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Working Papers

Victim blaming and alleged innocent victims of false allegations and wrongful convictions

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Introduction

This article evaluates a piece of advice from a barrister to a friend of an alleged innocent victim of a false allegation who was convicted and imprisoned for the alleged offence from the perspective of the Government's guidance on challenging victim blaming language and behaviours.

As will be shown, the thinking expressed in the barrister's opinion shows no concern whatsoever for whether the alleged innocent victim is, or could be, an innocent victim of a false allegation and a wrongful conviction. On the contrary, it is delivered entirely from the perspective of the criminal appeals system, placing the responsibility, blame and the forms of harm that are engendered by wrongful convictions firmly and entirely onto the person claiming to be wrongly convicted.

This adds further to research that I have conducted elsewhere that found that lawyers are generally unable to put their clients' interests above their subservience to a criminal justice system that causes innocent victims to be wrongly convicted yet works to prevent them from being overturned.

The UK Government's guidance on challenging victim blaming language and behaviours

The UK Government's guidance on challenging victim blaming language and behaviours defines 'victim blaming' in the following terms:

"Victim blaming is any language or action that implies (whether intentionally or unintentionally) that a person is partially or wholly responsible for abuse that has happened to them. It is harmful and can wrongfully place responsibility, shame or blame onto a victim, making them feel that they are complicit or responsible for the harm they have experienced."

An under researched aspect of victimhood studies relates to alleged victims of false allegations and wrongful convictions, who have also tended to be neglected or omitted by successive Victim's Commissioners for England and Wales when advocating for further concern and/or resources for victims of crimes relating to sexual offences in society.

No doubt linked to the 'believe the victim' ideology that has gripped the nation over the last decade or so, there appears to be a widespread difficulty in adopting a balanced approach by agents of the criminal justice system and members of the public, alike, to the question of who, precisely, is the victim when allegations of rape, child sexual abuse and other sexual offences are made.

What we have, instead, is a society within which there is an overtly one-sided and highly biased approach where complainants are seen unproblematically as victims without the need for evidence to substantiate the claim.

This fails almost entirely to consider the reality that false allegations and wrongful convictions are a routine feature of the criminal justice system and that the individual complained about

may well be the victim of an offender committing the criminal offence of perverting the course of justice.

How barristers can blame alleged innocent victims of false allegations and wrongful convictions for their convictions

In this section, I explore the advice from a barrister to an alleged innocent victim of a false allegation who was convicted and imprisoned for the alleged offence. The advice was given through a friend of the barrister who is also a friend of the alleged innocent victim convicted for the offence.

In terms of structure, the advice will be broken up and analysed in terms of the different parts or planks that the barrister used to support their conclusion that they didn't 'see any merit' in another attempt by the alleged innocent victim of a wrongful conviction to overturn their conviction on appeal.

'My understanding is that he has already appealed to the court of Appeal twice, in effect, and [had] his application rejected twice? As such, there is really no further for him to go.'

The reference in the above extract from the barrister's advice to '*in effect, and [had] his application rejected twice*' refers to an application directly to the Court of Appeal (CoA) and an application to the Criminal Cases Review Commission (CCRC) by the alleged innocent victim of a wrongful conviction, both of which were rejected.

But, it is the reference to, '*As such, there really is no further for him to go*' that betrays a particularly negative and rather problematic understanding of the history of wrongful convictions in Britain, generally, and the workings of the CCRC and how it relates to the CoA, specifically.

First, such a remark fails to understand that there is no limit to the number of applications that alleged innocent victims of wrongful convictions can make to the CCRC. In so doing, the advice also neglects cases such as Andy Malkinson, who recently overturned a wrongful conviction for rape following the referral of his third (3rd) application to the CCRC back to the CoA.

Second, such advice can have a chilling effect on victims of wrongful convictions, deterring them from making applications to the CoA or CCRC.

Third, in advising that '*there is really no further for him to go'* such advice can also take away, rather than give, hope to applicants who have applications rejected by the CCRC that they, too, may one day have their convictions referred by the CCRC and overturned by the CoA in the way that Andy Malkinson did.

Taken together, such advice can further entrench reports that alleged innocent victims of wrongful conviction and imprisonment have lost faith in the CCRC and can't be bothered to challenge their alleged wrongful convictions.

'Every allegation of [a sexual offence] involves one person's word against another, that is the nature (normally) of sexual allegations.'

