CASE NOTE

R v Frank Alan Button [2001] QCA 133 :

Exposing a Wrongful Conviction Through DNA Testing

Amanda Dingle*

> Some twenty-five hundred years ago, the Athenian statesman and lawmaker Solon was asked how true justice could be achieved in Athens. His answer … was that "justice could be achieved whenever those who were not injured by injustice were as outraged as those who had been".[1]

Similar rationale resounds throughout the recent judgment of Williams JA (with whom the other presiding Justices, White J and Holmes J, agreed) in the Queensland Court of Appeal case of *R v Frank Alan Button*[2], signifying a determination to encourage judicial and general understanding of the outrage and grave implications surrounding a wrongful conviction.

Button has heralded consideration of the seriously under-analysed question of what avenues need to develop to provide a wrongly convicted person with a legal right to utilise DNA testing in order to prove their innocence. This was a landmark decision in Australia, being the first in which DNA analysis was instrumental in freeing a person from the grasp of a wrongful sentence. This case serves to highlight that the Australian criminal justice system is certainly not immune to error in convictions.

The somewhat scathing judgment by Williams JA conjures images of the lugubrious morale one would experience while wrongly imprisoned and, throughout the episode, knowing there is no recourse to a legal right to insist that DNA testing be undertaken to prove one's innocence. Williams JA accepted that the common law should be

---

* Assoc Deg Law Graduate; LLB student - Southern Cross University.

1 Yant M, *Presumed Guilty - When Innocent People are Wrongly Convicted*, Prometheus Books, New York, 1991, p221.

2 [2001] QCA 133, Supreme Court of Queensland, Court of Appeal, 'BC200101682' (10 April 2001) *Queensland Unreported Judgments*, Butterworths Online (17/06/01).

quick to recognise DNA identification as a determinant of guilt as well as of innocence. He described this as "the two-fold purpose" [3] of DNA testing, and spoke highly of the accuracy and certainty provided by such testing. Since the evidence from DNA testing was "the breakthrough" to "conclusively establish"[4] Button's innocence, the case is an excellent example of the utilisation of such testing to exculpate convicted persons.

Brief Facts of the Case

Frank Button had been convicted of raping a 13 year old girl by a jury in August 1999 and was sentenced to a six year gaol term.[5] It was ten months into his term before all DNA evidence was finally tested and the Court of Appeal quashed his conviction. This further testing was only undertaken because of the persistent insistence of Button's defence team, who recognised that DNA analysis was a powerful avenue of prolific reliability to review a conviction. The defence team could not rely upon any statutory right to innocence testing at the post-conviction stage as no such legislative provision exists in Australia, hence the resort to the common law.

The conviction had centred on expert evidence of a DNA scientist from the Queensland Government's John Tonge Centre which had opined that "no conclusive results could be gleaned from vaginal swab DNA testing"[6]. During the appeal proceedings, the Director of Public Prosecutions admitted that "crucial DNA tests on bed sheets had not been completed"[7]. This meant that the jury had convicted Button

---

[3] *R v Frank Alan Button* [2001] QCA 133 (10 April 2001) *Queensland Unreported Judgments,* Butterworths Online (17/06/01) at paragraph 5.

[4] *R v Frank Alan Button* [2001] QCA 133 (10 April 2001) *Queensland Unreported Judgments,* Butterworths Online, (17/06/01) at paragraph 5. For further judicial acceptance of the accuracy and certainty of DNA testing see :
R v David John McIntyre [2001] NSWSC 311 (11 April 2001) per Bell J <http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2001/311.html>
R v Karger [2001] SASC 64 (29 March 2001) per Mullighan J <http://www.austlii.edu.au/au/cases/sa/SASC/2001/64.html>
R v Pantoja (No1) (1996) 88 A Crim R 554 and affirmed in *R v Milat* (1996) 87 A Crim R 44.

[5] 'QLD : Sex Conviction A Black Day, Court Told' (posted 11/04/01) *Australian Current Law News,* Butterworths Online (11/07/01) at para 2.

