Speech – Wednesday 10 October 2018 at UCL

Mahmood Hussein Mattan was hanged on 8 September 1952 for the murder of Lily Volpert. His conviction was amongst this Commission's very first referrals. Vital evidence was simply not disclosed by the police.

In quashing the conviction, The Court of Appeal stopped short of saying that an innocent man had been hanged, though that is obviously what happened. But it did say:

"….injustices of this kind can only be avoided if all concerned in the investigation of crime, and the preparation of criminal prosecutions, observe the very highest standards of integrity, conscientiousness and professional skill".

We no longer hang people. But I have to tell you that the experience of this Commission, having reviewed over 23,000 cases since being set up, is that even today we all too often still see instances where the investigation and preparation of criminal prosecutions fall well short of the highest standards of integrity, conscientious and professional skill called for by the Court over 20 years ago.

I drew attention 5 years ago in my 2012/13 annual report to disclosure failures as the continuing biggest single cause of miscarriages of justice. I repeated those concerns in subsequent Annual Reports. This led to a joint police/cps inspection into disclosure in 2017. Sadly, that report showed that our concerns were all too well founded. The report makes chilling reading. It spoke of a routine failure to comply with disclosure requirements. Disclosure issues were often only dealt with at the last minute, if at all. The situation was so bad that the Report's authors spoke of a culture of defeated acceptance by police and prosecutors.

We see the evidence of this failure all around us. In the recent high profile collapse of rape and serious sexual offence prosecutions, such as that of Liam Allan, Oliver Mears, Isaac Hay and Samson Mikele. So bad had matters

become the CPS commissioned a special review of ongoing prosecutions earlier this year. A review which led to 47 cases being dropped by them on non-disclosure grounds. The CPS say they believe these 47 cases would all have been stopped before trial in any event. Even if true, this, "Well we would almost certainly have got round to dropping the cases in the end" defence is scant comfort to those who will have had to suffer months if not years of unnecessary uncertainty and opprobrium. This Commission routinely refers convictions on non-disclosure grounds. Recent examples include the cases of Embleton, Dunn and Z, all within the last year or two.
So I do not myself think that the CPS contention that the existing checks and balances in the system guarantee cases which should be stopped will always be stopped before trial is supported by current evidence.

A particularly worrying aspect of the CPS review's findings were the number of instances where material that was already in the prosecution's possession when charges were brought - and which undermined the prosecution fundamentally - had still not been looked at at point of charge. Equally worrying, the CPS report points to instances where lines of enquiry which might have stopped the case in its tracks had simply not been identified by investigators at all, or if identified not followed up. This is supported by our own experience. A frequent ground of Commission referrals is a line of enquiry followed up by ourselves, which could and should have been identified by the original investigation, and which was completely missed by investigators.

What underlies this, in my view, is a widespread and worrying lack of grip by too many investigators in the basics of criminal investigation. A lack of grip which is resulting in those who should be brought to justice not being properly investigated, in trials collapsing at the courtroom door or during trial itself; and still worse convictions which prove unsafe and which were entirely avoidable.

But do not just take my word for it. Consider what Her Majesty's Inspectorate of Constabulary said in a report published just last year. The inspectors did not find a single police force which was outstanding at crime investigation.

They found 10 – that's almost a quarter of all police forces - required improvement in the basic policing task of investigating crime. And they found a dire shortage of trained investigators with one in five investigator positions either vacant or filled with untrained officers.

What do serving front line officers themselves say? Almost half the police officers surveyed told inspectors they felt their force was not very effective, or not at all effective, at investigation. The Inspectorate describe the shortage of qualified detectives and other investigators as, "a continuing national crisis".

Police officers must have a sound knowledge and understanding of the fundamentals and essentials of criminal law, including the rules of evidence and procedure. Cases can then be investigated, and if the evidence is there, the accused brought to trial. False accusations can be flushed out and the wrongly accused protected.

Identifying and pursuing appropriate lines of enquiry which might support the defence case or undermine the prosecution case is not inimical to, or a distraction from, good police work and good prosecuting. It <u>is</u> good police work and good prosecuting.

