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# The Safety of Convictions in the Court of Appeal: Fresh Evidence in the Criminal Division through an Empirical Lens

Paul Dargue

**Keywords:** Court of Appeal; Criminal Appeals; Fresh Evidence; Empirical Legal Studies; Judicial Decision-Making.

## ABSTRACT

An academic consensus exists that the England and Wales Court of Appeal (Criminal Division) determines appeals against conviction in a narrow or an unduly restrictive manner. This consensus has developed through observation and empirical study of the Court over several decades. It is said in particular that the Court adopts a narrow approach when considering appeals which raise primarily factual issues, especially fresh evidence or 'lurking doubt' appeals. This article discusses two new empirical studies of the Court, one of which is a replication of Roberts's recent study which featured in the *Journal of Criminal Law* in 2017. The empirical evidence in support of the allegation of a restrictive approach is explored in this article from a theoretical and methodological perspective. It is argued that the question of the Court's approach is difficult to study empirically, and so suggestions of empirical support for a restrictive approach overreach the limits of the methods employed. This is not to suggest that the Court of Appeal does not make mistakes, nor even is it to suggest that the Court is not narrow or unduly restrictive. Rather, it is suggested that the empirical findings offered as evidence of the restrictive approach, which gives rise to the consensus position, is weak and should be treated with caution, especially in light of the author's two new empirical studies of the Court.

## Introduction

Empirical Legal Studies (ELS) is a field of legal study which aims, through systematic data collection and observation, to answer legal research questions.<sup>1</sup> One area of the

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<sup>1</sup> See WH Van Boom, P Desmet and P Mascini, 'Empirical Legal Research: Charting the Terrain' in the same (eds), *Empirical Legal Research in Action: Reflections on Methods and their Applications* (Edward Elgar: Cheltenham, 2018) at 8.

England and Wales legal system which has faced some empirical scrutiny is the Court of Appeal (Criminal Division). Empirical studies since Knight's in the 1970s have disclosed evidence of the Court having an allegedly unduly restrictive approach to determining appeals which raise factual issues.<sup>2</sup> This is in contrast to appeals which raise largely legal or procedural irregularities; empirical studies have shown the Court is more likely to quash convictions due to errors of legal process than due to fresh evidence.<sup>3</sup> Malleson's research<sup>4</sup> conducted on behalf of the *Royal Commission on Criminal Justice* (RCCJ),<sup>5</sup> and Roberts's recent study, provide apparent empirical evidence of the approach of the Court, and the apparent resistance of the Court to liberalising its approach to fresh evidence appeals.<sup>6</sup>

Partly as a result of Malleson's research, and the academic consensus<sup>7</sup> that the Court appeared unduly restrictive in its approach, the RCCJ recommended what became the 'unsafety test'. The Court of Appeal has operated this test since 1995, following the enactment of the *Criminal Appeal Act 1995* via an amendment to the *Criminal Appeal Act 1968*.<sup>8</sup> The 'unsafety test' means the Court must quash a conviction on appeal if it thinks that the conviction is unsafe, and it must dismiss the appeal otherwise.<sup>9</sup> There is no further definition of the meaning of an unsafe conviction given in the Act, and so the Court's past jurisprudence remains relevant.<sup>10</sup> The key pre-amendment decisions include *R v Cooper*,<sup>11</sup> which created the doctrine of 'lurking doubt', and *DPP v Stafford*<sup>12</sup> where the House of Lords considered how the Court of Appeal should determine fresh evidence appeals. A key provision is section 23 of the

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<sup>2</sup> M Knight, *Criminal Appeals*, (Stevens and Sons: London, 1970).

<sup>3</sup> See K Malleson, *Royal Commission on Criminal Justice: Review of the Appeal Process Research Study No. 17* (HMSO: London, 1993).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Report of the Royal Commission on Criminal Justice* (RCCJ) cm 2263 (HMSO: London, 1993).

<sup>6</sup> See most recently S Roberts, 'Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal' (2017) 81 J Crim L 303 (hereafter 'Roberts').

<sup>7</sup> See also for evidence of consensus, R Pattenden, *English Criminal Appeals 1844 – 1994* (Clarendon: Oxford, 1996); R Nobles, D Schiff, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (Oxford University Press: Oxford, 2000); S Roberts, L Weathered, 'Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission' (2009) 1 OJLS 43.

<sup>8</sup> Criminal Appeal Act 1995, s 2

<sup>9</sup> Criminal Appeal Act 1968 (as amended) s 2.

<sup>10</sup> See JC Smith, 'Legislative Comment' (1995) Crim LR 920.

<sup>11</sup> (1969) 53 Cr App R 82.

<sup>12</sup> [1974] AC 878.

*Criminal Appeal Act 1968*, as amended, which gives the Court the power to receive 'fresh evidence' if it thinks it is in the interests of justice to do so. The 1995 Act also created the *Criminal Cases Review Commission* (CCRC) which has the power to refer cases to the Court of Appeal for a full appeal hearing.

The results of an empirical study focussing on the Court was recently published by Stephanie Roberts (hereafter 'Roberts').<sup>13</sup> Roberts used 'both qualitative and quantitative empirical research [to] try to determine what the Court's approach is in fresh evidence appeals'.<sup>14</sup> Roberts argued that the Court does not appear to have adopted a more liberal approach to its powers under the 'unsafety test', despite the intention of the RCCJ when that test was recommended.<sup>15</sup> Whilst more fresh evidence appeals were surmounting the hurdle of obtaining permission to appeal, evidence potentially of a more liberal approach, fresh evidence appeals were less likely to be successful in 2016 than they were in 1990.<sup>16</sup> This is seen as a problem, as one of the core functions of the Court is to rectify miscarriages of justice,<sup>17</sup> an unduly narrow approach may perpetuate injustice as well as correct it.<sup>18</sup>

To explore the allegation of a restrictive approach in fresh evidence appeals, this article draws upon two new empirical studies of the Court. Firstly, a study of murder and rape appeals against conviction decided between 2006 and 2010 is considered. It is shown that for these appeals fresh evidence was the most frequently successful ground of appeal, giving some reason to doubt the allegation that fresh evidence appeals are in general rarely successful. This has some potentially troubling implications, as well as raising questions around sampling for empirical study of the Court. Secondly, Roberts's study of fresh evidence appeals has been replicated. Whilst the replication study produces overall findings which are similar to Roberts's, a closer analysis of the data giving rise to the findings leads to doubt about the strength

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<sup>13</sup> Roberts, above n 6.

<sup>14</sup> *Ibid*, at 305.

<sup>15</sup> *Ibid*, at 325.

<sup>16</sup> *Ibid*, at 320.

<sup>17</sup> See S Roberts, *Post-Conviction Review in England and Wales: Perpetuating and Rectifying Miscarriages of Justice* in G Lennon, C King, and C McCartney (eds) *Counter Terrorism, Constitutionalism and Miscarriages of Justice* (Hart: Oxford, 2019) at 250.