The problem with this aspect of the barrister's advice is that the specific alleged wrongful conviction that they were asked to give advice on did not rely only on the uncorroborated word of accuser versus accused. They likely wouldn't know or appreciate this as they didn't look at the claim of Innocence to try to determine its truthfulness or otherwise but, rather, looked at the case from the perspective of the chances of winning an appeal.

This, again, highlights how the barrister's first consideration or allegiance, if you will, is to the way that the criminal appeals system is structured rather than to the possible innocence of their client and of a false allegation and wrongful conviction.

It is from this standpoint that I argue that if the barrister had bothered to spend a little time considering the possible innocence of the alleged innocent victim; if they had spent some time trying to see the alleged innocent victim as a fellow human being who was caught up in the greatest threat to, and challenge of, their life and livelihood, then they might have arrived at a very different conclusion.

It is on this basis that I argue that criminal appeal lawyers don't look for innocence because if they thought that their client was or might be innocent then they might not be able to continue to work as criminal appeal lawyers and might not be so quick to dismiss them.

This links with how barristers, like other professions, 'other' the individuals; the subjects at the heart of their work. Like G.P.s have 'patients' and teachers have 'pupils' or 'students', lawyers have 'clients', and it is not strictly not permitted for a lawyer to represent their own family member or friend on claims that there would be a 'conflict of interest'. The so called 'conflict of interest' being referred to is, I argue, a smokescreen to hide the possibility or reality that they might not be able to 'other' their friend or family member in the way that they can 'other' a stranger who is a client.

To apply this theory to the present discussion, if criminal appeal lawyers were allowed to represent their Fathers or Brothers, for instance, who are convicted of alleged sexual offences but say that they are innocent, for instance, then they might identify, personally, with the issues. As a consequence, they might be better placed to have open eyes and see the flaws of the criminal appeals system because it would become personal to them. As a result, they might not be able to so easily dismiss their Father or Brother on the basis that the structures of the system were more important that the innocence or potential innocence of their Father or Brother.

As this relates specifically to the claim of innocence in question, I have personally read many of the relevant legal documents in the case including the statements from the accuser and the accused, as well as statements from witnesses that support the accused's account. There were also claims in the accuser's statements that have been undermined and discredited and the context and timing of the alleged sexual offence is also problematic, to say the least. These facts and issues will form the basis of a second application to the CCRC that is currently being prepared.

None of this seemed to register with, or matter to, the barrister as they were blinkered by the rules and procedures of the existing criminal appeals system, which cares not if appellants to

the CoA or applicants to the CCRC are innocent or not on the basis that they were all matters that could have been or should have been dealt with at trial on on a previous appeal.

'What is almost impossible to comprehend is why he did not give evidence. Bearing in mind consent was his defence then it would have been up to him to explain why he "reasonably believed" she was consenting. That can only be achieved by giving evidence...It is similar to a client going "no comment" in interview.'

I am in almost full agreement with the barrister on this point and have asked countless alleged innocent victims of wrongful convictions over the years why they gave a 'no comment' interview to the police and/or why they didn't give evidence at their trial and tell the jury in their own words that they did not commit the serious criminal offence that they were accused and convicted of.

The problem with 'no comment' interviews to the police and not giving evidence at trial is that it can create suspicions that the accused suspect or defendant has something to hide; that they committed the criminal offence that they are accused of. This is enshrined in s. 34 of the Criminal Justice and Public Order Act 1994, which provides that the a court, in determining whether the defendant is guilty of the offence charged may draw such inferences as appear proper from evidence of silence in certain circumstances.

Moreover, we have, arguably, been conditioned through soap operas and movies in popular culture that when a suspect goes 'no comment' in the police interview or opts to not give evidence at trial that they *are* guilty; that they are trying to escape justice for a crime that they did, in fact, commit - think, for instance, Phil Mitchell in *Eastenders* when he says 'get me my brief' when he is arrested by the police and gives a 'no comment' interview and we all know that he did the crime that they think he did because we saw him do it on our television screens with our very own eyes.

Where I differ from the barrister, however, is that I know that clients can be advised to give 'no comment' interviews by their solicitors and also to not to give evidence by their barristers at their trials.

I also know that innocent victims of wrongful convictions can truly believe that they do not need to give their account to the police or to a jury at trial because they believe that the presumption of innocence and the burden of proof on the prosecution to prove their case beyond a reasonable doubt will work to protect them from being wrongly convicted.

