

Review of Convictions after Jury Trials: The New French Jury Court of Appeal

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Abstract

The French have recently created a jury court of appeal (*cour d'assises d'appel*) for appeals from the jury trial court (*cour d'assises*) which latter, transplanted from the British after the Revolution, judges serious criminal cases. A convicted accused has now a right to a new trial before another jury court. This article looks at why and how this new court came to be added to the French criminal justice system. It notes that that system, essentially operated by legal professionals (judges and prosecutors), has now opted for an increased role for lay persons in the disposition of serious criminal cases. It also notes that despite the "second chance" offered those convicted by the *cour d'assises* there has so far been a low level of appeals (about 10 per cent of convictions), partly explicable perhaps by a rate of re-conviction no lower than in the *cour d'assises* — 95 per cent.

The article then considers by way of contrast how the United Kingdom and Australia have dealt with appeals from convictions by juries, noting that convictions by the well entrenched and highly regarded criminal juries in those jurisdictions may be overridden by courts of criminal appeal on very broad criteria ("unsafe" conviction, "miscarriage of justice") which ultimately allow a subjective judicial reaction to the guilt of the accused. It may be seen as ironic that the French have extended the use of the jury in giving an accused a "second chance" while the British and Australians have allowed a degree of judicial "second guessing" over jury verdicts. The article also looks at alternative "revision" procedures for alleged miscarriages of justice in serious criminal cases in France, the United Kingdom and Australia.

How are jury verdicts of guilty to be reviewed on appeal? In the United Kingdom and Australia for nearly a century now that task has been entrusted to Courts of (Criminal) Appeal, exercising wide, legislatively-formulated powers, including, from the outset in Australia and more recently in the United Kingdom, a general power to order a new trial. Until very recently the French have relied on the *Cour de cassation* which could 'break' convictions in the jury court (the *cour d'assises*) but only for errors of law apparent from the record of the proceedings (the dossier), in which case a retrial would be ordered. Since the beginning of 2001 however a conviction in the *cour d'assises* can be 'appealed' to a second *cour d'assises* (a *cour d'assises d'appel*) for a retrial. This may seem strange to anglophones but it shows a faith in the jury court as the ultimate arbiter of guilt in serious criminal cases, without the control of judicial review. The purpose of this article is to look at this recently instituted *cour d'assises d'appel* and to contrast it with Anglo-Australian appeal procedures in relation to jury verdicts of guilty. This contrast will point out the irony of a criminal justice system essentially operated by legal professionals (the French) extending its exceptional and limited use of lay persons in its

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decision-making about serious criminality, while criminal justice systems in which lay persons have always played a significant role in decision-making about serious criminality (the British and Australian) have come to permit judge-only review of decisions made by these lay persons.¹

1. *An Introduction to the cour d'assises*

The *cour d'assises* is the French jury court. It was introduced into France in 1791, closely modelled on the British criminal jury. In its present form it is comprised of three judges (a President and two assessors) and nine jurors who, since 1941, sit and deliberate together both on culpability and punishment. It has jurisdiction over crimes, or offences punishable with 10 or more years imprisonment. A two-thirds majority (8 out of the 12) is required for any finding against the accused in relation to culpability. The jurors do not have access, as do the judges, to the dossier recording the investigation of the case before them and must rely on the oral evidence of witnesses as adduced by the presiding judge at the hearing. No directions are given to the jurors by the presiding judge except that they are told that they must have an 'intime conviction' of guilt before they can convict.² It will be apparent that the *cour d'assises* functions differently to an anglophone jury court particularly as regards differentiation of function between judge(s) and jurors.

2. *Traditional Methods of Review of Criminal Cases in France*

A. *The Criminal Chamber of the Cour de cassation*

The final court of review of criminal cases in France is the criminal chamber of the *Cour de cassation*. Its jurisdiction is confined to 'violations of the law' in the lower courts and if a 'violation' is found to exist the sanction is annulment of the decision.³ The normal consequence is remission (*renvoi*) of the case to another court of the same level for rehearing.⁴ The procedure is initiated with a *pourvoi* (petition) by an aggrieved party. *Pourvois* may be brought by aggrieved parties

1 It is not necessary for the purpose of this article to give a detailed account of the French criminal justice system, except perhaps to note that the system is essentially grounded in the investigation, which is fully recorded in the *dossier*, rather than in the trial or hearing and that the system is basically operated by prosecutors, judges (both investigative and adjudicative) and, where necessary, court-appointed experts. Detailed accounts of the system may be found in AV Sheehan, *Criminal Procedure in Scotland and France* (1975); Richard Frase, 'Comparative Criminal Justice as a Guide to American Law Reform: How do the French Do It, How Can We Find Out, and Why Should We Care?' (1990) 78 *Cal LR* 539; Jean Pradel, 'France' in Christine Van Den Wyngaert (ed), *Criminal Procedure Systems in The European Community* (1993); Bron McKillop, 'What can we Learn from the French Criminal Justice System?' (2002) 76 *ALJ* 49. For a more general view of criminal justice in civil law systems in a comparative context see two articles by Mirjan Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *U of Pa LR* 506 and 'Structures of Authority and Comparative Criminal Procedure' (1975) 84 *Yale LJ* 480.

2 *Code de Procédure Pénale* art 353 (hereafter CPP). The detailed provisions regulating proceedings before the *cour d'assises* are to be found in CPP arts 231–380. For the application of these provisions in a particular case see Bron McKillop, *Anatomy of a French Murder Case* (1997).