<sup>18</sup> *Ibid*, at 257 – 9.

of the evidence of a purported restrictive approach, and the suggestion that the Court is more restrictive than it was at the time of Malleson's study. Whilst it is not necessary to lay claim to empirical support when evaluating the Court's practices,<sup>19</sup> once claims to empirical support are made it is necessary to adhere to certain standards if conclusions are to be valid.<sup>20</sup>

The replication demonstrates that the question of the Court's allegedly restrictive approach is inadequately specified to be susceptible to robust empirical analysis. The Court of Appeal has two options: to allow or to dismiss appeals. Presumably, the concern with an unduly restrictive approach is limited to unsuccessful appeals or applications. To have empirical support, it would need to be explained which unsuccessful appeals were considered restrictively decided and why, and which, if any, were not restrictively decided. Otherwise, it will appear that all unsuccessful appeals were considered unduly restrictive, which cannot be a realistic position to hold. The concern regarding the Court's approach in fresh evidence appeals is especially aligned with concerns relating to the conviction of the factually innocent.<sup>21</sup> But the introduction of the issue of innocence means that empirical analysis of the Court's allegedly restrictive approach enters two methodological quagmires: the issue of determining which appellants are factually innocent, and issue of explaining the difference between a 'restrictive' decision and an appeal which was simply unsuccessful. Thus, Roberts's analysis is adequate as an example of traditional interpretative legal research, but its conclusions are not justified empirically. This is not to suggest that Roberts, and others, are necessarily wrong to say the Court appears unduly restrictive. Rather, this article questions the methodology used to address the question of the Court's approach and the strength of the purported evidence. This will be of broader value to anyone considering conducting ELS in the future. This article is primarily focussed on appeals which adduce fresh evidence. Little

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<sup>19</sup> See C Hoyle, M Sato, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (Oxford University Press: Oxford, 2019) at 14.

<sup>20</sup> For an in depth discussion see L Epstein, G King, 'The Rules of Inference' (2002) 66 U Chi L Rev 1.

<sup>21</sup> See H Quirk 'Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer' (2007) 70 MLR 759 for a discussion of the difficulties in considering innocence in the criminal justice process. See PG Cassell 'The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions' [1999] 22 Harvard J Law & Pub Policy 523, at 535 – 8 for a discussion of the empirical difficulties with the question of innocence.

will be said about appeals based upon procedural irregularities, but it is important to note that the Court's role is much broader than considering appellants who claim to be innocent or raise fresh evidence. The author considers the conviction of the innocent, and convictions following breaches of due process or fair trial rights to be 'wrongful convictions', and this is the term primarily used in this article.

### **An evaluation of the Court's allegedly restrictive approach**

The Court of Criminal Appeal (as the Court of Appeal (Criminal Division) was known until 1966) was created by the *Criminal Appeal Act 1907*. Section 4 of that Act gave the Court broad powers to quash convictions thought unreasonable, where there was an error of law, or where there had been a miscarriage of justice. Despite this seemingly broad power, it was noted by Ross, shortly following the creation of the Court, that 'cases are extremely rare in which the conviction has been quashed solely on the ground ... [that it] was unreasonable'.<sup>22</sup> The Court was not very busy and received little academic attention until the 1950s,<sup>23</sup> when concern began to grow that the Court was not operating as it should.

Nobles and Schiff observe the 1950s as the 'high watermark of judicial non-receptivity' in particular in relation to fresh evidence.<sup>24</sup> Reports by the *Donovan Committee*,<sup>25</sup> and a number of reports by the group JUSTICE, presented the Court as being restrictive in reopening factual issues.<sup>26</sup> This criticism led to reformulation of the Court's powers by successive *Criminal Appeal Acts* in the 1960s. Firstly, the Court was given the power to order a retrial in fresh evidence appeals.<sup>27</sup> Secondly, the Court of Criminal Appeal was abolished and the Court of Appeal, which at the time heard only civil appeals, reconstituted into its current civil and criminal divisions.<sup>28</sup> Thirdly, the Court's

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<sup>22</sup> RE Ross, *The Court of Criminal Appeal* (Butterworth & Co, 1911) at 88.

<sup>23</sup> See Pattenden, above n 7.

<sup>24</sup> See Nobles and Schiff, above n 7, at 61.

<sup>25</sup> Donovan Committee, *Report of the Interdepartmental Committee on the Court of Criminal Appeal Cmnd 2755* (HMSO: London, 1965).

<sup>26</sup> JUSTICE, *Criminal Appeals* (Stevens and Sons, 1964); JUSTICE, *Miscarriages of Justice* (Justice: London, 1989).

<sup>27</sup> Criminal Appeal Act 1964, s 1.

<sup>28</sup> Criminal Appeal Act 1966, s 1.

powers under section 4 of the 1907 Act were rewritten. The Court's primary test became whether the conviction under review was 'unsafe or unsatisfactory'.<sup>29</sup>

It was during the operation of the 'unsafe or unsatisfactory' test that the 'greatest disaster to have shaken British justice'<sup>30</sup> occurred. This crisis<sup>31</sup> was a series of miscarriages of justice which had not been rectified previously by the Court of Appeal. It culminated in numerous quashed convictions for serious offences in the late 1980s and early 1990s. Following the quashing of the convictions of the *Birmingham Six*, the *Royal Commission on Criminal Justice* (RCCJ) was convened.<sup>32</sup> This review has had the greatest practical impact on the Court in the medium term, owing to its recommendation of the 'unsafety test'. The RCCJ included an empirical study of the Court of Appeal by Kate Maleson.<sup>33</sup> She read 300 cases from 1990, and concluded that cases with fresh evidence were often rejected or treated with great caution by the Court.<sup>34</sup> She found that the amendments to the Court's powers in the 1960s had not led to a significant change in approach, which she considered to be unduly restrictive.<sup>35</sup> She has also argued that the Court had a preoccupation in preserving finality and deference to jury verdicts, which could be best served by rarely reopening factual issues.<sup>36</sup> As a result, the RCCJ called upon the Court to be readier to reverse jury verdicts than it had shown itself to be in the past.<sup>37</sup> Thus, whilst the 'unsafety test' was designed to give the Court more general powers, it was done so with a proviso, or a hope / expectation, that it would exercise that discretion in a particular way; namely, in a more liberal way.

Roberts has recently conducted a methodologically similar study to Maleson. Roberts read the first 300 cases from the year 2016, and analysed them quantitatively and qualitatively. She found that of the 300 cases, 42 sought to adduce fresh evidence. Of

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<sup>29</sup> Criminal Appeal Act 1966, s. 4. The changes were consolidated by the Criminal Appeal Act 1968

<sup>30</sup> Lord Devlin, 'The Conscience of the Jury' (1991) 107 (Jul) LQR 398.

<sup>31</sup> A number of books were written in reference to this period, also commonly called a 'crisis', see C Walker, K Starmer (eds) *Justice in Error* (Blackstone: London, 1993); M McConville, L Bridges (eds) *Criminal Justice in Crisis* (Edward Elgar: Cheltenham, 1994).

<sup>32</sup> See RCCJ, above n 5.

<sup>33</sup> Maleson, above n 5.

<sup>34</sup> *Ibid.*, at 11.

<sup>35</sup> *Ibid.*

<sup>36</sup> K Maleson, 'Appeals Against Conviction and the Principle of Finality' (1994) 21 JL & Soc'y 151.

