

COMMENT

The New French Jury Court of Appeal Revisited

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Abstract

Revisiting the new French jury court of appeal after my article on it in the June 2006 issue of this Review, it is apparent that the low appeal rate of the early years (an average of 10.5 per cent over the first 3 years, 2001–03) has increased significantly to an average of 23 per cent for the years 2001 to April 2008. This should not be surprising as a convicted accused is being offered a ‘second chance’ of an acquittal. Appeal rates since 2002 include appeals by the prosecution against acquittals. A much-publicised murder case in which the prosecution successfully appealed against an acquittal is recounted and the issue of whether such appeals could be considered in Australia is raised.

1. Introduction

An article by the author, published in the *Sydney Law Review* in 2006 dealt primarily with the establishment in France from 2001 of a court of appeal in serious criminal matters comprising jurors (12) and judges (3) named the *cour d’assises d’appel*.¹ This court was established to provide for appeals from a first instance *cour d’assises*. It may be of interest to Anglophones to note two matters in relation to this new *cour* since the above article was written.

2. Rate of appeals to the cour d’assises d’appel

The original article expressed some surprise at the relatively low rate of appeals to the new *cour*, particularly as it offered a convicted accused a ‘second chance’ at an acquittal. As indicated in the article, the appeal rates for the 3 years 2001, 2002 and 2003 were 7.3 per cent, 12.7 per cent and 11.4 per cent respectively.² The most recent figures available to the writer show that from the beginning of 2001 when the *cour d’assises d’appel* came into function until the present (April 2008), there

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1 Bron McKillop, ‘Review of Convictions After Jury Trials: The New French Jury Court of Appeal’ (2006) 28 *Sydney Law Review* 343.

2 McKillop, above n1 at 351.

have been some 3500 appeals from 15 200 decisions of the *cour d'assises* — an overall appeal rate of 23 per cent.³ This seems to indicate that 'second chances' are being taken more readily, although it should also be noted that from March 2002 the prosecution was given a right to appeal against an acquittal. (For an example of an appeal by the prosecution see the case (or saga) outlined below.) As noted in the original article,⁴ the conviction rates in the *cour d'assises d'appel* were 95 per cent for the years 2001–03. These rates are being maintained in that *cour*. A study by the *Ministère de la justice* (Ministry of Justice) for the years 2003–05 showed a conviction rate in that *cour* of 94.3 per cent.⁵ This could be seen as a dampener on appeals against conviction, as could the risk of a higher sentence on a second conviction.

3. *A Prosecution Appeal against an Acquittal in France*

As noted above and in the original article,⁶ in March 2002 the prosecution was by legislation⁷ given a power to appeal to a *cour d'assises d'appel* against an acquittal.⁸ Such a power is generally not enjoyed by Anglophone prosecutors on an acquittal by a jury court. It may be of interest to see how this power has been exercised in a recent and celebrated French murder case.⁹

The case arose in Nice. The accused, Maurice Agnelet, an *avocat*,¹⁰ befriended and became the lover of a young woman, Agnès Le Roux, the heiress to a casino fortune. After having given Agnelet a power of attorney over her assets, including bank accounts and shares in the casino company, Le Roux disappeared from Nice at the end of October 1977 and neither she nor her body have ever been seen again. Agnelet was investigated in 1978 for illegal confinement of a person (*séquestration*), but was not prosecuted. He was subsequently investigated for the manipulation of votes in Le Roux's casino company for the benefit of the rival casino, which resulted in him being struck off as an *avocat*. In 1983, he was arrested and investigated for the murder (*homicide volontaire*) of Le Roux but

3 Pierre Tournier, *Arpenter le Champs Pénal* 14 April 2008, (ACP No 85–6): <<http://arpenter-champs-penal.blogspot.com>> accessed 14 April 2008.

4 McKillop, above n1 at 351.

5 Laure Chaussebourg et Sonia Lumbrose, "L'appel des décisions des cours d'assises: conséquence sur la déclaration de culpabilité", *Ministère de la justice, Infostat*, no 98, (Paris, Décembre 2007), noted in Pierre Tournier, above n2.

