justice D Hunt and conducted by Arthur Manning Riedel, Sydney, Government Printer (1989) at 21.

on the jeans. The Chief Ballistics Officer according to Mrs Kuhl directed her to desist from further testing as the evidence was not required. This directive from whomsoever it came suppressed evidence which would have supported the defence case that the victim was standing.

SCIENTIFIC EVIDENCE

The Chief Scientific Officer, Detective Penman, having made observations concerning the flow of blood from the deceased's body, the angle of entry of the bullet, and other details such as the position of the rifle on the floor set up a scenario which supported the police theory that dictated a shooting of the victim whilst she was lying down, therefore postulating a deliberate act on the part of Mr Rendell. There appeared to be no answer the accused could put to these facts presented by experts.

The Counsel assisting at the Inquiry obtained independent expert evidence from other highly qualified forensic experts from other states. In the opinion of Dr Manock, a scientific expert from South Australia, supported by Dr La Brooy from New South Wales came to the conclusion that: "the deceased was standing in the hallway outside the bedroom door when shot".

Dr Manock was also of the view that the deceased was not standing upright but more likely with head slightly bent forward at the time of the shooting. This explained the angle of entry of the bullet. He went on to say that he believed the gun discharged from accidental dropping. His opinion accorded with the accused's explanation.

A further sloppy piece of evidence presented to the jury was that the gun bore smear marks, and no finger prints were visible, indicating or suggesting that it was wiped. However it was not brought to the attention of the jury that the gun had been previously handled a number of times for the purpose of testing by the police before being sent to Sydney for examination. The wiping was clearly after this handling had been done.

In his report to the Chief Justice at the end of the inquiry Mr Justice Hunt referred to certain matters arising from Mr Riedel's report before stating his conclusions. Justice Hunt said:

> The first [matter] relates to the quality of the weapons testing which was carried out both in relation to Mr Rendell's trial and Mr Riedel's inquiry. Mr Riedel has drawn attention to the widely varying results obtained by the application of the same scientific tests by different experts as to how the test themselves lack both sophistication and precision and to how the results depend largely on the skill, experience and *motivation* of the expert who conducts them ...[3]

His Honour continued later:

> Police Officers who have been qualified to express opinions of this nature [re: forensic evidence] in criminal trials and not only in relation to weapons, do not always understand the obligation upon the Crown to produce *all* relevant evidence whether or

3 Id at 8.

> not it assists the Crown case either to the jury or to the legal representatives of the accused and secondly that if committal proceedings in criminal cases are going to be abolished or at least severely curtailed (as is presently being discussed) it will be necessary for a clearly defined obligation to be imposed upon the Crown to produce to the accused, well in advance of the trial for examination by his own experts all of its scientific reports as well as the working papers and the full result of all experiments carried out by those who prepared those reports ...

A recent article by Patrick O'Connor[4] discusses the need for disclosure and concludes: "The duty of disclosure is too fundamental to be treated other than systematically, professionally and with a full appreciation of the gross imbalance of resources between the parties to criminal trials".

The failure to disclose evidence, actual suppression of evidence, and partisan interpretation of evidence by the prosecution in the Rendell case led to a gross miscarriage of justice. The case itself manifested an imbalance of resources and the prosecution's control over information. As a result Mr Rendell spent approximately nine years in maximum security.

THE ARTHUR LOVEDAY CASE

The second case I would like to comment on is the inquiry into the conviction of Arthur Joseph Loveday for murder.

In May 1981 an inmate of Parramatta Gaol, Stephen Leslie Shipley, was murdered. He suffered death by being repeatedly struck across the skull with an iron bar. Evidence was given at the trial that there was much blood in the cell in which the incident allegedly occurred. The quality of the police investigation was sloppy. No blood was found in the carpeted cell where the death allegedly occurred, nor on the woodwork of the beds or furniture where blood must have been splattered according to the evidence. As far as one can judge detailed investigation was made of the empty cell where the body was found.[5] It was just a gaol murder and treated as such.

According to the authors of an essay in *Travesty — Miscarriages of Justice*, as the police verbal is more cynically assessed by juries and is controlled to a degree by audiovisual interviews, the use of the informer grows in importance.[6] In his summing up of the evidence given at the Loveday Inquiry, Mr Darcy Leo, the Justice appointed to hold and report on the inquiry said:

> It must be accepted that where offences occur in prison, unless they happen to be perpetrated in the sight of a prison officer, any evidence leading to conclusions about who committed the offence must of necessity be based on the evidence of prison informers.[7]

4 O'Connor, P, "Prosecution Disclosure: Principle, Practice and Justice" *Crim LR*, July 1992, 464–477.

5 A cursory investigation appeared to made of the cells of the top floor of Wing 4 known as "the Bronx".

6 Brown, D and Duffy, B, "Privatising the Police Verbal: The Growth Industry in Prison Informers", ch 11 in *Travesty — Miscarriages of Justice*, above n1.