And for those of us concerned with miscarriages, ensuring that these basic police and prosecution shortcomings are acknowledged and put right has to be a top priority. Any analysis of miscarriages needs to be seen in the context of these fundamental shortcomings.

It is this Commissions' practice, whenever a systemic cjs failing comes to light, to double check all the cases we have reviewed which might conceivably have been touched by that failure. Thus we re-reviewed cases relating to discredited H.O. pathologists, and, following our referral of the Sean Hodgson case we re-reviewed all similar cases which had come to us to see if there was any scope for further DNA testing. That is why we are currently, looking again at a range of conviction cases we have closed to double check for non-disclosure issues, even though looking searchingly at disclosure is something

we already do routinely in case reviews as part of our standard operating procedures.

But we can look only at the cases which come to us. We now know that there are systemic problems in police and prosecution investigative and disclosure work which have persisted for some years. And however good police and prosecutors are at improving their current approach – and I am in no doubt that serious efforts are now being made – there is a real risk, amounting in my view to a near certainty, of a number of unsafe convictions including people still in custody arising from these poor past practices and which have not and may never come to us for the Commission to review.

This is a gap which must be filled. Those in prison are amongst the most disadvantaged in society. Many struggle with basic literacy and numeracy. They have none of the advantages we enjoy. And by definition, those to whom disclosable material has not been disclosed (or, still worse, where relevant lines of enquiry were simply never pursued) will not know of this. In my view the only proper course now is for police and prosecutors to themselves initiate a targeted review of existing convictions; starting perhaps with those from police forces where we know from inspectorate work there are ongoing problems with the quality of their criminal investigative work. If the State gets it wrong, it is the State's responsibility to put things right. The Commission has been in touch with the Law Officers and the CPS to propose such a review and to offer to assist. That offer has not been taken up. This is disappointing. In my view there is a risk that serious miscarriages of justice will go undetected and unrectified as a result.

I have stressed these matters because I believe there is a serious problem in need of urgent action and because one of this Commission's responsibilities is to draw attention to systemic weaknesses. And I do not think this problem has had the attention it deserves.

But I want to turn now to this Commission's own review work and the ongoing challenges we face.

First, resources. The last decade has seen a huge increase in our work load against significant cuts in our budget, though with efforts latterly by the MoJ to protect us from further downward resource pressure, for which we are grateful. We have responded by looking hard at our processes so as to maximise efficiency and effectiveness, and in particular to reduce queues. When I first joined the Commission applicants could wait years for reviews even to start. That problem is now behind us. Today if you apply to us, work on your case will start right away. This is a considerable step forward and represents a great deal of hard work by the Commission's leadership and staff. To all of whom I pay tribute here. We have also reduced the length of time reviews take. In the past, even routine reviews could take years to complete. Now most take months. That said we still have a number of very long running cases. Usually, these are cases which are either very complex or are very troubling to us. Troubling in the sense that we have not been able to find evidence to justify a referral to the courts, but where we remain concerned and accordingly wish to continue to search for evidence.

Obviously reviews cannot go on for ever. People need certainty. Victims and their families and friends as well as claimants cannot have their lives on hold indefinitely. But equally we do not ever want to let go of a case where in our own minds we think there may be reason to doubt even if we have yet to find sufficient evidence that the conviction maybe unsafe.

This brings me to the heart of the Commission's work and the reason, as I see it, for continuing tension between ourselves and campaigning groups. The great historic miscarriages, such as the Guildford 4, Birmingham 6, were corrected by campaigners who fought tooth and nail for justice. This Commission grew out of that campaigning. It is understandable that campaigners want us to carry on as if we too were campaigners, acting in a campaigning manner. Understandable but, for us, impossible.

We cannot be a campaigning body. We are a statutory body operating under a statutory remit. The only basis on which we can refer cases back to the

courts is if they meet the “Real Possibility” test – a test not of this Commission’s devising but laid down for us by Parliament. And that means finding credible new evidence or argument, not before the court at trial or on appeal. As a statutory body and part of the criminal justice system we are, and will always have to be, evidence led. We do not and cannot simply act for the applicant. We have to consider the interests of accused and accuser equally, be evidence led and act in, and only in, the interests of justice.

