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The Times Law Awards 2003: Victims or Defendants – Can there be justice for all?

In the Middle Ages the guilt or otherwise of an accused was easy to establish. Particularly popular was trial by ordeal. The accused would be bound and thrown in water. If he sank, he was innocent. If he floated, he was guilty. Some observers may be forgiven for thinking that the Government's White Paper boldly entitled "Justice for All" could introduce a unwelcome element of populist 'rough and ready' justice, that concern for victims could take precedence over the rights of the accused. It is true that public confidence in the criminal justice system has waned and there is a perception that the punishment no longer fits the crime. The adoption of a populist approach that puts victims above the legal rights of the defendant, however, is not the way to improve public confidence but may mean the Government misses its best opportunity to improve the criminal justice system and could eventually lead to punishing the innocent and not the guilty. So is "Justice for All" really about justice for all?

While many of the proposed changes are to be welcomed as enhancing the rights of victims and witnesses, the basic thrust of the White Paper is that this is to be done by reducing the rights of defendants. Take, for example, the suggestion that previous convictions of the defendant ought to be put before the jury more frequently. At present, previous convictions can be raised on a 'tit-for-tat' basis, namely if the defendant attacks the character of a prosecution witness, the defendant loses his shield and evidence of his previous misconduct becomes relevant. What the Government is proposing is far more wide-reaching. It is true that the proposals stop short of routine introductions of previous convictions in all cases, however, the Government is of the view that previous convictions are to be disclosed if relevant to the offence. While they pay lip-service to the fact that the judge should have the final say on whether the information would have a disproportionately prejudicial effect on the defendant, in practice, the introduction of previous convictions will always be prejudicial. A fair

trial will be virtually impossible. The example the Government provides in its White Paper is even more astonishing: that should a defendant be acquitted of a similar offence in a previous trial, then the jury should be informed of the previous charges because of their 'clear probative value'. When the full might of the State is brought against an individual it would be worrying if legal principle and tradition was exchanged for a legal system based on the adage of 'there's no smoke without a fire'. According to the Government, it would defy belief that a person could be charged with similar offences on separate occasions and still be innocent. However, such changes could only have a prejudicial effect. By introducing more frequently evidence of 'bad character' the system will inevitably assist the prosecution in obtaining a conviction.

Populism and concern about the victims of crime is also the driving force behind the idea of abolishing the rule against double jeopardy. Double jeopardy means that a person cannot be charged with the same offence more than once, even though new evidence of guilt is discovered after trial. The failed private prosecution by the Lawrence family contributed to the public's concern that Stephen Lawrence's killers have never been brought to justice. It would be wrong for the Government to overturn an 800 year principle however on the basis of one highly sensitive case. Should the rule be abolished, it would be impossible for a subsequent trial to be ever fair since the jury members knowing of the previous trial would assume that the new evidence must prove guilt. The worst that can happen to a society is not that the guilty go unpunished but that the innocent are wrongly convicted. The aim of the rule is to protect the individual from repeatedly having to protect himself against prosecution. It constitutes a reassurance given to innocent people, once acquitted, that they should never have to go through the same distress again. Further, the existence of the rule also gives the prosecution an incentive to prepare the case thoroughly before presenting it to the court. Thus the suggestion that the abolishment of the rule would open the door to retrials in cases such as Stephen Lawrence and Damilola Taylor is misconceived since all necessary evidence was reasonably available at the time. The unsatisfactory outcome of both cases was primarily due to inadequacies in the police force and the Crown Prosecution Service.

Other controversial proposals included in the White Paper, such as the removal of the right to trial by jury in complex cases such as fraud or allowing the wider use of 'hearsay' evidence in certain circumstances, will not contribute to achieving fairness either to the defendant or to the victim. The government should not treat criminal justice system reform as a 'zero-sum' game and stop approaching it from the point of view that the victim can only benefit at the expense of the defendant. There are no winners or losers as it is in the interests of both parties that the outcome of a case should be just and uncompromised. Perhaps, more attention should be given to tackling primary causes of crime, such as lack of education or unemployment, as well as ensuring an efficient police forces and Crown Prosecution Service. Thus more crime can be prevented by enhancing the opportunities for the poorest and most deprived groups of our society rather than by securing even higher conviction rates. Further, in cases that actually come to court the conviction must be secured solely on basis of solid evidence of proof of guilt beyond reasonable doubt and not by an imbalanced criminal justice system driven by populism, favouring the rights of the victim over the rights of the accused.