7 *Report of the Inquiry pursuant to section 475 of the Crimes Act 1900 into the Guilt of Arthur Joseph*

In the Loveday inquiry one encountered a network of informers whose evidence in other serious cases recurs as frequently as recurring decimals — among these Stephen Robinson, Justin McCauley, Andrew Anastasiou and above all Alan Joseph Cohen, also known as Alan Joseph Black. The recent Independent Commission Against Corruption inquiry dealt with a number of these and manifested the mode of operation used by the Police and the Internal Investigation Unit of the Department of Corrective Services to avail themselves of the services of a network.[8] Mr Loveday was the victim of one such network.

It was following three records of interview each preceded by a bargaining on the part of Cohen to give information in exchange for being sent to a gaol of his own choosing from which he then escaped. Loveday was charged together with five others with murder, some six months after the incident. After lengthy analysis of Cohen's evidence Mr Darcy Leo said: "I am satisfied that Cohen's evidence has been so discredited that considerable doubt now exists as to the guilt of Arthur Joseph Loveday." Despite this finding Cohen still enjoys a new identity. He even perjured himself at the inquiry and got away with it as he had been given immunity.

Serving the long years of incarceration Mr Loveday had worked unceasingly on his case, tracing the inconsistencies in evidence given by the informers, checking dates of supposed conversations incriminating him, the escort details of the informers, thus showing the impossibility of some of their conversational evidence to have taken place, cross referencing evidence given by the same informers in the trials of other prisoners, to whose documents he was given access, similar fact conversational and hearsay evidence (a tool frequently used) and above all the benefits which appeared to follow items of information given.[9]

Mr Loveday supplied us with a list of benefits received by informers in his case. This was work which was open to Mr Loveday to acquire within the system, particularly in the maximum security area where he was placed. The information proved invaluable to the legal representatives preparing his petition for an inquiry. It was time consuming finding the facts involving two journeys to Albany in Western Australia seeking evidence, journeys to Goulburn and Maitland Gaols, but finally the investigation resulted in showing that the evidence against him was a total fabrication.

HOW TO SAFEGUARD AGAINST THE INDISCRIMINATE USE OF INFORMERS IN THE JUSTICE SYSTEM

> Prisoners are particularly vulnerable to inducement threat or manipulation by police, prison authorities and other prisoners. Informers have easy access to the authorities, enjoy certain privileges, the granting of immunity and other favours causes an unfair

Loveday, presented by the Hon Justice M D Finlay, conducted by Darcy Francis Leo, Justice of the Peace, Sydney, Government Printer (1992) at 15.

8 Independent Commission Against Corruption, *Report on an Investigation into the Use of Informers*, Parts 1 & 2 (1993).

9 For instance: bail, moves to an easier prison, visits to girlfriends at home, recommendations provided by the police or corrective service officers to a Judge when bail was sought or a reduction in sentence given.

> balance in favour of the prosecution through promises of favourable treatment promised as witness cooperation.[10]

As Mr Leo pointed out information will always be available from informers. I suggest a very close and careful scrutiny of the informer and his history before accepting his evidence, an inquiry into what benefits he is anticipating or hoping for. For instance, in the Loveday case Cohen seemed to provide vital evidence in circumstances when he was facing charges of escape and of possessing guns at Parramatta Gaol.

Secondly there is an observable close cohesion between Police and the Department of Corrective Services, Internal Investigation Unit. This has led to a development of the informer industry. The Internal Investigation Unit has gained influence over prison classification transfer and witness protection programs. These are bargaining chips for the inmate looking for the thirty pieces of silver. It is not clear what records are kept of these exchanges between prisoners and authorities and to whom there is accountability.[11]

In a paper delivered in October 1991 Mr Justice Samuels, then of the Court of Appeal, addressed himself to three cases involving a miscarriage of justice, the case of the Birmingham Six in England, the Chamberlain case in the Northern Territory and the McLeod-Lindsay case in New South Wales. He restricted his remarks to defective scientific evidence; however, they have a wider application: "Mistakes in the course of the trial which defied detection in the course of the ordinary appellate processes."

He further asks:

> How can we prevent a miscarriage of justice of this kind? The answer is simple enough, or at least, there is an answer which is plain and persuasive, and which has been advanced by Mr Justice Morling, by Mr Justice Loveday, and by Lord Scarman, a distinguished former Law Lord. The emphasis of the recommendations made vary somewhat, but all are agreed that what is required is an independent forensic service, staffed by experts whose skills are beyond question and whose services are available to all who may require them. At present there is no such service in New South Wales although there is, I understand, in Victoria. I gather that plans are now in place for the establishment of a national forensic science institute; but whether this is to be a research organisation or a consultative one I do not know. What is necessary, it seems to me, is what I have adumbrated. That is a service which is independently managed — that is, independent of police or prosecuting authorities — funded directly by government, responsible to a Minister and thus to the Parliament, and ready to supply expert advice and evidence to accused persons on the variety of forensic topics which may arise.[12]

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10 Byrne, P, "Granting Immunity from Prosecution", in Potas, I (ed), *Prosecutorial Discretion: Proceedings 7–9 November 1984*, Australian Institute of Criminology, Canberra (1984) 155–172.

11 In making this observation, I am indebted to the research reported in Chapter 11 of *Travesty — Miscarriages of Justice*, above n1.

12 Samuels, G, "Is This the Best We Can Do?", paper delivered on the occasion of the 25th Anniversary of the Foundation of the Academy of Forensic Science, 29 October 1991.