<sup>37</sup> See RCCJ, above n 5.

the 42 fresh evidence appeals, three were quashed.<sup>38</sup> This seemingly low rate of success, 1% overall or 7% of the fresh evidence cases, when compared with Maleson's higher figures from 1990, meant that 'the chances of success remain very rare in fresh evidence appeals', and in fact were significantly lower than in 1990.<sup>39</sup> This led to calls for reform to the Court's processes to seek liberalisation of its approach.<sup>40</sup> The use of statistics in empirical studies of the Court have furnished the allegation that the Court is unduly restrictive. From a methodological perspective, the use of these statistics is questionable. Simple statistics are far too basic to allow reliable inferences to be drawn. This is especially so when the complex role and normative position of the Court is considered.

The Court's role is to do justice to the appeals it hears, and in the criminal arena this is problematic because decisions as to guilt in serious crimes tried on indictment are first taken by a jury. The most serious error a jury can make is to convict a person who in fact had nothing to do with the crime, i.e. convict a 'factually innocent' person. That the Court of Appeal exists at all is due to the case of Adolf Beck, a man convicted on two separate occasions of two separate groups of offences in which he proved he had no involvement at all.<sup>41</sup> As Laudan discusses, the criminal trial has its own epistemology.<sup>42</sup> The criminal maxims such as the requirement of proof 'beyond reasonable doubt', the choice between 'guilty or not guilty', and the burden of proof, seek to distribute errors which can arise at trial in a particular direction. Corresponding with the maxim that it is better to acquit a guilty person than it is to convict an innocent one, the structures of the criminal trial seek to make it sufficiently difficult to convict any defendant that the chances of convicting a factually innocent person is sufficiently low that it is considered safe to continue to try people. But the structures of the criminal

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<sup>38</sup> Roberts, above n 6, at 320. Roberts initially reported that only one conviction was quashed, as appeals which were ordered to be retried were not included in the calculation. It is submitted that the decision to omit appeal which were ordered to be retried was an erroneous decision and serves to artificially reduce the number of successful appeals reported. It is erroneous because in order to be retried, the conviction must first be quashed. The error is compounded because it is known what the outcome of one of the retried cases (*R v Evans* 2016 EWCA Crim 452) was. Evans was acquitted at retrial. It does not appear correct to suggest that this conviction was anything other than successful.

<sup>39</sup> Roberts, *ibid.*

<sup>40</sup> *Ibid.*, at 326.

<sup>41</sup> See Pattenden, above n 7.

<sup>42</sup> See L Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge University Press: Cambridge, 2012).

trial does not, and does not attempt to, make it *impossible* to convict a factually innocent person. To attempt to make it impossible to convict an innocent person would require fundamental shifts in the structures of evidence and proof,<sup>43</sup> such as a much higher standard of proof. In any event that would only be to attempt to avoid convicting the innocent; it could never be known whether any attempt actually succeeded or not, because it is rarely in truth known who is factually innocent or guilty.

Whilst being required to do justice in the appeals it hears, the Court of Appeal works within this framework and within the system's epistemology. It does not know for sure who is innocent and who is guilty, but needs to reach a decision on the safety of convictions. The Court cannot disregard the structures of evidence and proof and the logic necessary to convict. Whilst juries do not give reasons for convicting, the fact of conviction can allow the Court to piece together the minimum of what must have been accepted by the jury, if they followed their instructions.<sup>44</sup> The fact of conviction means that the jury must have been sure of at least the core elements of the offence beyond reasonable doubt. The truth may be that the appellant is innocent, but in fresh evidence appeals unless an appellant is able to introduce (at least) a reasonable doubt there is no basis on which to quash the conviction.<sup>45</sup> It may be thought that the Court ought to consider whether the jury *should* have convicted, not whether it *could* have convicted.<sup>46</sup> The difficulty with this approach is that the jury did convict, and in a system which has the jury as the primary decision-makers the Court of Appeal cannot readily ignore that fact. This would be in effect a retrial by the judiciary, but the Court is not equipped for such a function given its limited time and resources.<sup>47</sup>

It is undeniable that the judgments from the Court of Appeal frequently express the primacy of the jury as fact finders, and the exceptional nature of reopening factual issues at appeal. This can be demonstrated by the Court's view of 'lurking doubt'

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<sup>43</sup> For arguments suggesting that the avoidance of convicting the innocent should be the primary focus, see M Naughton, *The Innocent and the Criminal Justice System: A Sociological Analysis of Miscarriages of Justice* (Plgrave MacMillan: Basingstoke, 2013).

<sup>44</sup> And assuming they were properly directed by the judge. If not this would be considered procedural irregularity.

<sup>45</sup> That is, for appellants who raise fresh evidence. Different issues arise for procedural irregularities.

<sup>46</sup> See Roberts, above n 6, at 326.

<sup>47</sup> See P Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart: Oxford, 2011) ch 14.

appeals. If the appellant has been unable to locate any fresh evidence, and cannot point to any procedural irregularity at trial, he or she can appeal on the basis of a 'lurking doubt'. Lord Widgery in *R v Cooper* developed the doctrine.<sup>48</sup> He stated that the 'unsafe or unsatisfactory' ground under the *Criminal Appeal Act 1968* meant that if all the evidence had been before the jury, and the evidence was correctly summed up, the Court could still quash the conviction if they had a subjective sense of unease, or a 'lurking doubt' about the conviction. The conviction in *Cooper*, based on disputed identification evidence, was subsequently quashed. This could be considered a broad statement of its powers.

Malleson's study showed that despite this broad proclamation, convictions were rarely quashed on the basis of lurking doubt.<sup>49</sup> The Court has in recent years retreated from the expansive interpretation of lurking doubt provided in *Cooper*. In *R v Pope*,<sup>50</sup> dismissing the appeal, the Court re-asserted that the constitutional primacy for the verdict rests with the jury.<sup>51</sup> The Court said that where there is a case to answer and the jury has convicted, 'it is not open to the Court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or may be unsafe'.<sup>52</sup> The Court said that appeals based on 'lurking doubt' will be exceptional,<sup>53</sup> and that reasoning was used to dismiss appeals in a number of subsequent cases.<sup>54</sup> If following *Pope*, it becomes unclear what the judges' role is when hearing appeals against conviction. If the word 'hunch' is replaced with 'judgment', that appears to be what the Court should be doing when it hears appeals – deciding whether the conviction is unsafe. What is clear is that it has been sought to close-off appeals which do not raise anything new; either fresh evidence or new legal argument.

A further example is the unanimous Supreme Court decision in *R (Nunn) v Chief Constable of Suffolk Police*.<sup>55</sup> The Supreme Court pointed to the different normative

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<sup>48</sup> *R v Cooper* (1969) 53 Cr App R 82.

<sup>49</sup> Malleson, above n 3.

<sup>50</sup> [2012] EWCA Crim 2241.

<sup>51</sup> *Ibid* at [14].

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid*.

<sup>54</sup> *R v Stewart* [2013] EWCA Crim 1421; *R v Young* [2015] EWCA Crim 2305.