6 McKillop, above n1 at 348.

7 *Loi no 2002–307 du 4 mars 2002 complétant la loi no 2000–516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes* (1).

8 It is noteworthy that the prosecution does not have such power on an appeal (which is by *pourvoi* or petition) to the *cour de cassation* from a *cour d'assises*. Article 572 of the *Code de Procédure Pénale* (CPP) prevents the prosecution appealing against an acquittal by a *cour d'assises*, except in the interests of law alone and without prejudice to the party acquitted.

9 The account of this case has been taken largely from the newspaper *Le Monde* (13 October 2007) at 3, 33.

10 Broadly equivalent to a barrister in Anglo-Australian jurisdictions.

ultimately was not prosecuted. In 1990, he was arrested and prosecuted for the misappropriation of Le Roux's money and sentenced to 30 months' imprisonment. In 1999, the murder investigation was re-opened after a former mistress of Agnelet's admitted to having falsely provided an alibi for him for the days when Le Roux had disappeared. In December 2006, Agnelet was sent to trial before the *cour d'assises*¹¹ in Nice but was acquitted. The prosecution appealed against the acquittal to the *cour d'assises d'appel* in Aix-en-Provence where Agnelet was, in October 2007, eventually convicted of murder and sentenced to 20 years' imprisonment. He appealed unsuccessfully against that conviction to the *cour de cassation*¹² and is now appealing to the European Court of Human Rights in Strasbourg.

It would be hard to see how the truth of this matter has been made manifest¹³ through these proceedings. One commentator has in fact noted that if all the judges and jurors in the *cour d'assises* at Nice (12 in all) had voted not guilty and 10 of the judges and jurors (15 in all) in the *cour d'assises d'appel* at Aix-en-Provence had voted guilty (the necessary two-thirds majority),¹⁴ then there would have been 10 votes for guilty as opposed to 17 for not guilty.¹⁵

Appeals by the prosecution in Australia have traditionally been limited to appeals against the sufficiency of sentence or to review on points of law without effect on any acquittal.¹⁶ Could appeals against acquittals in jury trials as in France (but to a Court of Criminal Appeal rather than another jury court) now be considered here?¹⁷ There is an argument that lifting the defence to a position of "equality of arms" with the prosecution is desirable for the fair and effective functioning of our adversarial system. The logic of this could be extended to equality in the rights of appeal. Support for such equality can be found in the first sentence of art 14(1) of the International Covenant on Civil and Political Rights: 'All persons shall be equal before the courts and tribunals.'¹⁸ In a comment on this provision the United Nations Human Rights Committee has stated that this equality 'ensures equality of arms', which means that generally 'the same procedural rights are to be provided to all the parties', such that there would be 'no

11 A court comprising 3 judges and 9 jurors.

12 The *cour de cassation* is the final court of appeal in France, but only considers questions of law.

13 The '*manifestation de la vérité*' as objective runs like a *leitmotiv* through the *Code de Procédure Pénale* (CPP).

14 CPP, art 359.

15 From an analysis by Stéphane Durand-Souffland in *Le Figaro* (22 October 2007) at 2.

16 See *Crimes (Appeal and Review) Act 2001* (NSW) ss 56, 57, 107, 108.

17 There are limited rights of appeal or revision on *cassation* against acquittals in some other European jurisdictions. See Judge Christine van Den Wyngaert et al, *Criminal Procedure Systems in the European Community* (1993), at 16 (Germany), 182 (Greece), and 314 (The Netherlands), and also 378–9 (Scotland).

18 Australia is party to this Covenant but its provisions have not been legislated into domestic law.

equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision.¹⁹ Or vice-versa — and thus equal procedural rights.

At this stage of the evolution of our criminal justice system, however, such arguments are unlikely to result in the overturn of the non-appellability of jury acquittals.

¹⁹ United Nations Human Rights Committee, General Comment No 32 on Article 14 of the International Covenant on Civil and Political Rights (23 August, 2007), paragraphs 12 and 13.