3 CPP art 567.

4 CPP arts 609, 610.

against judgments in the *cour d'assises*, or in the *cours d'appel* (Courts of Appeal) on appeals from the two lower criminal courts of first instance — the *tribunaux correctionnels* (Correctional Courts) or the *tribunaux de police* (Police Courts).⁵ There cannot however be any *pourvoi* by the prosecution against an acquittal by a *cour d'assises* except 'in the interests of the law alone' and without prejudice to the party acquitted.⁶

A court of review which considers issues of law only and not findings of fact is generally not regarded as fulfilling the requirements of a court of appeal. Indeed the French generally do not regard the *Cour de cassation* as a court of appeal.⁷ Further, the nature of proceedings in the *cour d'assises* make it difficult for the *Cour de cassation* to function even as a court of review on legal issues. There is normally no transcript of evidence given by witnesses or the accused, no rulings on the admissibility of evidence (evidence, if relevant, is generally admissible and its source is already in the *dossier*) and no record of any directions or guidance given by the presiding judge to the jurors when they all retire to consider their verdict.⁸ The *Cour de cassation* is confined in considering questions of law to the brief written summary of the proceedings in the *cour d'assises* made by the recording clerk (*greffier*) and to the record of the investigation, the latter of which comprises the essentials of the *dossier*.

That the French did not regard the *Cour de cassation* as a true court of appeal is evidenced by the French reservation to their ratification in 1988 of article 2 of the 7th Protocol to the European Convention on Human Rights.⁹ This article recognised the right of any person convicted of a criminal offence to have that conviction re-examined by a superior court. The French reservation was that such re-examination could be limited to a review of the application of the law such as by a *pourvoi en cassation*. Despite this reservation commentators recognised that the French position was not tenable over the long term.¹⁰

5 CPP art 567.

6 CPP art 572.

7 See for example, Jean Pradel, 'L'appel contre les arrêts d'assises: un apport heureux de la loi du 15 juin 2000' (2001) *Recueil Dalloz Chroniques* 1964 at 1965.

8 Admissibility of evidence may have already been considered by the investigating chamber (*chambre d'instruction*) of the *cour d'appel* on appeal from an order of the investigating judge (*juge d'instruction*) under CPP arts 185 or 186-1, and subsequently by the *Cour de cassation* on a *pourvoi* against the judgment of the investigating chamber under CPP art 567.

9 *Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 22 November 1984, ETS 117, art 2 (entered into force 1 November 1988).

10 See for example, Pradel, above n7; Henri Angevin, 'Mort d'un dogme: A propos l'instauration, par la loi du 15 juin 2000, d'un second degré de juridiction en matière criminelle' (2000) *Jurisclasser Périodique, La Semaine Juridique* 1795.

B. *The cour d'appel*

Judgments in the *tribunal correctionnel*¹¹ and the *tribunal de police*,¹² the two lower-level criminal courts, may be appealed to the criminal appeals division of the *cour d'appel*.¹³ *This court is constituted by a President and two other judges (conseillers)*.¹⁴ The appeal is by way of a rehearing, the facts particularly being re-examined. The procedures for hearings in the *tribunaux correctionnels* and the *tribunaux de police* are applicable.¹⁵ As those hearings are based on a *dossier* containing a record of the investigation into the offence including the depositions (*procès-verbaux*) of the witnesses and the defendant, the hearing of the appeal will also be based on that *dossier*. Witnesses are not normally called, either at the first instance hearing or on the appeal.¹⁶ A defendant appellant, if present, will be interrogated by the president and/or the other judges.¹⁷ On an appeal by the prosecution the *cour d'appel* has the power to substitute a conviction for an acquittal or to increase the penalty.¹⁸ The *cour d'appel* could hardly be regarded as a suitable court for appeals from the *cour d'assises*. It is designed to hear appeals from the inferior, non-jury criminal courts and makes its decisions on the basis of the *dossier*. The *cour d'assises* on the other hand is expected to and does hear oral evidence from witnesses which is considered by lay jurors generally without access to the *dossier*. The jury court is outside the hierarchy and method of judicial functioning of the courts up to and including the *cour d'appel*.

It should also be mentioned that there is a revision (*révision*) procedure available to a person convicted of a *crime* or a *délit* in the French criminal justice system.¹⁹ It is however relatively narrow in scope, being confined to four situations — after a homicide conviction if there are ‘sufficient indications’ that the ‘victim’ is still alive; the subsequent conviction of someone else for the same offence; the conviction for perjury of a witness against an accused; and fresh evidence emerging after a conviction sufficient to raise a doubt about guilt.²⁰ The

11 The *tribunal correctionnel* deals with *délits*, which are punishable with up to 10 years imprisonment. Its procedures are dealt with in CPP arts 381–520.

12 The *tribunal de police* deals with *contraventions* which are punishable by fines. Its procedures are dealt with in CPP arts 521–549.

13 CPP arts 496–520 deal with appeals from *tribunaux correctionnels* and CPP arts 546–549 with appeals from *tribunaux de police*.

14 CPP arts 510, 549.

15 CPP arts 512, 549.

16 For examples of procedure in these two lower-level courts, noting the absence of witnesses, see Bron McKillop, ‘Readings and Hearings in French Criminal Justice: Five Cases in the *Tribunal Correctionnel* (1988) 46 *Am J of Comp Law* 757; Bron McKillop, ‘Police Court Justice in France: Investigations and Hearings in Ten Cases in the *Tribunal de Police*’ (2002) 24 *Syd LR* 207. This may be changing because of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5, art 6.3(d) (entered into force 3 September 1953) requiring witnesses against a person charged with a criminal offence to be available for examination in court. See for example, *Randhawa*, 1989 *Bulletin des Arrêts, Chambre Criminelle of the Cour de cassation*, case no 12.