<sup>55</sup> [2014] UKSC 37; [2015] AC 225.

position of a defendant during a trial, and an appellant post-trial. Whilst the defendant is treated as innocent until being convicted, the appellant has been proved to be guilty to the satisfaction of the jury and this allows for inferences of the route to verdict to be drawn.<sup>56</sup> The Court said there is a 'powerful public interest in the finality of proceedings' and in not reopening proceedings without good reason.<sup>57</sup> Clearly, there is a logic and a truth to this. A more nuanced argument is to acknowledge that the appeal process in particular involves a balance between the interests of prisoners and appellants, victims, and the public at large.<sup>58</sup>

In seeking to explore the question of the Court's approach empirically, Roberts, and by extension Malleson before her, sought to make descriptive inferences regarding the Court's performance and approach.<sup>59</sup> That is, using facts which can be observed – information from judgments – to explore something which is normative or cannot be directly observed – whether the Court is unduly restrictive.<sup>60</sup> If it is said that there is empirical support for a particular claim, it is implied that qualitative or quantitative data has been collected in some systematic way.<sup>61</sup> If seeking to determine through empirical study whether the Court decides appeals in an unduly restrictive manner, it would need to be explained what would be seen in the data if that was the case – the 'observable implications'.<sup>62</sup> This is how the 'normative' becomes 'concrete' and so can be observed in a dataset.<sup>63</sup> In particular, it would need to be explained what the difference is between an unsuccessful appeal and an appeal determined in a restrictive manner. Since presumably some unsuccessful appeals are not considered restrictive, there must be a difference.

It is difficult to know what is meant by an unduly restrictive approach, in such a way that it can be recorded empirically. To say that a decision is unduly restrictive, which appears to mean little more than the decision is disagreeable or could have been

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<sup>56</sup> *Ibid*, at [32].

<sup>57</sup> *Ibid*.

<sup>58</sup> C McCartney, 'Case Comment' (2015) 19(2) E & P 120, at 126

<sup>59</sup> See L Epstein, and G King, 'The Rules of Inference' (2002) 66 U Chi L Rev 1, at 29 – 31.

<sup>60</sup> *Ibid*.

<sup>61</sup> See Van Boom, Desmet and Mascin, above n 1, at 8-9.

<sup>62</sup> Epstein and King, above n 59, at 29-30.

<sup>63</sup> *Ibid*, at 34.

decided differently, is inherently subjective. In the absence of a clear explanation of the meaning of an unduly restrictive approach, it can mean that the observer simply disagrees with the outcome of certain appeals. The primary evidence offered for the contention that the Court is restrictive is that there is a low overall success rate. This entails the assumption that at least some unsuccessful appeals were in fact dismissed due to a restrictive approach and that this can be demonstrated empirically. This will be very difficult to prove in an empirical way. Without knowing what the right answer to the appeal was, it cannot be known whether the Court was right or wrong, restrictive or justified, in dismissing an appeal. Roberts acknowledges that at least one unsuccessful appeal in her study was, in her view, understandably dismissed by the Court.<sup>64</sup> With this concession, the claim that the low success rate found is evidence of a restrictive approach is undermined, because at least one of the unsuccessful appeals was not restrictively decided. This raises the question of how many other unsuccessful appeals were at least arguably not determined in a restrictive way. More importantly, it raises the question of what, if unsuccessful appeals are not necessarily restrictive, is meant by the word restrictive.

### **Fresh Evidence in the Court of Appeal (Criminal Division)**

The Court of Appeal has the power to receive fresh evidence by section 23 of the *Criminal Appeal Act 1968* (as amended by the 1995 Act). Section 23(1) states that the Court can receive fresh evidence if they think it is 'necessary or expedient in the interests of justice' to do so. In deciding whether it is in the interests of justice to receive any evidence, the Court must have regard to the following four factors in section 23(2):

- (a) whether the evidence appears to the Court to be capable of belief;
- (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
- (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

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<sup>64</sup> Roberts, above n 6, at 324.

(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings

The Court of Appeal has frequently stated that the interest of justice test is the overriding test for the admission of fresh evidence. In *R v Erskine; R v Williams*<sup>65</sup> the Court made it plain that its focus is upon the 'interests of justice' test, and the four factors are neither exhaustive nor conclusive.<sup>66</sup> This has been repeated in later cases.<sup>67</sup>

In relation to factor (d), this is the factor which is said to cause appellants the most difficulty in fresh evidence appeals.<sup>68</sup> If the evidence was available at trial, and the appellant cannot provide a reasonable explanation for failing to adduce it, the evidence is not fresh and so the Court will usually decline to admit it under section 23. If the appellant can provide a reasonable explanation then the test is passed. As is made clear in *Erskine*, the appellant will need to provide good reasons for not adducing evidence at trial.<sup>69</sup> However, even if the appellant cannot provide good reasons or if the evidence is not fresh, but the evidence would make the conviction unsafe, the Court will always admit it.<sup>70</sup>

Roberts considered whether the four factors are too easily used in order to decline to admit fresh evidence.<sup>71</sup> She found that they were and 'it would seem that the judiciary are applying s 23(1) restrictively by imposing the conditions in s 23(2) on s 23(1)'.<sup>72</sup> In particular, she found that 'the most common reason for rejecting the fresh evidence under section 23 was because the evidence was available at trial and there was no reasonable explanation as to why it was not used'.<sup>73</sup>

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<sup>65</sup> [2009] EWCA Crim 1425.

<sup>66</sup> *Ibid*, at [39].

<sup>67</sup> See *R v Grant-Murray* [2017] EWCA Crim 1228; *R v Rogers* [2016] EWCA Crim 801; *R v Bakir* [2014] EWCA Crim 2420.

<sup>68</sup> Roberts, above n 6, at 323.

<sup>69</sup> *Erskine*, above, n 65, at [39].

<sup>70</sup> *Ibid*.

<sup>71</sup> Roberts, above n 6, at 321.

<sup>72</sup> *Ibid*, at 324.

<sup>73</sup> *Ibid*, at 321.

Roberts cited five cases, *Calvert*, *Pratt*, *Osmani*, *Day*, and *Reid*, from her sample which were rejected because the Court said there was no reasonable explanation for not calling the evidence at trial.<sup>74</sup> This is taken to be evidence of a restrictive application of its powers. An inspection of these cases reveals, however, that factor (d) was not the only reason for declining to admit the evidence in these cases. In *R v Calvert*<sup>75</sup> the Court rejected new analysis of CCTV evidence, but this was because the issue had already been aired extensively at trial. The ‘fresh’ evidence ‘would not in any event have afforded any ground for allowing the appeal’.<sup>76</sup> In *R v Pratt*<sup>77</sup> the evidence of a new expert was rejected in part because the evidence could have been adduced at trial, but also because, in the Court’s view, ‘even if such evidence had been admitted at trial, the outcome in this case would have been the same’.<sup>78</sup>

In *R v Osmani*,<sup>79</sup> after confirming that the ‘bedrock’ of a fresh evidence appeal is the interests of justice test,<sup>80</sup> rejected the fresh evidence in part because trial tactics meant that the evidence was not strictly fresh, but also because ‘there can be little faith in the reliability of anything that [M] said in the course of this conversation’ which formed the fresh evidence.<sup>81</sup> In *Day*,<sup>82</sup> a number of pieces of fresh evidence were rejected because of factor (d), but also because the fresh evidence was inadmissible, or did ‘not assist on the question of allowing the appeal’.<sup>83</sup> In *Reid*<sup>84</sup> the Court said there was no reasonable explanation for failing to call the new witnesses, but also, ‘in any event, we do not see how this evidence would have made a difference’.<sup>85</sup> It is possible that the Court was acting in a deliberately ‘restrictive’ manner by declining to admit the fresh evidence in these cases. An alternative, and preferred, explanation is that after considering the evidence properly against the facts of the case, the new evidence would not have made the conviction unsafe. If the Court is sure that the evidence

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<sup>74</sup> *Ibid*, see note 131 therein.