I realise that this can generate tension between the Commission and those who believe passionately, that a particular convicted person is innocent.

But within our system a miscarriage of justice cannot be demonstrated by belief, however strongly that belief is held and however passionately it is argued. Unpicking wrongs requires objectivity, hard work, the laborious examination of material that is voluminous, complex and often hard to trace; it requires identifying and pursuing new lines of enquiry and new sources of expertise. Evidence has to be found. And since no-one, at trial or on appeal, holds back any evidence which they think might support their cause, it almost invariably means finding things people were not previously aware of – and finding it often many, many years after the event in question. In our justice system evidence and evidence alone are what establish innocence, guilt and the safety of convictions. There are jurisdictions, where the courts approach things differently. Thankfully the jurisdiction we live in is not one of them.

And to those who say that even if such evidence cannot be found, and that there is in the Commission’s judgment no real possibility a conviction will be quashed by the court, we should still nevertheless refer it, I say this. If we do after long and careful deliberation conclude that there really is no realistic likelihood of the court quashing a conviction, what useful purpose would such a referral serve other than to raise false hope in the convicted person and pointless pain and concern to the victim, their friends or family?

There is a separate point about whether the courts are unduly restrictive in their approach to safety and whether the rules which the court itself applies

should be changed. For example in cases of lurking doubt. This is an area the Justice Select Committee thought the Law Commission might consider further. We are on record as saying we would welcome such a review. But absent that, I do not believe that referring cases which do not meet the court's criteria is a productive way forward.

A word here about what might be loosely termed "celebrity cases", cases where there is strong interest by the public and strong campaigning support for what is invariably characterised as an obvious miscarriage of justice. In the Commission's experience there is little if any correlation between the media profile of a case and the likelihood of its being a genuine miscarriage. I can think of high profile cases where no basis has been found for supporting a referral, where investigation has actually strengthened the case against the accused or even where the convicted person, having maintained their innocence for years, has subsequently admitted guilt. Equally, some of the most shocking miscarriages of justice this Commission has seen have attracted little if any public interest even after the full extent of the miscarriage has come to light.

Take the case of 17 year old T; trafficked into this country, raped, assaulted and forced to work as a prostitute. T escapes from her tormentors but is arrested as she seeks to flee the country and then pleads guilty to possessing a false identify document. Fortunately, we were able to refer this conviction. We saw the prosecution as an abuse of process, and the conviction was quashed. The right outcome eventually. But isn't it extraordinary that a young girl who was the victim of such brutalising treatment should have been treated this way in the first place. What she did might have been in some literal sense a breaking of the law. But how she was treated hardly chimes with what most of us would see as justice.

Or the case of A, convicted of seriously sexually assaulting a woman. The Commission's investigation uncovered something the police investigation had completely missed. It turned out the woman had made under different names a series of similar accusations against several different men, none of which

previous allegations had been found to be credible. Again a conviction the Court had no hesitation in quashing.

Or the case of B accused of a vicious assault on a woman with a chisel. The case at trial turned on whether it was him or someone else. The court believed her not him. It subsequently became apparent that the real issue was whether anyone had assaulted her at all or whether the case was one of self-harm. Again conviction quashed following our referral.

None of these cases hit the headlines. All were notable miscarriages of justice.

A criticism often made of this Commission is that in adhering to Real Possibility we are applying the wrong test. But the test is not our own invention. It is the test laid down for us in legislation. I can see that there is an argument whether Parliament got it right. But that is not down to us. Public bodies are rightly criticised for not doing the job they were asked to do. It is slightly odd to criticise a public body for doing precisely what Parliament has laid down in law it should.

As to whether Parliament did get it right, I myself think that the form of the current test is an inevitable consequence of the decision to leave the final say on safety with the Court. If it is the Court's decision then the Court's criteria will always be the criteria which matter and therefore the ones we have to take account of in reaching our referral decisions. To have us referring on one test, and the Court applying another, would simply be to institutionalise chaos.