I remember talking with Michael Lawson, for instance, a former police officer, who was given a seven year custodial sentence following 17 alleged counts of child sexual abuse when working as a care worker, when he overturned his conviction. I asked him why he didn't give evidence at his trial. He said that he didn't think that he needed to as he knew that they couldn't find any evidence to support the allegations as he was innocent and didn't commit the alleged sexual offences against the children in his care.

I will not rehearse the arguments here due to word limits other than to say that I have written much about the need to distinguish between the presumption of innocence in theory and how it actually works in reality counter to any belief that it is a protection against wrongful conviction. Indeed, the presumption of innocence in practice renders innocent victims

vulnerable to being wrongly convicted. Whether suspects of crime or defendants in criminal trials they are rendered passive; they do not need to do anything to prove their innocence which is assumed. At the same time, a legislative framework designed to obtain convictions, inherently unreliable forms of evidence are deemed admissible in criminal trials and unlimited resources are provided to the police and prosecution to obtain criminal convictions, which is justified all in the interests of reducing the so called burden on the prosecution in the fight against crime.

'They all say "my legal representative advised me to go no comment" and the jury is always told that it is an individual's decision whether to follow that advice, or not. It is not "binding" on a defendant, they still retrain the final choice.'

In the previous section, the barrister claimed that '*What is almost impossible to comprehend is why he did not give evidence.'* In the next section of the advice, however, they undermined themselves by acknowledging that solicitors can, and do, advise clients to give 'no comment' interviews to the police.

Then, in an explicit move to blame alleged innocent victims of wrongful convictions on their convictions they go on to say that '*the jury is always told that it is an individual's decision whether to follow that advice, or not. It is not "binding" on a defendant, they still retrain the final choice.'*

It is true that a common complaint by alleged victims of wrongful convictions is to say that they were let down or failed entirely by their lawyers. It is also true that attempting to overturn an alleged wrongful conviction on the basis of poor or ineffective defence is almost impossible.

This is because the rules and procedures that govern the relationship between defence solicitors and their clients contains caveats such as the one referred to by the barrister, i.e. that even though they can be, and are, advised by their solicitors to give 'no comment' interviews it is their own fault and responsibility (think victim blaming here) if they go along with their solicitor's advice and it backfires; goes wrong and adverse inferences are made and they are convicted.

Without exception, all of the alleged innocent victims of wrongful convictions that I have spoken with or communicated with through letters and emails over the years that I have worked on alleged wrongful convictions have had a problem accepting this. They point out that their lawyers are the experts in the law and that they trust them and follow their advice and they don't understand how they are responsible and their solicitors have no responsibility or accountability when the advice is proven to be bad advice and they are convicted, allegedly wrongly.

To their cost, and their cost alone, many alleged innocent victims of wrongful convictions try to put things right on appeal only to be told that the 'doctrine of finality' means that they only have one bite of the cherry, one trial; that they had an opportunity to say whatever they wanted to say in the police station or at trial and they choose not to. This adds another dimension to this discussion of blaming innocent victims of wrongful convictions on their wrongful convictions in terms of the way that the procedures of the criminal appeals system also work to blame innocent victims of wrongful conviction on their convictions; to place the

responsibility for the wrongful conviction and the forms of harm that derive from them onto the victim.

'In my experience, any client who does NOT give evidence is asked by their representatives to sign an endorsement which will state something along the lines of "The time has come when I have to decide whether to give evidence or not. After careful consideration and having been told by my representatives how my lack of evidence could be held against me by the jury after the Judge gives an adverse inference direction, I have decided of my own free will not to give evidence."...I imagine an endorsement like this was prepared by his legal team and then signed by him. The main thread of such an endorsement is the understanding that it is the client's (underlined in the original) decision not to give evidence. This friend of yours would have been told that at the point he would be expected to go to the witness box, the Judge would have asked his barrister, in front of the jury, if his client realised that the time had come when his client would be giving evidence and that his failure to do so could result in the jury holding this decision against him. HIs barrister would have had to say in front of the jury and his client "he has been so advised". Bearing in mind all of these steps that should have been gone through, and I imagine his solicitors have kept a very tight grip on the endorsement they no doubt got him to sign, it is hard to believe anything other than this man decided to not give evidence. He may regret that decision now but now is too late.'

The next part of the advice from the barrister was similar to the previous part about the solicitor and 'no comment' interviews, but this part related to barristers and the provisos that they employ to cover their own backs and place the blame and responsibility onto the client when they take their advice to not give evidence in their trials and end up convicted.