<sup>75</sup> [2016] EWCA Crim 890.

<sup>76</sup> *Ibid*, at [41].

<sup>77</sup> [2016] EWCA Crim 1304

<sup>78</sup> *Ibid*, at [23].

<sup>79</sup> [2016] EWCA Crim 26.

<sup>80</sup> *Ibid*, at [37].

<sup>81</sup> *Ibid*, at [52].

<sup>82</sup> [2016] EWCA Crim 645.

<sup>83</sup> *Ibid*, at [24].

<sup>84</sup> [2016] EWCA Crim 341.

<sup>85</sup> *Ibid*, at [17].

would make no difference, in effect this is the statutory test under section 23(2)(b) then it will be highly unlikely that the Court will find it in the interests of justice to admit the evidence. To suggest otherwise is to maintain that the Court should receive evidence which it – and it is the Court, for better or for worse, which has been tasked with making the decision – does not think would make the conviction unsafe.

An alternative source of the potentially restrictive approach relates how it decides whether the fresh evidence makes the conviction unsafe once they have admitted it. Roberts argues that there are arguably two ‘approaches’ the Court can take to determining fresh evidence appeals.<sup>86</sup> These are the supposedly more liberal ‘jury impact’ test and a supposedly more restrictive ‘*Stafford*’ approach.<sup>87</sup> In the jury impact test the judges are to consider what impact the fresh evidence might have had on the jury. This may be more liberal because it might be thought that if the evidence had not been before the jury, it is at least possible it could impact the decision to convict and so the conviction should be unsafe. The *Stafford* approach asks the judges to weigh up all the evidence, including any not before the jury, and ask whether the conviction remains safe. Roberts suggests that the *Stafford* approach is restrictive because it allows the Court of Appeal to dismiss appeals if it is sure that the appellant is guilty, despite a jury having never tested the new evidence.<sup>88</sup> The case of *R v Pendleton*<sup>89</sup> was supposed to bring clarity to how the Court determines fresh evidence appeals. The House of Lords in this case held that *Stafford* was the correct approach, but ‘in any case of difficulty’ the Court should test its provisional view by asking whether the evidence might reasonably have affected the decision of the jury to convict.<sup>90</sup> This is seen as reintroducing the apparently more liberal jury-impact test.

It is difficult to see that there is any great substantive difference between the *Stafford* approach and the jury-impact approach. They are both part of the question of whether the conviction is unsafe. Roberts notes that the supposedly more restrictive *Stafford* approach is used to both allow and dismiss appeals, and the supposedly liberal jury-

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<sup>86</sup> Roberts, above n 6, at 313 – 8.

<sup>87</sup> See *Stafford v DPP* [1974] AC 878.

<sup>88</sup> Roberts, above n 6, at 314.

<sup>89</sup> [2001] UKHL 66.

<sup>90</sup> *Ibid*, at [19].

impact approach is used to both dismiss and allow appeals.<sup>91</sup> When Lord Bingham in *Pendleton* left open the jury impact test it could be seen as failing to bring some clarity to the issue.<sup>92</sup> The difficulty is that the House of Lords could not stipulate specific rules, because each case is fact-specific; the outcomes of appeals depend upon the opinions of the judges as to the overall strength of the case.<sup>93</sup> If the Court is sure of the safety or unsafety of the conviction, it will not need to apply or state the 'jury impact' test.<sup>94</sup> It would clearly be possible for the Court of Appeal to decide to be more open in quashing convictions on the basis of fresh evidence. There is no right answer to whether this would be the right approach, it would again need to balance the interests of appellants and the interests of victims and the public interest in finality. Whether the Court currently has that balance correct is questionable.<sup>95</sup>

In Roberts's sample of 300 cases, 42 cases (14%) raised fresh evidence. Three convictions were quashed on the basis of fresh evidence, giving a success rate of 7% of the 42, or 1% of the 300 cases. This led Roberts to conclude that the chances of success are low in fresh evidence cases due to a restrictive approach. The Court cannot readily be criticised for not quashing convictions on the basis of fresh evidence in cases where there was no fresh evidence raised. If 300 is used as the denominator, and the number of successful appeals on the basis of fresh evidence (three)<sup>96</sup> is the numerator, then a low (1%) success rate will follow. But the large majority of the 300 cases did not attempt to raise any fresh evidence, so 300 is not the correct denominator and it is liable to mislead. A denominator of 42 is more suitable if trying to calculate a success rate for appeals which raised fresh evidence. The 1% success rate provided by Roberts should not readily be used as an indicator of the likelihood of success in fresh evidence cases.

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<sup>91</sup> Roberts, above n 6, at 317 – 8

<sup>92</sup> *Ibid*, 314.

<sup>93</sup> See A Ashworth, M Redmayne, *The Criminal Process* (4<sup>th</sup> ed, Oxford University Press: Oxford, 2010) at 383.

<sup>94</sup> *Ibid*.

<sup>95</sup> See for example D Hamer, 'Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission' (2014) (37)(1) UNSW Law Journal 270.

<sup>96</sup> See n 38 above, for an explanation of why three is used as the numerator in this paper.

As stated above, the ‘observable implications’ of a restrictive approach have not been specified clearly. It is only by explaining how data relating to the restrictive approach has been collected in a systematic way that it is possible to lay claim to *empirical* support for the allegation, rather than appearing to rely on subjective opinion.<sup>97</sup> There are some suggestions, such as the success rate, or fresh evidence being rejected under section 23(2)(d),<sup>98</sup> but it needed to be explained more clearly how Roberts decided which outcomes were ‘restrictive’ and which were not, or which she simply disagreed with. By using the low overall success rate as an indicator of an approach, there was little consideration of whether the label ‘restrictive’ was always justified. This is quite simplistic and not a systematic empirical method. Roberts accepts that not all the appellants relying on fresh evidence will be innocent, and the Court does need to decide which appeals should be allowed and which dismissed.<sup>99</sup> However, the lack of explanation as to what does constitute an unduly restrictive decision means it is not possible to know how decisions were reached by her as to whether an appeal was determined restrictively. As Roberts acknowledges, it is difficult to envisage how the concept of an appeal being determined restrictively could be made more concrete for empirical analysis.<sup>100</sup> Nevertheless, the methods employed by Roberts do not appear sufficient to evidence the Court’s allegedly restrictive approach in an empirical sense.

In order to evaluate claims regarding the Court’s approach further, the results of two new studies of the Court are discussed. In so doing, further weaknesses in the evidence for a restrictive approach will be exposed.

### **Study One: Murder and Rape Appeals 2006 – 2010**

In this study, all murder and rape full appeals (not applications for permission) against conviction decided between January 2006 and December 2010 were analysed. There were a total of 472 appeals in this sample. 135 of the appeals were successful, giving a success rate of 28%. 55 murder appeals were successful, and 80 rape appeals were

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<sup>97</sup> See L Epstein, G King, n 59, at 29 – 34.

<sup>98</sup> Roberts, above n 6 at 313.

<sup>99</sup> Roberts, above n 6, at 326.

<sup>100</sup> Ibid, 318.

successful. Clearly, this success rate is significantly higher than in Roberts’s study; the reasons for this are discussed further below.