[6] 'QLD : Sex Conviction A Black Day, Court Told' (posted 11/04/01) *Australian Current Law News,* Butterworths Online (11/07/01) at para 4.

[7] *7.30 Report,* ABC, Sydney, 7.30pm, 11 April 2001; <http://www.abc.net.au/7.30/s2/6116.htm>

based on inconclusive evidence, pointing to incompetent investigation as the most likely cause of the miscarriage of justice. Specifically, the DNA testing at pre-trial stages had focussed heavily on guilt testing, rather than innocence testing. For example, whilst samples from the bed sheets had been taken, 'prosecutors assumed they would not help *convict* the man'[8].

Public Policy Concerns

When formulating his judgment, it is likely Williams JA was well aware of certain public policy concerns arising from his decision to permit DNA evidence to quash a conviction.

One of those concerns was the payment of compensation to the wrongly imprisoned person. Williams JA observed that "the court can do little as far as compensation to the appellant".[9] This may be construed as an attempt to limit the financial liability of the criminal justice system. However, merely stating that "the court can do little" does not express any persuasive comment regarding the appropriateness of compensation to someone who has suffered the opprobrium of a false conviction. Instead, William JA's remark may be construed as simply recognising the lack of statutory provision for compensation to the wrongly convicted. Indeed, it could be argued that "if all Australians were to have access to statutory schemes for compensation in the event of miscarriages of justice, such miscarriages may be less likely to occur, as the prospect of large compensation payouts may ensure better government of the criminal justice system"[10].

Another concern that Williams JA may have had in mind was that his judgment would highlight the fallibility of the criminal justice system. In the course of his judgment he regarded as a major concern that DNA evidence was not available at trial, and also the inefficient pre-trial conduct of the investigating police.[11] However, these matters were given only passing reference, with his Honour concluding that he was "at least heartened by the fact that the Director of Public Prosecutions

---

8 Ibid.

9 *R v Frank Alan Button* [2001] QCA 133, (10 April 2001) *Queensland Unreported Judgments*, Butterworths Online, (17/06/01) at paragraph 10.

10 Author unknown, 'Responding to Custody Levels - Compensation for Miscarriages of Justice' *Reconciliation and Social Justice Library*, para 1 <http://www.austlii.edu.au/au/other/IndigLRes/car/1993/6/21.html> (10/04/01)

11 *R v Frank Alan Button* [2001] QCA 133, (10 April 2001) *Queensland Unreported Judgments*, Butterworths Online, (17/06/01) at paragraph 3 and 9 respectively.

… has put in train the necessary investigations"[12]. This is a very mild reproach of significant and identifiable weaknesses of the criminal justice system. It may be that Williams JA was concerned to play down such fallibility because it may be hazardous to societal confidence. However, insulating society does little to assist reform of the criminal justice system. Indeed, society needs to be fully informed so that it may pressurise parliaments to act.

A third concern that Williams JA may have considered was the potentially high financial cost of DNA testing.[13] To the contrary, his Honour advocated extensive testing to circumvent miscarriages of justice, wisely noting the greater cost to the community of having miscarriages of justice, and to the wrongly punished person. [14] Williams JA did not offer any solution in the event that the accommodation of costs becomes topical. Obviously, should innocence be proven, it would be a further disgrace to insist that the convicted person pay for testing. Conversely, there is merit in penalising a prisoner who makes a bogus claim to innocence. Such penalty would discourage superfluous claims created by devious minds, thus providing increased time and cost efficiency. As DNA testing can determine innocence with certainty, such a penalising provision would be fair and just. Only the truly innocent would be provided for without creating a loophole to freedom for the guilty.

A Missed Opportunity

Much of Williams JA's judgment focused upon pre-trial stages and eschewed the role of DNA testing in exonerating the wrongly convicted. Therein lay a missed opportunity to strongly advocate that there should be, at any stage of the criminal justice system, a right to expose innocence with certainty via DNA analysis. It is highly unacceptable to ignore the right to insist on post-conviction DNA testing, particularly in light of the facts in *Button*.