I am not surprised that the bulk of the advice to the alleged innocent victims of a wrongful conviction was devoted to emphasising that he would have been warned that *HIS* decision could be held against him and if it was, as it was in this case, then it's his own fault. This is the epitome of victim blaming under the UK Government's definition cited above.

We read and hear much about how lawyers 'go to war' for their clients; how they are 'fearless' ; and 'combative'. The pages of the newspaper for prisoners, *Inside Time*, are brimming with adverts with such claims from criminal appeal lawyers touting for business. The advice from the barrister in this case, however, tells a different reality.

Does the barrister really think that a person who was frightened to death by what they say was a false allegation of a sexual offence had the capacity to make rational decisions about something that they knew nothing about, i.e. the mysterious workings of a criminal justice system that is designed to obtain convictions whether the suspect (police station) or defendant (Crown Court) did or did not commit the alleged criminal offence that they are accused of or on trial for? (On this point I direct readers my book, *The Innocent and the Criminal Justice System*).

Does the barrister even care?

Or, do they only care that their actions and the actions of the lawyers that advised the alleged innocent victim of a false allegation and wrongful conviction to give a 'no comment' interview at the police station and to not give evidence at his trial are in keeping with legal practice and the relevant guidelines, notwithstanding the fact that such guidelines serve to apportion the

blame, responsibility and any harmful consequences of wrongful convictions onto innocent victims who dutifully follow the advice given to them by their lawyers and know no better than to do so?

And, even if they are working within the existing legal guidelines and so called best practice, do they ever reflect that those guidelines are problematic when they fail to prevent, or contribute to, the wrongful conviction and imprisonment of innocent victims when innocent victims overturn their convictions and the wrongful conviction comes to light, such as the cases of Andy Malkinson, Mike Lawson, Basil Williams-Rigby, Warren Blackwell, Stephan Kiszko and Roger Beardmore, to name but a few pertinent cases?

Do they ever think that compliance with law is not synonymous with morality, and that they may be working within the dictates of the criminal justice or criminal appeals systems but they may be causing or contributing to innocent victims being wrongly convicted and harmed and damaged in innumerable ways in the process?

'He may regret that decision now but now is too late. I'm sure if there had been any merit in what he was saying...then that would have been picked up on by the Court of Appeal. In a nutshell, I don't see any merit in his complaints.'

The final comments in the advice from the barrister read to me as cold, callous, uncaring and simply incorrect in terms of the lack of understanding shown of how the Court of Appeal functions.

It is not about whether the alleged innocent victim '*regrets*' not giving evidence at his trial and it is not '*too late*' for his conviction to be challenged through the CCRC, as outlined above.

Moreover, and, again, without rehashing all of the arguments here, the Court of Appeal, save in exceptional cases, examples of which I do not know, is concerned only with fresh evidence that was not or could not have been available at the time of the original trial. It is not concerned with whether appellants did or did not commit the alleged criminal offences that they were convicted of but, rather, with whether they had a fair trial - with fair trial here understood in terms of fairness of process rather than fairness of outcome. As such, innocent victims of wrongful conviction can be, and are, rejected by the Court of Appeal, which is why the CCRC was set up, which can also fails innocent victims of wrongful convictions as it is required by Statute to work in a subordinate role to the CoA.

In this context, it is somewhat worrying that the barrister who gave the advice that has been analysed here thinks and advises that if the alleged innocent victim's conviction had '*any merit...then that would have been picked up on by the Court of Appeal'*. The notion that the CoA is infallible is simply not true, which also questions the professional competency of the said criminal appeal barrister.

Conclusion

It is important to note that the analysis conducted here is of a single piece of advice from a lawyer to a friend of an alleged innocent victim of a false allegation and a wrongful conviction.

It must also be acknowledged that there are exceptions to every rule and my analysis in this piece does not claim to be a universal critique of all criminal appeal lawyers.

But, exceptions to rules do not disprove those rules, they prove them. And, in my experience or reading scores of such pieces of advice over the years, I can state with confidence that the advice evaluated in this article is representative of what barristers think, generally, and what they say, routinely, to their clients regarding their attempts to overturn their alleged wrongful convictions through appeal.

I can't count the number of times an alleged victim of wrongful conviction or one of their family members or supporters has said that they wished that they had known about such things before they / their family member / their friend had been wrongly convicted.

This is written with the intention that it is read widely and that it may contribute to preventing innocent victims from being wrongly convicted because they unwittingly follow the advice or their criminal defence solicitor or criminal appeal barrister without realising that the advice may not be in their best interests and if they are convicted it is they, alone, who will carry the can.