All the grounds of appeal raised in the appeals were collected. This replicates previous work by Malleson for the RCCJ,<sup>101</sup> and Roberts.<sup>102</sup> The following table shows the top five grounds of appeal raised in the 472 appeals, and the frequency in which each ground was a successful ground of appeal.

**Table 1: Five Most Common Grounds of Appeal Raised in Murder and Rape Appeals 2006-2010**

<b>Issue Raised</b>	<b>Number of Cases Raised (% of cases in which issue was raised)</b>	<b>Cases Successful</b>
Summing Up	216 (45%)	38
Misuse of Evidential Discretion	166 (35%)	24
Fresh Evidence	130 (27%)	59
Refused No Case To Answer	51 (10%)	2
Unfair Trial Specifically	50 (10%)	8

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<sup>101</sup> Malleson, above n 3.

<sup>102</sup> S Roberts, ‘The Decision Making Process of Appeals Against Conviction in the England and Wales Court of Appeal (Criminal Division)’ (DPhil thesis, London School of Economics and Political Science, 2009).

The following two tables show the top five grounds of appeal and frequency of success in murder and rape appeals respectively.

**Table 2: Five Most Common Grounds of appeal raised in sampled appeals:**

**Murder**

<b>Issue Raised</b>	<b>Number of Cases Raised (% of cases in which issue was raised)</b>	<b>Cases Successful</b>
Summing Up	110 (45%)	15
Misuse of Evidential Discretion	87 (36%)	8
Fresh Evidence	76 (31%)	31
Refused No Case To Answer	34 (14%)	2
Unfair Trial Specifically	27 (11%)	2

**Table 3: Five Most Common Grounds of appeal raised in sampled appeals: Rape.**

<b>Issue Raised</b>	<b>Number of Cases Raised (% of cases in which issue was raised)</b>	<b>Cases Successful</b>
Summing Up	106 (45%)	23
Misuse of Evidential Discretion	79 (34%)	16
Fresh Evidence	54 (23%)	28
Refused No Case To Answer	17 (7%)	0
Unfair Trial Specifically	23 (10%)	6

In table 1, it can be seen that the three most commonly argued grounds of appeal overall were allegations of errors in the trial judge's summing up; claims that the judge in some way misused their direction to include or exclude evidence; and fresh evidence. Note that the 'lurking doubt' ground does not appear in the tables: it was raised 30 times overall and was successful on three occasions (twice in murder, once

in rape). Overall, appellants in murder appeals raised broadly the same grounds as those in rape appeals. Fresh evidence stands out as the individual ground which was most frequently a successful ground of appeal (successful on 59 occasions, 45% of the times it was raised). This is significantly higher than the fresh evidence success rate found in Roberts's study (7%).

Fresh evidence was raised in 76 murder appeals and 54 rape appeals. Whilst fresh evidence was raised more frequently in murder appeals, it was marginally more frequently successful in rape appeals. There were 28 convictions for rape quashed on the basis of fresh evidence: 51% of the times it was raised. There were 31 murder convictions quashed on basis of fresh evidence, which is 40% of the times it was raised. This suggests that while fresh evidence is less forthcoming in rape appeals it is more likely to be considered persuasive than in murder appeals.

Of the 130 fresh evidence appeals, 33 (25%) were CCRC referrals. Twenty of the CCRC's fresh evidence referrals were successful (60% of CCRC fresh evidence referrals). Therefore, 33% of the successful fresh evidence appeals were CCRC references. The CCRC clearly had an impact in increasing the number of fresh evidence appeals reaching Court, and in increasing the number of successful fresh evidence appeals. The rate of CCRC referrals might go some way towards explaining why there is a higher success rate for fresh evidence appeals in this sample of murder and rape appeals than was seen in previous studies. Without the CCRC referrals there were 97 appeals raising fresh evidence (20% of all cases) of which 39 were successful; a 40% success rate. This remains significantly higher than Malleson's / Roberts's success rate.

As can be seen from the above, in this study, fresh evidence was the ground of appeal which was most frequently successful. In murder and rape appeals, at least, it cannot be said that the Court of Appeal treats fresh evidence with particular caution or that they are particularly rare. As this sample included only rape and murder appeals, it cannot be said that this is any evidence against the Court's allegedly restrictive

approach at fresh evidence appeals in general. However, one conclusion which can be drawn from this is that the incidence of fresh evidence appears related to the offence which is being appealed, and that murder and rape are more susceptible to raising fresh evidence than other offences. There are several potential reasons for murder and rape being more susceptible to success, such as appellants serving longer in prison giving them more time and determination to uncover fresh evidence which undermines their convictions. Lawyers may be more prepared to act (especially pro bono) in more serious offences, and it may be easier to gain public support for suspected / potential miscarriages of justice in more serious offences.

A potentially disturbing implication of this finding is that fairly high numbers of murder and rape convictions in the period 2006 – 2010 were overturned by fresh evidence. This means that those appellants were in some way wrongfully convicted, and all will have served prison sentences. There has not yet been sufficient research to determine at what rate convictions for other offences are overturned. Given that it might be assumed that murder and rape investigations are the most careful and the most thorough, it is troubling to find that a high proportion are later shown to be wrongful convictions. It raises the question of whether, if other offences were given closer scrutiny either by the Court or the CCRC, more wrongful convictions would be uncovered.

When only full appeals against conviction for the most serious offences are considered, it is shown that fresh evidence has a good chance of being successful. This is partly explained by the fact that the CCRC conducts more investigations into serious offences, and so are more likely to refer convictions for serious offences. A further reason for the higher success rate seen here is that all these cases have passed the leave filter, and so clearly more likely to be successful. This point is returned to in the next section. What is clear is that for the offences of murder and rape the chance of success on the basis of fresh evidence is not low, at least once permission to appeal has been granted.

## Study Two: Fresh Evidence Appeals Decided January – July 2016

Roberts's study of fresh evidence appeals from 2016 has been replicated. In replicating Roberts's study, it has not been sought to disprove empirically the allegation that overall the Court has a restrictive approach to factual issue appeals. As discussed above, the reason for this is that the meaning of a restrictive approach has not been sufficiently specified by Roberts, meaning a replication of that question is impossible. Rather, adopting a more traditional interpretative approach in places, it is suggested through the replication exercise that based upon the information provided in judgments, some unsuccessful appeals do not appear to be restrictively decided. There is no claim to empirical evidence against the restrictive approach offered here. It is always possible to point to reasons as to why an appeal was arguable, and that by dismissing it the Court might have been restrictive.<sup>103</sup> The aim of this replication is to highlight some of the cases which on balance in the author's view did not appear restrictive. If the view that these appeals did not appear restrictive is preferred, then the headline low success rate is not evidence of being restrictive, but only evidence that relatively few appeals are successful. Whilst that is useful to know, that statistic does not support the assertion of an unduly restrictive approach. This section also highlights some flaws in the analysis of data in Roberts's study, many of which will also apply to Malleson's 1990 study.