17 CPP arts 513, 549.

18 CPP arts 515, 549.

19 Provided for in CPP arts 622–626. A crime carries 10 or more years imprisonment and is prosecuted in the *cour d'assises*.

application for revision is made to a commission comprising five judges of the *Cour de cassation* plus five other judges. If warranted after investigation of the matter, the commission is to refer it to the criminal chamber of the *Cour de cassation* functioning still as a court of revision.²¹ If this court, after a public hearing (but based on a duly recorded investigation by the commission), finds the application well grounded it is to annul the conviction and remit the case to a court differently constituted but at the same level for a rehearing.²² Because of the narrow scope of this revision procedure, dealing mainly with extreme cases of justice miscarrying, it could hardly serve as a form of appeal from judgments of *cours d'assises*. It is of note, however, that the criminal chamber of the *Cour de cassation* functions here like a court reviewing the merits of a case, as much concerned with facts as with the law. This is exceptional work for this court which is normally concerned with purely legal issues.

3. *Towards the Creation of the cour d'assises d'appel*

Notwithstanding the French reservation to article 2 of the 7th Protocol to the European Convention on Human Rights,²³ considerable governmental attention was being given to the question of an appeal from a conviction in the *cour d'assises*. Since 1982 there had been proposals from two commissions of inquiry and three legislative proposals (*projets de loi*) from Attorneys-General (*Gardes des Sceaux*).²⁴ The majority of these proposals favoured an appeal court comprising three judges from the *cour d'appel* (meaning higher level judicial representation than is normal in the *cour d'assises*) and nine jurors. The eventual legislation left judicial representation the same as in the *cour d'assises* (the President from the *cour d'appel* and two *assesseurs* normally from the *tribunal correctionnel*, a court of first instance), but the number of jurors was increased from nine to 12.

An important element in the debate about reviewing a decision of the *cour d'assises* concerned attitudes to lay jurors in the French criminal justice system. One view was that as the jury court enjoyed high popular regard²⁵ its decisions should not be interfered with by judges.²⁶ This view led readily to the position that if there had to be a re-examination of a jury court's decision then let it be by another jury court. Although there were views hostile to the jury as part of the administration of justice, particularly from operatives within the system, and even a view that the abolition of the jury would benefit the system,²⁷ these views conceded that as a political matter the jury must remain.

20 CPP art 622.

21 CPP art 623.

22 CPP art 625.

23 Above n9.

24 See Pradel, above n7 at 1964–1965; Angevin, above n10 at 1796.

25 According to a poll in 1996 cited by Pradel, above n7 at n12, 82 per cent of the people interrogated were favourable to the judgment of *crimes* by a *cour d'assises* with a jury.

26 The 'dogme' (dogma) in the title of Angevin's article, above n10, is the dogma of the infallibility of the *cour d'assises* (with jury).

From a comparative perspective it is doubtless easier to accept a review by a jury court of another jury court's decision where relatively few issues of law arise at a hearing than would be the case with an adversarial trial, where legal issues as to the admissibility of evidence and the directions to the jury are common.

A. *The Legislation Creating the cour d'assises d'appel*

By a law enacted on 15 June 2000,²⁸ the CPP was amended to provide for an appeal from a conviction by the jury court, the *cour d'assises*, to another jury court, a *cour d'assises d'appel*.²⁹ This second jury court is to be designated in a particular case by the criminal chamber of the *Cour de cassation*³⁰ and is to re-examine the case as if hearing it afresh.³¹ The appeal will give a convicted accused a 'second chance' before another jury court. On an appeal by an accused only, the original sentence cannot be increased.³² Appeals may also however be brought by other parties.³³ A prosecutor (*ministère public*) may appeal, for example, against the insufficiency of sentence³⁴ or against a conviction perceived to be vitiated by illegality.³⁵ By a controversial amendment to the CPP on 4 March 2002,³⁶ however, a prosecutor-general (*procureur général*) was given the significant additional power to appeal against an acquittal by the *cour d'assises*, entailing a re-trial of the case. Appeal is also available to a civil party and a person civilly responsible as regards their civil law interests.³⁷

On appeal to a *cour d'assises d'appel* involving both criminal and civil issues by an accused only, or by a civil party only, or by a person civilly liable only, that appellant's position as regards civil damages cannot be worsened, except that a civil party may have their damages increased to cover additional loss or damage since the judgment of the initial *cour d'assises*.³⁸ Appeals from a *cour d'assises* involving civil issues only are not to be heard by a *cour d'assises d'appel* but by the criminal appeals division of the *cour d'appel*.³⁹

27 See, for example, Angevin, above n10 at 1795, who was of the view that it would be logical, simple and juridically irreproachable to abolish the *cour d'assises* and have those accused of crimes dealt with by the *tribunaux correctionnels*.

28 Loi no 2000-516, into force on 1 January, 2001.

29 This law sought generally to enhance the presumption of innocence and the rights of victims.

30 CPP art 380-14.

31 CPP art 380-1.

32 CPP art 380-3.

33 CPP art 380-2. Appeals included cross-appeals (*appels incidents*).

34 See Pradel, above n7, at 1967.

35 See Angevin, above n10 at 1797.

36 Loi no 2002-307.

37 CPP art 380-382. By way of brief explanation of 'civil interests', the French criminal justice system allows victims of crime to be joined as civil parties (*parties civiles*) to criminal proceedings. A civil party may claim damages for his or her criminal injuries occasioned by an accused person (CPP arts 2, 3, 85-91). The French system also allows a person who may be vicariously liable under the civil law for criminal injuries occasioned by an accused person (a *personne civilement responsable*) to be joined into a criminal prosecution for the purposes of civil damages (CPP arts 2, 3 and the *Code Civil* art 1384). Civil parties and persons who may be vicariously liable are entitled to legal representation for the purposes of the investigation and at the hearing. Issues of civil damages are for the judges alone, not the jurors.