A word about openness. The Commission has considerable, and potentially highly intrusive, investigative powers. These give the Commission the ability to access not only police and security intelligence of the most sensitive kind, but also to look into the most intimate details of people's private lives. Obviously if we refer a case our review findings, subject to the usual constraints, are available to the Court and so in the public domain. But if we

conclude a case and do not refer it, Section 23 of the 1995 Act makes it a criminal offence for us to disclose anything we found during the review, save in the most limited of circumstances, so as to protect the privacy of individuals and to protect sensitive information.

I know that can be a source of frustration to campaigning groups, journalists and others. It can also, believe me, be a source of frustration to ourselves. I can think of many cases we have reviewed which not only found no basis for referral but where our investigation turned up new evidence which strengthened the prosecution case. In our statement of reasons this will properly have been disclosed to the applicant and their legal representatives. But we cannot disclose this new evidence more widely ourselves. And, for obvious reasons, the applicant will seldom want to do so.

In such cases the applicant may continue to maintain their innocence, as they are of course fully entitled to do, perhaps releasing selected parts of our findings – those which support their case – or simply rest on the assertion that our review was not sufficiently thorough and complete. It is extremely difficult for the Commission to respond to this other than in the most general terms. Not only because of the Section 23 prohibition on disclosing anything found in our review but also because the Commission must always keep – and be seen to be keeping – an open mind about cases. Applicants are free to re-apply to the Commission at any time. And if they do so we must be able to consider their new application entirely afresh and in a completely unbiased way.

That said, I do not think the current situation is satisfactory. Apart from the obvious reputational issue for the Commission, we live in an age that places a high premium on transparency; and rightly so. Obviously sensitive personal and security information needs appropriate safeguarding. But I would myself like the Commission to be able to be more open about what reviews have covered and what they've found. This would require a change to legislation. But I think such a change would be both timely and desirable.

The Commission's referral rate is a constant point of discussion. Do we refer too few cases? Are we in thrall to the Court of Appeal? Do we miss cases? And so on.

First some myth busting. We do not have and have never had a target – of any sort, shape or description - for the proportion of our referrals to the Court that we expect to be successful, in the sense of resulting in the conviction being quashed. All we do, all we have ever done, is to record the number of cases we refer and record the number of quashed convictions that result. We keep score. But that is all.

That said our statutory test is real possibility. And a real possibility is – as Bingham LCJ said – somewhere below a racing certainty but above an outside chance. This in turn suggests that if we are applying the test properly a year on year "success" rate of 80 to 90% would be too high; too close to racing certainty. While a year on year rate of 20 to 30% would be too low – too close to outside chance. Our rate fluctuates year on year between about 70% and 40% which I think is what one might expect.

On whether we miss miscarriages, no one knows how many unsafe convictions there are in the system. Not you, nor I, nor anyone. It is unknown and unknowable. We can say how many people apply to us and we can say when we have found something. What we cannot say, where evidence supporting a referral has not been found, is whether that is because we've missed it or whether it wasn't there to be found in the first place. There is, in short, no objective benchmark against which our effectiveness in detecting miscarriages can be judged.

I can, however, say this. We measure, and have always measured our referral rate as a percentage of the total applications to the Commission. Measured in this way our referral rate over the lifetime of the Commission has been 2.7% Some people think that a low rate. However, around 40% of the total applications to the Commission are from those who have not exhausted their normal rights of appeal or are ineligible in some way. And the 1995 Act

says we should not consider "No Appeal" cases for potential referral unless there are exceptional circumstances, which as the words imply are exceptional. So we have to turn away around 40% of all applications we receive. This means that only somewhat more than half of the applications to the Commission, over its lifetime, have actually been reviewable and therefore potentially referrable. And if we look at our referral rate against these cases it nearly doubles to over 5%. Is that percentage surprisingly low; or worryingly high?

One final word about referrals. The Commission is not just here to identify potential miscarriages. We also quality assure, and promote confidence in, the justice system. A review which concludes that a conviction, on the evidence available, is well-founded – provided it is a thorough review – is not a failed review. If the trial and appeal process is working as it should, we should expect the great majority of our reviews to conclude that the original verdict was well founded. Which is exactly what we do find.