Roberts states that she read the first 300 available appeals from 2016 on *CaseTrack*, finding 42 fresh evidence appeals between January and July. For the purposes of this replication, only fresh evidence appeals were considered. The *Westlaw UK* and *LexisLibrary* databases were searched to attempt to locate all the fresh evidence appeals decided between January and July 2016.<sup>104</sup> 48 cases were located, concerning 56 individual appellants / applicants. In contrast to the sample of murder and rape appeals, this sample, like Roberts's, contains both full appeals and renewed applications. This is a crucial point, returned to below, in understanding the cases which were contained in Roberts's 1% success rate. It is reasonable to assume that the additional cases located in the replication occurred after the 300 appeals in

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<sup>103</sup> One argument being that, for those who were represented, there were lawyers prepared to make the case for them in Court.

<sup>104</sup> The CaseTrack service was discontinued in February 2017 before this replication commenced.

Roberts’s overall sample. The following table shows the neutral citation numbers for all the cases in this replication sample.

**Table 4: List of cases in sample (neutral citation case number)**

14	26	52	117	194	266
278	308	316	341	350	361
380	440	452	453	456	464
473	474	499	504	571	590
645	677	890	921	945	1030
1066	1114	1131	1192	1245	1255
1264	1299	1304	1305	1374	1565
1597	1607	1683	1798	1818	1842

Based upon the information provided in Roberts’s article, the two samples can be compared. Both samples had three successful appeals; an overall success rate of 6% in the replication sample, compared with 7% in Roberts’s sample. There were four cases which Roberts cited in her article which could not be located for this replication.<sup>105</sup> One of the cases which Roberts cited which could not be located was *R v IB*,<sup>106</sup> which was one of the three successful appeals in her sample.<sup>107</sup> There were, however, still three successful appeals in the replication sample, two<sup>108</sup> of which Roberts referred to in her article, and one (*R v Bryant*) which she did not.<sup>109</sup> *Bryant* occurred in late July so may have occurred after Roberts’s sample of 300 cases.<sup>110</sup> Of the 48 individual cases in the replication sample, Roberts cited 36 (75%) of them. The samples are not exact but it is clear that many of the same cases have been located.

Turning to the replication sample, 41 cases (85%) were renewed applications, not full appeals, none of which were granted permission. Seven cases were full appeals, three of which were successful, a success rate of 42%. It appears that there were six full

<sup>105</sup> These were *R v Otti* [2016] EWCA Crim 865; *R v IB* [2016] EWCA Crim 1758; *R v Bish* [2016] EWCA Crim 699; *R v Robinson* [2016] EWCA Crim 762.

<sup>106</sup> *Ibid.*

<sup>107</sup> It is possible that this case was only available on *CaseTrack*.

<sup>108</sup> She referred to *R v Evans* [2016] EWCA Crim 452, and *R v Chitolie* [2016] EWCA Crim 14.

<sup>109</sup> [2016] EWCA Crim 1245.

<sup>110</sup> It is possible that *R v IB* and *R v Bryant* are the same case, but they do not appear to be. The *IB* case did not appear in the search for cases.

fresh evidence appeals, with three of them successful, in Roberts's sample, a success rate of 50%.<sup>111</sup> The rest being renewed applications, none of which were granted permission.<sup>112</sup>

It can be seen that a high number of renewed applications produces samples which are biased towards unsuccessful outcomes and low success rates. When so many cases are renewed applications for permission it should not be surprising that the overall success rate is low. The reason for this bias is that applications are decided differently from appeals. The test in applications is whether the grounds are 'reasonably arguable'. If a renewed application is successful, the conviction is not usually quashed, there will need to be another hearing at a later date. This signifies the fundamentally different character of appeals and applications. The test for being granted permission to appeal would appear to be lower than needing to demonstrate that the conviction is unsafe. It follows that where an application for permission is rejected, the Court does not think that it is even reasonably arguable that the grounds, or in this sample the fresh evidence, would make the conviction unsafe. To the extent that it might be assumed that at least a proportion of the applications are genuinely hopeless, it is questionable why the label 'restrictive' should always be attached to a decision to decline permission.

It may be argued that the sample of full murder and rape appeals discussed above is also biased, but in favour of successful appeals. Full appeals are significantly more likely to be successful in any sample of cases because they have already been through the application process (or, for CCRC references, a thorough review) and judges / the CCRC have already decided that the grounds are reasonably arguable or that there is a realistic possibility that the conviction will be quashed. Whilst both samples are biased, it is argued that the sample of full appeals presents a more accurate picture of the Court's decision-making. Furthermore, because the test operated in renewed applications is fundamentally different from that operated in appeals against conviction

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<sup>111</sup> Roberts, above n 6, at 325. Roberts's article would have benefitted from being clearer on this issue.

<sup>112</sup> Ibid, at 319, and table 2 at 318.

there are in effect two different questions being answered by the Court. By including both appeals and applications in the sample, and not offering any discussion of the differences between these kinds of cases, important alternative explanations for the low success rate in appeals is not considered. A key alternative explanation for the finding that there was a low success rate in the Court of Appeal in Roberts's sample is that most of her cases were renewed applications which, for a variety of reasons, are not the strongest cases.

One of Roberts's key arguments is that the adoption of the unsafety test has not altered the Court's approach. She reached this conclusion by comparing her results with Malleson's for the RCCJ. In Malleson's study of 300 appeals from 1990, there were 23 fresh evidence appeals, and six were successful,<sup>113</sup> compared with Roberts who found 42 fresh evidence appeals only three of which were successful. This led Roberts to reach the conclusion that the chances of success were significantly lower in 2016 than they were in 1990 – which, if true, may be indicative of the failure of the unsafety test to alter the Court's approach. In Hoyle and Sato's recent wide-ranging analysis of the CCRC, they noted that the conclusions drawn in Roberts's article correlates with the general feeling within the CCRC that the Court is slower to accept fresh evidence than it might have been in the past.<sup>114</sup>

There are some reasons to be sceptical of Robert's analysis. It is suspected that Roberts read more renewed applications for permission than Malleson did. As explained above, an abundance of renewed applications leads to a lower overall success rate. Roberts notes the apparent increase in renewed applications in her 2016 study compared to Malleson's in 1990,<sup>115</sup> but does not appear to appreciate the impact this will have on her analysis. If Roberts read more renewed applications than Malleson did, for the reasons explained above, it would be likely that the success rate would be lower. Further, while Roberts explains the apparent difference in success rate as being caused by a continued restrictive approach, it may be the case that more

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<sup>113</sup> Ibid, at 320.

<sup>114</sup> See Hoyle and Sato, above n 19, at 331 – 2.

<sup>115</sup> See Roberts, above n 6, at footnote 117.

of the appeals were simply hopeless in 2016 than in 1990. It is submitted that the primary reason Roberts has a low success rate in her sample has nothing to do with the alleged 'approach' of the Court, and everything to do with the fact that renewed applications are less likely to be successful than full appeals.

In the replication sample, the Court would frequently describe the renewed applications as being hopeless. For instance, in *R v Dillon*<sup>116</sup> the application was described as being an 'expensive waste of time'.<sup>117</sup> The fresh evidence in *R v Martin*<sup>118</sup> was considered 'not credible on its face'.<sup>119</sup> *R v AXN*<sup>120</sup> was described as having no merit. In *R v S*,<sup>121</sup> in which a series of text messages and photographs were submitted as fresh evidence, the Court could not understand what was supposed to be demonstrated by the evidence or its relevance to the conviction.<sup>122</sup> In *R v Angel*<sup>123</sup> the fresh evidence application was considered hopeless because the evidence was not fresh. A number of these cases are cited in Roberts's article as possible evidence of restrictive applications of the Court's powers. It is not clear upon what basis they were restrictive, other than the fact they were unsuccessful.