38 CPP art 380-6.

If an accused withdraws his or her appeal, any cross-appeal (*appel incident*) cannot be pursued.⁴⁰

The *cour d'assises d'appel* is constituted by 12 jurors (compared with nine in the *cour d'assises* at first instance)⁴¹ and three judges (as at first instance). The increase in the number of jurors affects the relative voting power of jurors and judges, increasing that of the jurors in the *cour d'assises d'appel* to 80 per cent (from 75 per cent) and diminishing that of the judges to 20 per cent (from 25 per cent). This is of some significance as regards the majority required for any finding against an accused. This majority for both courts is two-thirds of the jurors and judges combined.⁴² In a likely scenario that the three judges are for a finding against an accused they would need to be supported by seven of the 12 jurors (or 58.3 per cent of the jurors' voting power) in the *cour d'assises d'appel* but by five of the nine jurors (or 55.5 per cent only of the jurors' voting power) in the *cour d'assises*. This of course does not alter the requirement for a majority of the jurors for any finding against an accused.

Review of any decision of a *cour d'assises d'appel* by the *Cour de cassation* is available on the application of any party.⁴³ Success by an applicant in the *Cour de cassation* will result in a remit (*renvoi*) of the case to another *cour d'assises* for a (second) rehearing.⁴⁴

After the enactment of the legislation creating the *cour d'assises d'appel* but before it came into force the Minister of Justice issued a circular explaining and commenting upon the legislation with suggestions about how it might best be implemented in practice.⁴⁵ Some examples of this may be noted. Early in the relevant sections of the circular it is made clear that the *cour d'assises d'appel*, a 'judicial innovation', is not a traditional French appeal court concerned to 'confirm, amend or overturn' a first instance decision but a court which must 'entirely re-examine' a case as far as practicable without reference to an earlier first instance hearing.⁴⁶ How far this will in fact be 'practicable' is probed later in the circular when it is noted that the questions posed to and the answers given by the earlier court of first instance and the resulting decision made by that court are required to be read to the *cour d'assises d'appel*,⁴⁷ thus effectively obliging the president of the court to inform the jurors that the earlier decision is the subject of an appeal before them.⁴⁸ The circular then advises the President not to refer to the

39 CPP art 380–5

40 CPP art 380–11.

41 CPP art 296. Permissible challenges to jurors have consequently been increased from five to six for the accused and from four to five for the prosecutor: CPP art 298.

42 CPP art 359.

43 CPP art 567. Review by the *Cour de cassation* is now only available from the *cour d'assises d'appel* and no longer from a *cour d'assises*.

44 CPP art 610.

45 *Circulaire* CRIM 00–14 of 11 Decembre 2000, reprinted under Chapter 8 of Book 2 of the *Code de Procédure Pénale* (Dalloz, 2004).

46 *Id* at 636.

47 CPP art 327.

48 Above n45 at 639–640.

accused as a convicted person (*condamné*).⁴⁹ In another example the circular makes suggestions about the listing for hearing of cases before a *cour d'assises d'appel*. The suggestions are that the President of such a court not have sessions in which only appeal cases are heard but that such cases be heard at the end of sessions dealing also with first instance hearings. As the same jurors will then sit through a number of first instance hearings they will have some experience as jurors when they come to sit as jurors on appeal.⁵⁰

The process of digesting the new *cour d'assises d'appel* by the criminal justice system has produced some consequences of interest. These have been canvassed in particular by Jean Danet, *avocat*⁵¹ and academic, in an article entitled '*Le Procès d'assises Après la Reforme: Regard Sur les Pratiques*'.⁵²

I will refer to four of these consequences as canvassed by Danet. The first has to do with the relation of the appeal hearing to the first instance hearing. As well as the presiding judge, the prosecutor and the *avocats* for the accused and any civil party appearing on the appeal may not be the same as those appearing at the first instance.⁵³ This could result, to some extent, in different issues being treated in different ways. Although the witnesses will normally be the same at the two hearings they could well also have lost 'a little of [their] spontaneity'.⁵⁴ Such a loss could be compounded if, as is now possible, the witnesses and the accused are questioned directly by the lawyers for the parties.⁵⁵ This questioning could explore any discrepancies between the oral evidence of the witnesses or the accused and their depositions (*procès verbaux*) from the investigation in the dossier. Questioning could be even more harmful to the witnesses and the accused if their oral evidence at the first hearing had been recorded at the direction of the presiding judge,⁵⁶ as such recording is now more likely to be sought by the parties, particularly the accused.⁵⁷ The second consequence, described by Danet as 'disquieting', relates to concerns for victims of *crimes* obliged to relive a second time in court their experience as victims. This is of particular concern as regards victims of sexual aggression. Danet notes a legislative project to permit a victim to give their evidence by means of an audio-visual recording.⁵⁸ The third and 'surprising' consequence is that in some *cours d'assises d'appel* increases in sentences are outnumbering reductions or confirmations.⁵⁹ This could well give those convicted of *crimes* pause before appealing if a 'second chance' is as much

49 Id at 640.

50 Id at 637–638.

51 Equivalent to the English and Australian barrister.

52 (2003) *Revue de science criminelle et de droit pénal comparé* 289.

53 Id at 306.

54 Ibid.

55 *Loi* no 2000–516, 15 June 2000, provided for such direct questioning instead of questioning through the intermediary of the President by reformulating CPP art 312.