---

[12] *R v Frank Alan Button* [2001] QCA 133, (10 April 2001) *Queensland Unreported Judgments*, Butterworths Online, (17/06/01) at paragraph 9.

[13] Conversely, to counter any concern regarding cost, it appears that the newer PCR technology is considerably less expensive than the older RLFP analysis. In fact, 'the real cost, including salaries and other overheads is about $150 a sample' cited in Freney L and Ansford T,'DNA in Forensic Science - Infallible Crimebuster?' (1999) 19(1) *Proctor* 16 at 19.

[14] *R v Frank Alan Button* [2001] QCA 133, (10 April 2001) *Queensland Unreported Judgments*, Butterworths Online, (17/06/01) at paragraph 7.

On the bright side, the decision in *Button* was a refreshing outcome, with the common law being advanced to provide judicial clarification of the viability of DNA analysis to exonerate an innocent prisoner (even if focus was not sufficiently on the post-conviction stage). This issue was hitherto inadequately dealt with at common law.

Williams JA defined Button's wrongful conviction as leading to 'a black day in the history of administration of criminal justice in Queensland'[15]. This is commendable judicial acknowledgment of the travesty inherent in wrongful convictions. However, it is hoped that when similar cases appear, the courts will be much more forthcoming in calling for the pressing need for law reform to allow post-conviction testing as a right, both at common law and under statute.

Making Post-Conviction DNA Testing a Legal Right

Scientific techniques equate with "a value free, objective systemisation of decisions and processes where discretionary and subjective judgments are minimised."[16] In contrast many individuals in the criminal justice system, (such as police, prosecutors and juries) exercise discretion.[17] Due to subjective human error, this discretion may contribute to the occurrence of wrongful convictions, thereby increasing injustice. DNA science provides an effective tool to alleviate this and has been praised "by some authorities as the most significant development in criminal justice this century."[18] The innocent person who was stripped of their liberty because such technology was unavailable at the time of conviction, may now be exculpated.

There are currently an estimated 2,500 innocent people in Australian prisons.[19] Conscience does not rest comfortably knowing that there is an effective technique which is unfettered by inaccuracy and available to exonerate, and yet which is not facilitated to its full potential. The time is overdue for legislatures to implement laws in Australian jurisdictions which clearly express a legal right to access DNA innocence testing at post-conviction stages. This would eschew further

---

15 *R v Frank Alan Button* [2001] QCA 133, (10 April 2001) *Queensland Unreported Judgments*, Butterworths Online, (17/06/01) at paragraph 1.

16 Corns C, 'The Science of Justice and Justice in Science' in Arup C (ed) *Science , Law and Society - A Special Issue from Law in Context*, Bundoora, Victoria, La Trobe University Press,1992, p 18.

17 Corns, note 16

18 Corns, note 16 at p 7.

19 *7.30 Report*, ABC, Sydney, 7.30pm, (11/4/01); <http://www.abc.net.au/7.30/s2/6116.htm>

imposition of injustice upon innocent people who have been wrongly imprisoned.

Conclusion

DNA analysis has revolutionised crime solving and has proven to be an effective tool to demonstrate the likely guilt of suspects. It is so effective that every Australian jurisdiction has enacted comprehensive legislation to legitimate procedures for the testing of suspects.[20] Unfortunately, none of the existing legislation deals with DNA testing at the post-conviction stage.

With the proliferation of acceptability of DNA evidence at pre-trial and trial stages, it seems only just and logical that such evidentiary techniques are likewise utilised at the post-conviction stage. Henceforth, it is vital that legislation be speedily enacted to provide a legal right to have a case re-heard and with all evidence resuscitated, in light of DNA testing which exhibits a convicted person's innocence. Such exoneration, as occurred in *Button*, would do much to appease society's conscience that a person has not been punished for a crime he or she had not committed.

---

[20] For an overview of the provisions, see : Griffith G, 'Briefing Paper - DNA Testing and Criminal Justice', 5/2000 <http://www.parliament.nsw.gov.au/prod/w…f/PH/Pages/ResearchBf052000?OpenDocument> (04/03/01).