Are we really investigators or just people with our noses buried in the files? Almost invariably, the key to establishing a conviction's unsafety is to uncover weaknesses in the prosecution's case as it was presented at trial. And establishing how a case ran at trial in practice means a detailed review of the case papers, the prosecution and defence files, the judge's summing up and so on. But that is just the starting point. We start with the paperwork to ensure we have the fullest possible understanding of the case, the forensic decisions taken and so on. Starting there is also the chance to check up on disclosure and whether all the potentially relevant information which was in the possession of the prosecution was in fact disclosed. Only by starting from there, from what happened at trial and why, can one decide what further lines of investigative enquiry might then be worth pursuing.

There is of course an important distinction between lines of enquiry which can in theory be pursued, and lines of enquiry which it is actually sensible to pursue. There is little point, for example, in DNA testing with a view to see if the accused's DNA is present at the scene of crime if several witnesses have

already placed the accused there and the accused themselves admit they were present. The questions we ask are, will undertaking a certain test or tests resolve a particular review question and what, put at its highest, might a line of enquiry show by way of building the case for a referral. Evidence is often cumulative. A line of enquiry may be worth pursuing even if, on its own, it can never be determinative. But there must be a clear line of sight between pursuing a line of further investigation and the possibility of demonstrating unsafety. And lest you think that this way of thinking might lead us to being unduly restrictive in our approach, consider this.

Last week I asked one of our team leaders what sort of investigative work they had been up to. They said that in current review work, expert evidence had been requested from psychologists, forensic linguists, forensic accountants, experts in Asperger's and Autism, experts in ESDA (electrostatic detection analysis – or indentation on paper several sheets below the original, to you and me), medical experts, experts in intoxication and so on. To say nothing of commissioning DNA testing, reviewing CCTV footage, tracing and interviewing new witnesses, investigating potential non-disclosure of phone evidence, making enquiries relating to police officers' disciplinary records and in relation to medical records. And that was just some of the investigative work, being carried out currently by just one of our investigative teams, in just some of our current reviews.

I want finally to say something about two of the most persistent myths about the Commission and how we approach our work – that we are somehow subservient to the Court of Appeal and that this can make us unduly cautious in our approach to referring cases. I can assure you, having spent 10 years as Commission Chair, that nothing could be further from the truth. Commissioners are chosen above all else for their independence of mind, powers of analysis and persistence. Stubbornness in pursuit of a point is in our DNA. Believe me I deal with Commissioners on a daily basis and I can vouch for that particular trait.

Commission staff spend their working lives sifting through cases in the knowledge that, for all the hundreds of cases they look at, they will find at most a handful where there is the real possibility of a referral. So when they get the slightest hint they may be onto something, nothing and no one could be more determined than they are to pursue the point. Or more resolute in pressing forward with every possible and appropriate line of enquiry.

As to being subservient to the Court of Appeal I can only say that those who suggest that cannot have been reading Court of Appeal judgments with enough attention recently. Sometimes the Court is complimentary about our work and means it. Sometimes the Court's apparently friendly words conceal a somewhat less sympathetic appreciation of our work, "thorough and painstaking" being the polite gloss behind which the words, "but quite mistaken and completely wrong", lie but barely concealed. And sometimes the criticism is sharp and direct. In short the court sometimes agrees with our analysis, sometimes is unpersuaded, and sometimes differs profoundly.

That is as it should be. Our responsibility is to decide whether a referral is justified according to the statutory test. Whether to actually uphold or quash a conviction is for the court. That is their decision. But the referral decision is ours and ours alone. We take it very seriously. And as an independent body we reach our conclusions on the evidence, and solely on the evidence, and without fear or favour from anyone.

I stand down this month after ten years as Chair of the Commission. It has been an honour and privilege to serve in that capacity. I would like to pay tribute to all Commission members, staff, Commissioners and Non Executives, both past and present, I have worked with throughout that time. And on the basis of that 10 years I say this. What unites the Commission and provides its life's blood is a burning sense that there are injustices out there and it is the Commission's job to find them and when it finds them to remedy them. And I am confident the Commission will be as resolute in that role under my successor, to whom I wish all the very best, as it has in the last 21 since its inception.