56 As is possible under CPP arts 379, 333.

57 Danet, above n52 at 299–301, 306.

58 Id at 306.

59 Ibid.

a 'second risk'. It may also mean that cross-appeals by the prosecution against leniency of sentence may turn out to be more favourably viewed than appeals against severity. The fourth consequence concerns an apparent reduction in the formalism of the approach previously taken by the *Cour de cassation* on 'appeals' from *cours d'assises*, a formalism requiring, for example, that the written record of a case comply strictly with the CPP and resulting in a relatively high percentage of successful appeals and consequent retrials. Danet suggests, backed by before and after examples, that such strict formalism is seen as no longer necessary with the advent of the *cour d'assises d'appel*.⁶⁰

Somewhat surprisingly there have been relatively few appeals to the *cour d'assises d'appel*. In 2001, the first year for such appeals, 227 were dealt with out of 3097 cases finalised at both levels of the *cour d'assises*, that is 7.3 per cent, while in 2002 the figures were 396 out of 3127 or 12.7 per cent, and in 2003 the figures were 371 out of 3255 or 11.4 per cent.⁶¹ It seems that the relatively high conviction rates in the *cour d'assises* at first instance of around 95 per cent⁶² are being maintained in the *cour d'assises d'appel*.^{63 64}

4. *Review of Jury Decisions in the United Kingdom and Australia*

A. *The United Kingdom*

The earliest procedure for the review of decisions by juries in criminal cases in England was by way of a writ of error.⁶⁵ This procedure was concerned with irregularities apparent on the record of the trial proceedings. The main limitation with this procedure was that the formal or public record generally comprised no more than the indictment, annotated with the plea of the accused and the verdict of the jury. There was no record of the evidence adduced at the trial or of the directions by the trial judge to the jury.⁶⁶ The limited nature of this procedure is not unlike that under which the *Cour de cassation* operates as a court of review except that there is a much more complete record for review before that court,

60 Id at 304.

61 Figures extracted from *Ministère de la Justice, Annuaire statistique de la Justice* (2005) at 125.

62 Conviction rates in the *cour d'assises* at first instance for the years 2001, 2002 and 2003 were 95.2 per cent, 94.9 per cent and 94.5 per cent respectively: *ibid*; See also Danet, above n52 at note 28.

63 Conviction rates in the *cour d'assises d'appel* for the same years were 96%, 95% and 94%: *ibid*.

64 It should be noted that the high conviction rate is in good part the result of the screening out of weak cases and down-charging from *crime* to *délit*, (a process known as '*correctionnelisation*') by the prosecutor and of the requirement that there be a committal for trial to the *cour d'assises* by the investigating judge on evidence sufficient for a conviction. See the new CPP art 181 enacted by *loi* no 2000-516, 15 June 2000, giving the committal power entirely to the investigating judge without need of reference to the *chambre d'accusation* (now the *chambre de l'instruction*) of the *cour d'appel* for the ultimate committal decision.

65 A brief history and critique of the writ of error is to be found in James Stephen, *A History of the Criminal Law of England* (1883) Vol 1 at 308-310.

66 Id at 308-309.

although on cases from a *cour d'assises* there is normally no transcript of evidence or directions to the jurors.⁶⁷

The limitations of the writ of error meant that it had limited use as a review mechanism and it was largely replaced by a procedure which was later formalised in the Court for Crown Cases Reserved in 1848. This procedure entailed judges who presided over trials at the assizes in which questions of law of some difficulty arose reserving those questions for the consideration of all the judges at Serjeant's Inn in London. Judgment or sentence would be postponed pending a decision by the judges, after argument by counsel, on those questions. Until 1848 the procedure was informal, no judgment or reasons being given.⁶⁸ When the Court was created in 1848 the quorum was five judges (including the Lord Chief Justice) although all the judges could sit. The jurisdiction of the court was exercised on a case stated by and at the discretion of a judge or recorder presiding over a jury trial as to any question of law (only) arising at the trial.⁶⁹

Neither the writ of error procedure nor the Court for Crown Cases Reserved could review a jury's decision on matters of fact. This only became possible with the creation of a Court of Criminal Appeal (CCA) by the *Criminal Appeal Act* (1907) 7 Edw VII, c23 (hereafter 1907 UK Act). This court was to be comprised of the Lord Chief Justice and eight specially appointed judges of the King's Bench Division but it could be constituted by any three or more such judges.⁷⁰ With the creation of this court, grounds of appeal, leave requirements and powers of the court were specified in some detail. These specifications were changed a few times up until the *Criminal Appeal Act* 1995 (UK) (hereafter 1995 UK Act) which, as we will see, settled upon a single ground for allowing an appeal against convictions. The 1907 Act provided under s3 for an appeal by a person convicted on indictment: (a) against that conviction on a question of law, (b) with the leave of the CCA or on a certificate of the trial judge against the conviction on a question of fact or of mixed law and fact or on 'any other ground which appears to the [CCA] to be a sufficient ground of appeal', and (c) with the leave of the CCA against the sentence. Under s4(1) the CCA was to allow the appeal and quash the conviction if it thought 'that the verdict of the jury should be set aside on the ground that it [was] unreasonable or could not be supported having regard to the evidence' or that the judgment should be set aside on the ground of a wrong decision on a question of law or that on any ground there was a miscarriage of justice. This was all with the proviso that, notwithstanding that the CCA was of the opinion that a point raised in the appeal might be decided in favour of the appellant, it could dismiss the appeal if it considered that 'no substantial miscarriage of

67 In addition to the writ of error there were two procedures by which a new trial could be sought after conviction on a jury trial. They were by a motion for a new trial in misdemeanour cases tried before the Queen's Bench Division or sent down by that Division to be tried by the assizes at *nisi prius*, and by a proceeding called a *venire de novo* consequent upon a defective special verdict from a jury: id at 310–311.