As has been discussed, it is too simplistic to use unsuccessful appeals as an indicator of the Court's approach. If an appeal is dismissed it does not necessarily mean that the Court was restrictive. Roberts accepts that the Court's decision in *R v Aboukadir*<sup>124</sup> could be considered an understandable decision because the DNA evidence raised at appeal demonstrated that the appellant was lying at trial.<sup>125</sup> This undermines Roberts's argument that a low success rate evidences a restrictive approach, because she accepts that some of the unsuccessful appeals did not appear to be decided restrictively. Although only an incomplete picture of the appeal can be gained from

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<sup>116</sup> [2016] EWCA Crim 316.

<sup>117</sup> *Ibid* at [15] – [16].

<sup>118</sup> [2016] EWCA Crim 474.

<sup>119</sup> *Ibid*, at [10].

<sup>120</sup> [2016] EWCA Crim 590.

<sup>121</sup> [2016] EWCA Crim 1607.

<sup>122</sup> *Ibid*, at [28].

<sup>123</sup> [2016] EWCA Crim 945.

<sup>124</sup> [2016] EWCA Crim 456.

<sup>125</sup> Roberts, above n 6, at 324.

reading Court transcripts, this is the same information that Roberts had, and it is possible to argue that there are other unsuccessful appeals which were at least understandable.

In this way, it is hard to argue against the Court's findings in cases such as *R v Quye*,<sup>126</sup> *R v Shaikh*<sup>127</sup> or *R v JM*<sup>128</sup> that the fresh evidence adduced lacked any credibility. For the case of *Shaikh*, Roberts does not say whether she considered this appeal to be restrictively decided or not, but it forms part of the low success rate and so by implication must be included within the class of restrictive appeals. As the applicant was unrepresented, she suggests that the appellant could have done better with legal representation, and implies that the Court dealt with this case (and others) in a somewhat perfunctory manner.<sup>129</sup> However, it is understandable why the Court rejected the application. The applicant was convicted of offering to engage in regulated activity (in this case, a cardiac physiologist) from which he was barred. He had attempted to apply for employment as a cardiologist, despite being barred from working with vulnerable adults. His defence was that he did not apply for the positions but it was either a computer error or a forgery.<sup>130</sup> The Court noted that these are highly unlikely events.<sup>131</sup> His fresh evidence was a number of documents on a USB stick. The application was refused because the 'evidence was clearly not capable of belief and is inconsistent with the defence advanced at trial. There is no proof that the document is genuine, or that it was stored on the USB stick. The applicant has been found on a number of occasions in the course of these various proceedings to have forged false documents'.<sup>132</sup> Whilst it is pertinent to note that the judgment from the Court is clearly used to justify the decision to dismiss the appeal, it is difficult to argue against the account given by the Court for rejecting the application.

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<sup>126</sup> [2016] EWCA Crim 1815.

<sup>127</sup> [2016] EWCA Crim 504.

<sup>128</sup> [2016] EWCA Crim 1264.

<sup>129</sup> Roberts, above n 6, at 324.

<sup>130</sup> *R v Shaikh*, above n 127, at [9].

<sup>131</sup> *Ibid* at [10].

<sup>132</sup> *Ibid*, at [18].

There are other unsuccessful cases in the sample where the decision to dismiss the appeal appears at least understandable. For example, in *R v Oldfield*,<sup>133</sup> the applicant was convicted of causing danger by interfering with a vehicle without reasonable cause – he had pulled the handbrake of his wife’s car while she was driving. He admitted having done so, but said he had reasonable cause. The question for the jury was whether he had reasonable cause, and they convicted him. He sought to adduce further evidence from two witnesses who had testified at trial. The Court rejected the application because the first statement did not add to what the witness said at trial, and the second statement appeared to be exactly the same as the one read out at trial.<sup>134</sup> On one view this decision could be considered restrictive, because the Court could have allowed the appeal even if the differences between the new statements was only minor to those given at trial. However, at the very least it is arguable that this decision was understandable in that nothing new appeared to be raised at the appeal.

A further case is *R v Dillon*,<sup>135</sup> the applicant was convicted of dangerous driving. A car was driven erratically and then crashed. The applicant was later found on foot with the keys to the crashed car in his pocket, and he was the registered keeper. The applicant, who had many convictions for driving offences, denied he was the driver at the time. His fresh evidence application appears to have been to call the then Chief Constable, the Director of Public Prosecutions and another unnamed member of the prison service.<sup>136</sup> Roberts cites this case alongside *Shaikh*, in suggesting that the applicant’s lack of legal representation might have hindered his chances of success. However, although the Court did not provide details as to the content of the fresh evidence, on any view it appears unlikely that the Chief Constable would be able to provide evidence in a case of this nature. As this appeal was unsuccessful, it would always have been open to the Court to be liberal and at least grant permission to appeal. But on the basis of what the Court said, there is nothing to think that the decision to refuse was unreasonable.

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<sup>133</sup> [2016] EWCA Crim 194

<sup>134</sup> *Ibid*, at [13].

<sup>135</sup> [2016] EWCA Crim 316.

<sup>136</sup> *Ibid*, at [15].

## **Conclusion**

This article has explored the evidence that the Court of Appeal (Criminal Division) has allegedly adopted a restrictive approach to its powers. There has been an apparent academic consensus amongst those interested, since at least the 1970s, that the Court has indeed had a restrictive approach to its powers. It has been sought to challenge the strength of the evidence of this approach. Roberts's recent study of the Court produced a number of headline statistics about the Court. She found that only a small number of appeals in her sample of 300 appeals were successful on the basis of fresh evidence. In this article, a number of substantial flaws have been highlighted with this statistic. Firstly, since only a small number of appellants raise fresh evidence, it follows that only a small number of convictions will be quashed on the basis of fresh evidence. Secondly, most of the appeals making up her sample were not appeals at all, but applications for permission. When these are rejected, it means that the Court felt the appeal was not even reasonably arguable. It is suggested this gives an insight into the kind of fresh evidence raised in many applications. It has been shown that it is unclear what is meant by the Court having adopted an unduly restrictive approach, or what it means for a case to be restrictively decided. It is suggested that the low likelihood of success seen in Roberts's study has more to do with the sample of appeals than being evidence of an approach.

Through two studies of the Court, one of which was a replication of Roberts's study, it has been suggested that there are other ways of looking at statistics from the Court. When only full appeals raising fresh evidence are considered, fresh evidence has a good chance of being successful. This does not support the view that the Court is particularly slow to quash convictions on the basis of fresh evidence, at least for murder or rape. Further, it has been suggested that some appeals or applications were not strong candidates to be quashed by fresh evidence. In summary, it is difficult to judge whether the Court has a restrictive approach, and it is very difficult to test this in an empirical sense. Roberts's previous study is insufficiently robust to give support to the claim of a restrictive approach.

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**Corresponding author:** Paul Dargue, Northumbria University School of Law, City Campus East, Newcastle upon Tyne, NE1 8ST, UK. Email: [p.dargue@northumbria.ac.uk](mailto:p.dargue@northumbria.ac.uk)