68 Id at 311.

69 Id at 311–312.

70 1907 UK Act s1(1), (2).

justice [had] actually occurred'. Writs of error and the powers and practice of the High Court in respect of motions for new trials in criminal cases were abolished by the 1907 UK Act.⁷¹

A power to order a retrial after an appeal was given to the CCA by the *Criminal Appeal Act 1964* (UK), but only where fresh evidence had become available and the interests of justice so required.⁷²

By the *Criminal Appeal Act 1966* (UK) (hereafter 1966 UK Act) the jurisdiction of the CCA was transferred to the Criminal Division of the Court of Appeal. The 1966 UK Act also reworded some of the powers of the Court as specified in the 1907 UK Act for allowing appeals. The words 'it is unreasonable or cannot be supported having regard to the evidence' in s4(1) of the 1907 UK Act were replaced with the words 'under all the circumstances of the case it is unsafe or unsatisfactory', the words 'on any ground there was a miscarriage of justice' were replaced with the words 'there was a material irregularity in the course of the trial', and the word 'substantial' in the proviso under the 1907 (UK) Act was deleted from the expression 'if [the Court considers] that no substantial miscarriage of justice has actually occurred'.⁷³ These rewordings of powers were re-enacted in the consolidating *Criminal Appeal Act 1968* (UK) (hereafter 1968 UK Act), together with the previous ground for setting aside convictions that there had been 'a wrong decision on any question of law'.⁷⁴ The power to order a new trial for 'fresh evidence' (only) was also re-enacted in the 1968 UK Act.⁷⁵

The 1968 UK Act also dealt with appeals to the House of Lords from the Court of Appeal, Criminal Division. Such appeals were to be by leave of the Court of Appeal or the House of Lords and only on a certificate from the Court of Appeal 'that a point of law of general public importance' was involved and it appeared to the Court of Appeal or the House of Lords that the point was one which ought to be considered by the House of Lords.⁷⁶ In disposing of an appeal the House of Lords could exercise any powers of the Court of Appeal or remit the case to that Court.⁷⁷

By the *Criminal Justice Act 1988* (UK) the power of the Court of Appeal to order a new trial was widened from 'fresh evidence' to the broader 'where it appears to the court that the interests of justice so require'.⁷⁸

Further changes to the regulation of criminal appeals were made by the 1995 UK Act, by way of amendments to the 1968 UK Act. Appeals to the Court of Appeal, Criminal Division, were now to lie only with leave of the Court of Appeal or on a certificate from the trial judge.⁷⁹ One ground only was provided for

71 1907 UK Act s20(1).

72 *Criminal Appeal Act 1964* (UK), s1.

73 1966 UK Act s4(1).

74 1968 UK Act 2(1).

75 1968 UK Act ss7(1), (23).

76 1968 UK Act s33.

77 1968 UK Act s35(3).

78 *Criminal Justice Act 1988* (UK) s43(2), amending 1968 UK Act s7(1).

79 1995 UK Act s1(1), amending 1968 Act s1(2).

allowing an appeal against conviction and that was that the Court thought ‘that the conviction [was] unsafe’.⁸⁰ The proviso allowing for the dismissal of an appeal if there were considered to be no miscarriage of justice was also deleted from the legislation.⁸¹

The 1995 UK Act also created a Criminal Cases Review Commission.⁸² The Commission consists of no fewer than 11 members, of whom at least one third must be sufficiently legally qualified.⁸³ The Commission may refer a conviction on indictment to the Court of Appeal and such reference is to be treated as an appeal.⁸⁴ Any reference must be on the basis that the Commission considers there is a ‘real possibility’ that the conviction would not be upheld if the reference were made because of an argument or evidence not previously raised or adduced, and an appeal has already been determined or leave to appeal refused.⁸⁵ Exceptional circumstances may also justify a reference.⁸⁶ There are similarities between this review procedure and that involving the *Cour de cassation* in France as outlined above, but with the significant difference that the ultimate arbiter in the United Kingdom is a court acting as on appeal while the ultimate arbiter in France is a court acting by way of revision, although it should be added that the Court of Appeal has broader power than the *Cour de cassation*, even it would seem when the latter is acting as a court of revision.

It is apparent that for nearly a century now the Court of Appeal in the United Kingdom has had considerable but varied powers of review of jury findings resulting in convictions. These powers range from the relatively specific (the jury verdict ‘cannot be supported having regard to the evidence’, ‘material irregularity in the course of the trial’) to the quite broad (‘miscarriage of justice’, ‘unsafe’, ‘unsatisfactory’). The sole power now in the United Kingdom is if the court thinks the conviction is ‘unsafe’. With the demise of the proviso from 1995, and thus of the reserve power in the court to dismiss an appeal if it considered that no miscarriage of justice had occurred, it could be suggested that the powers of the court over jury verdicts had been reduced, but the potential breadth of the ‘unsafe’ power would mitigate against such a suggestion. A court which previously might have been minded to decide a point in favour of an appellant but then apply the proviso should have little difficulty in not holding a verdict unsafe. The foregoing evidences the considerable range of criteria that have been employed in the cause of judicial review of jury verdicts in the United Kingdom and, with ‘unsafe’, the choice ultimately of a relatively discretionary and avowedly subjective criterion,⁸⁷ allowing scope for some double-guessing of jury verdicts, but without having seen or heard the witnesses and on the basis only of the transcripts of their evidence.

80 1995 UK Act s2(1), amending 1968 UK Act s2(1).

81 Ibid.

82 1995 UK Act pt 11.

83 1995 UK Act s8.

84 1995 UK Act s9.

85 1995 UK Act s13(1).

86 1995 UK Act s13(2).

B. Australia, or More Particularly, New South Wales

Trial by jury in criminal cases was not established in New South Wales (NSW) until 1839 when military juries were abolished.⁸⁸ Review of convictions in jury trials was initially by way of reservation of points of law by trial judges during the trial for the consideration of the Full Supreme Court. A stated case to the Supreme Court at the instance of the trial judge or on application by counsel on questions of law was available by legislation from 1849.⁸⁹ Although no express power was given to the Supreme Court to order a new trial it assumed that power in cases stated from trials in the Supreme Court (though not from trials in Quarter Sessions) until overruled on this by the Privy Council.⁹⁰

A Court of Criminal Appeal comprising three or more judges of the Supreme Court was created in New South Wales in 1912.⁹¹ The Court was modelled on the United Kingdom Court established by the 1907 UK Act. The grounds of appeal against a conviction and the powers of the court in determining appeals⁹² (including the ‘proviso’) were virtually the same as under the 1907 UK Act. Unlike the 1907 UK Act, however, the NSW court was, from the outset, given a general power to order a new trial if it considered that ‘a miscarriage of justice [had] occurred’ which ‘having regard to all the circumstances’ could be more adequately remedied by such an order than any other.⁹³ Writs of error and the powers and practice of the Supreme Court in respect of motions for new trials were abolished by this 1912 NSW Act,⁹⁴ as they had been by the 1907 UK Act. Unlike the developments in the United Kingdom by legislation since 1907 as outlined above, the original provisions of the 1912 NSW Act, particularly as to grounds for appeal (s5) and the powers of the Court (s6), have not been materially changed since 1912.⁹⁵

87 The leading judgment on ‘unsafe’ is that of Widgery LJ in *R v Cooper* [1969] 1 QB 267 where his Lordship spoke of ‘a subjective question’, and that being ‘whether there is not some lurking doubt’ in the minds of the judges, ‘a reaction which can be produced by the general feel of the case as the Court experiences it’: at 271. A similar but alternative formulation is to be found in the judgment of the Court of Appeal in *R v Wellington* [1991] *Crim LR* 543 — ‘whether we feel a reasoned and substantial unease about the finding of guilt’. See generally James Richardson & David Thomas (eds), *Archbold Criminal Pleading, Evidence and Practice* (2004) at 978–983. Note that in *Condron v United Kingdom* (2001) 31 EHRR I the European Court of Human Rights emphasised the need for the Court of Appeal to focus upon the (more objective) fairness of the trial rather than the safety of the conviction, having regard to the overriding right to a fair trial mandated by article 6 of the European Convention on Human Rights. For a discussion of this and related cases see Peter Murphy & Eric Stockdale (eds), *Blackstone’s Criminal Practice* (2004) at 1664–1668.

88 See John Bishop, *Criminal Procedure* (2nd ed, 1998) 412–413.

89 *Id* at 541–542.

90 *Id* at 542 and cases there discussed. On appeals in Australia before the creation of Courts of Criminal Appeal, see generally D O’Connor, ‘Criminal Appeals in Australia Before 1912’ (1983) 7 *Crim LJ* 262.

91 By the *Criminal Appeal Act 1912* (NSW) (hereafter 1912 NSW Act). Similar legislation has been enacted in all other Australian jurisdictions. See Bishop, above n87 at 551.

92 1912 NSW Act ss5, 6.

93 1912 NSW Act s8.

94 1912 NSW Act s23.

Appeals may be taken from the New South Wales Court of Criminal Appeal (hereafter NSWCCA) to the High Court of Australia but only by special leave of the High Court.⁹⁶ In considering a grant of special leave the High Court is to have regard to whether the proceedings involve a question of law of public importance and whether the interests of the administration of justice require consideration of the case by the High Court.⁹⁷ The High Court may affirm, reverse or modify the judgment of the NSWCCA, or give such judgment as ought to have been given⁹⁸ or remit the case to the NSWCCA.⁹⁹ The High Court has also a specific power to grant a new trial.¹⁰⁰ These appeal provisions are similar to their counterparts in the United Kingdom except that leave to appeal is a matter for the High Court alone to the exclusion of the NSWCCA. By contrast, in France *pourvois* to the *Cour de cassation* (and appeals to the *cour d'assises d'appel*) require no leave.

As in the United Kingdom and France there is in NSW provision for the review of convictions apart from appeals and *pourvois*. The provision in NSW is contained in Part 13A of the *Crimes Act* 1900 (NSW). Petitions may be made to the Governor of NSW¹⁰¹ (and then normally dealt with by the Attorney-General) or applications may be made to the Supreme Court.¹⁰² In either case an inquiry by a 'judicial officer' may be instituted¹⁰³ or the matter may be referred to the NSWCCA to be dealt with as an appeal.¹⁰⁴ The judicial officer after inquiry may also refer the matter to the NSWCCA to consider whether the conviction should not be quashed.¹⁰⁵ On an inquiry instituted by the Governor the judicial officer is to report back to the Governor who may then (on advice normally from the Attorney-General) 'dispose of the matter in such manner as to the Governor

95 There have been a number of additions to the Act dealing with appeals in other than 'ordinary cases' (so described in the heading to s 6) and with procedural matters. For a discussion of the legislation and case law concerning appeals to the Courts of Criminal Appeal in Australia see Bishop, above n87 at 551–87.

96 *Judiciary Act* 1903 (Cth) s35.

97 *Judiciary Act* 1903 (Cth) s35A.

98 The High Court on a number of occasions has considered the important appellate issue of whether there had been a 'substantial miscarriage of justice' at the appellant's trial, words originally used in the proviso to s4(1) of the 1907 UK Act (outlined above) and subsequently re-enacted in corresponding legislation in the Australian States, in NSW in s6 of the 1912 Act. The traditional signification given to those words by the High Court has been whether the accused at trial had 'lost a chance which was fairly open to him of being acquitted': *Mraz v R* (1955) 93 CLR 493 at 514 (Fullagar J). An alternate signification has also more recently been given — whether there has been an 'irregularity' at the trial 'that goes to the root of the proceedings' or that the proceedings were 'fundamentally flawed': *Wilde v R* (1988) 164 CLR 365 at 373 (Brennan, Dawson & Toohey JJ). Both significations were applied in *Glennon v R* (1993) 179 CLR 1, in which the majority held that there was no fundamental irregularity but the whole court held that as the accused had been deprived of a chance fairly open to him of being acquitted there had been a substantial miscarriage of justice.

99 *Judiciary Act* 1903 (Cth), s37.

100 *Judiciary Act* 1903 (Cth), s36.

101 *Crimes Act* 1900 (NSW), pt 13A div 2.

102 *Crimes Act* 1900 (NSW), pt 13A div 3.

103 *Crimes Act* 1900 (NSW), ss474C(1)(a), 474E(1)(a).

104 *Crimes Act* 1900 (NSW), ss474C(1)(b), 474E(1)(b).

105 *Crimes Act* 1900 (NSW), s474H.

appears just'. On an inquiry instituted by the Chief Justice on behalf of the Supreme Court the judicial officer is to report back to the Chief Justice who in turn must report to the Governor who may again 'dispose of the matter' in like manner.¹⁰⁶ The involvement of the NSWCCA in the review of convictions as outlined above is ultimately as an appeal court functioning as such.

The position of the Court of Appeal, Criminal Division, in the United Kingdom in this context is similar except that references to it come from a specialist Review Commission. The *Cour de cassation* in this context also is required to act in effect, but uncharacteristically, as an appeal court with broad, Anglo-Australian powers of review. New South Wales is exceptional in allowing for review by agents of the Executive (Governor, Attorney-General).

5. Conclusion

It is ironic that the French, having transplanted the British jury into their criminal justice system after the Revolution, a system until that time operated by legal professionals (particularly judges and prosecutors), have opted for a second jury court as the court of appeal for an accused convicted by a first jury court, while the British and Australians for nearly a century now have subjected guilty verdicts by jurors to scrutiny by judges and on very broad grounds — in the United Kingdom if the judges 'think that the conviction is unsafe' and generally in Australia if the judges are 'of opinion' on 'any... ground whatsoever there [has been] a miscarriage of justice', provided any such miscarriage is 'substantial'.¹⁰⁷ It is of course true that British and Australian appellate judges will often have legal issues relating to the admissibility of evidence and the directions by the trial judge to the jury to scrutinise when exercising their powers, issues which generally would not arise before any court hearing appeals from convictions by the *cour d'assises*. This may go some way in explaining why the British and Australians have settled for purely judicial appellate bodies while the French have opted for a second jury court, but the irony remains. This irony could, of course, be expressed in terms of a civil law system characterised by legal professional control over decision-making successfully digesting a common law decision-making body of lay persons which has become subject to legal professional oversight in that body's home jurisdictions.

It is noteworthy that the French are not the only Europeans with an enduring attachment to the transplanted British jury in criminal matters. The Belgians and the Danes also use jurors for trials of the most serious offences. In Belgium the assize court is constituted by three judges and 12 jurors, with the jurors alone deliberating on guilt but together with the judges on any sentence. In Denmark the High Court is also constituted by three judges and 12 jurors who deliberate apart on guilt but together on any sentence. There are no appeals against convictions by the jury court in Belgium and Denmark but there is recourse on questions of law to the *Cour de cassation* in Belgium and the Supreme Court in Denmark. It should

106 *Crimes Act* 1900 (NSW), ss474H(1), (3), (4). For the background to Part 13A and corresponding provisions in other Australian jurisdictions see Bishop, above n86 at 600–602.

107 1912 Act NSW s6(1).

however be noted that jury trials were abolished in Germany in 1924 (having been introduced in 1877) and in Spain in 1923 (having been introduced in 1888). It is apparent that the transplanted British criminal jury has done better in some European environments than in others. It may also be noted that as regards lay participation in criminal adjudication in Europe, specially qualified and appointed lay judges (not jurors) sit and deliberate with the judges in the superior criminal courts in Italy, Portugal and Greece.¹⁰⁸

The British and Australians have of course often sung the praises of the criminal jury. It has been hailed as 'the grand bulwark of [English] liberties',¹⁰⁹ as 'the lamp that shows that freedom lives',¹¹⁰ as a guarantee of 'the protection of the citizen against those who customarily exercise the authority of government'¹¹¹ and, more pragmatically, as 'the place where the bargain [between the law and the people] is struck'.¹¹² A French observer of the American polity in the nineteenth century was also much impressed with the democratising effect of the jury system.¹¹³ Such endorsements have not however stopped British and Australian legislators empowering judges to override jury verdicts on quite broad grounds.

Finally, although the two appellate systems we have considered differ markedly, the position as to new trials differs less. A French accused convicted by a *cour d'assises* has a right of appeal to a *cour d'assises d'appel*, provided the *Cour de cassation* is satisfied that the appeal is in time¹¹⁴ and in proper form.¹¹⁵ The appeal is then by way of a new trial. A convicted British or Australian accused may arrive at a new trial but by a more circuitous route. The leave of the Court of (Criminal) Appeal or a certificate of the trial judge may be required to launch an appeal. The appeal must then be allowed, and for an Australian appellant the 'proviso' not applied to dismiss the appeal. The Court may then order a new trial rather than an acquittal.¹¹⁶ Thus for a French appellant a retrial is virtually automatic while for a British or Australian appellant it may be the dubious consequence of a successful appeal. But at least then a second jury trial, as in France, becomes available.

108 For the details regarding the above-mentioned European countries see Christine Van Den Wyngaert (ed), *Criminal Procedure Systems in the European Community* (1993).

109 William Blackstone, *Commentaries on the Laws of England* (9th ed, 1783), Book 4 at 349 (republished in 1978).

110 Patrick Devlin, *Trial by Jury* (1956) at 164.

111 *Kingswell v R* (1985) 159 CLR 264 at 300 (Deane J).

112 Edward Thompson, *Writing by Candlelight* (1980) at 108.

113 Alexis De Tocqueville, *Democracy in America* (1835).

114 CPP art 380–15.

115 CPP art 380–12.

116 As some indication of the rate of new trial to acquittal orders on successful appeals against convictions in Australia, the New South Wales Court of Criminal Appeal for the 5–year period 1996–2000 allowed 281 appeals against conviction and ordered new trials in 163 (58 per cent) of those cases and acquittals in 118 (42 per cent) of them. Figures extracted from Judicial Commission of New South Wales 'Sentencing Trends' (No 22, February, 2002) available online at: <<http://www.judcom.nsw.gov.au/st/st22/index.html>>