Rewriting history in the Court of Appeal

Francis Bennion assesses the Derek Bentley decision

The Times front page on 31 July 1998 carried the untruthful banner headline 'Bentley is innocent'. Its law report for that day spelt out how the Court of Appeal, headed by Lord Bingham of Cornhill CJ, had overturned not only the Derek Bentley murder conviction but also a fundamental principle of English law. This is expressed in the maxim res judicata pro veritate accipitur (a thing adjudicated is to be received as true).{Co. Litt. 103.} Related maxims are interest reipublicae res judicata non rescindi (it is in the national interest that judgments be not rescinded){2 Inst. 359.} and interest reipublicae ut sit finis litium (it is in the national interest that legal proceedings be not protracted).{Co. Litt. 303.} These maxims indicate that once normal appeal procedures have been exhausted a case should not be reopened except for compelling reasons. These exist where a convict is languishing in prison when new evidence suggests the conviction may be unsafe. That was not the position in Bentley.

The use of maxims

Who nowadays cares about these dusty old maxims, especially when couched in the decent obscurity of a dead language? The then Chairman of the Bar Council, Anthony Scrivener QC, suggested that the courts should 'bar Latin once and for all' on the ground that 'the Romans and their civilisation have gone forever and that their language went with them'.{Speech to Clarity delivered in the Law Society's Hall, 28 October 1991. His suggestion might carry more weight if in the same speech he had not used 'longevity' as meaning prolixity in apparent ignorance of its derivation from the Latin longevus, long life.} More recently Lord Justice May said that 'the time has come to abandon all Latin tags'.{In re O and others, (CA) 31 March 1998, unreported.} In 1730 the use of Latin in court proceedings was forbidden by the statute 4 Geo 2 c 26, repealed as spent by the Civil Procedure Acts Repeal Act 1879. Perhaps it wasn't spent after all.

Our legal system may now indeed be mature enough to dispense with the props furnished by Latin tags. So can it also dispense with the principles they embody? That seems unlikely.

Sweet & Maxwell used to publish a handbook called Latin for Lawyers. I still have my student's copy of the second edition, dated 1937. It contains over a thousand Latin maxims, preceded by an exordium{Apologies to Mr Scrivener et al. for the use of this Latin term, which means a statement made at the beginning of a discourse.} from which I should like to quote.

> 'Law, like moral philosophy or politics, has its maxims which sum up in a pregnant sentence some leading principle or axiom of law . . . Like the rules of the common law, [they] derive their source and sanction from an immemorial antiquity, from frequent judicial recognition, and from the imprimatur{Apologies as before.} of the sages of our law . . . The merit of the maxim is twofold. It is a useful generalisation of law wherein every student who would become his gown may note, as Wingate says, how the same key opens many locks, or, to put it another way, how all cases are reducible to a few theses.
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> The other merit of the maxim lies in its epigrammatic form. Like the proverb, it embodies "the wisdom of many and the wit of one" . . . Nowhere more than in its maxims does the robust good sense of the common law of England display itself; and does not one of those very maxims warn the critic that no one ought to be wiser than the laws?'

The findings in Bentley

Robust good sense was not apparent in Bentley. What was that expensive collection of highly trained lawyers doing, mulling at public expense over the trial of a long-dead youth? The short answer is that they were responding, as the law required, to a reference from the Criminal Cases Review Commission made under section 9 of the Criminal Appeal Act 1995. The full answer involves rather more than that.

The Court of Appeal held that Bentley's conviction of murdering PC Miles on the night of 2 November 1952 be quashed as unsafe. The sole grounds for this were defects they found in the summing up by the late Lord Goddard CJ, whom Lord Bingham acknowledged to have been 'one of the outstanding criminal judges of the century'.

It is not my contention that the Court of Appeal were wrong in their finding that Bentley's conviction was unsafe. My assertion is that they had no business to be considering the matter.
Bentley was tried by the standards of his day. I well remember the public feeling at the time, and the anger aroused by the foul murder of PC Miles at the hands of Bentley's warehouse-breaking accomplice the 16-year old thug Christopher Craig. Bentley too was armed, with what his executioner Albert Pierrepoint called 'a knuckle-duster with a vicious spike upon it - in itself a lethal enough weapon'.{The Times, 1 August 1998.} But it's history now. What are we doing resurrecting it? Here are some more questions.

The appeal was lodged 'on behalf of' the deceased Bentley by his neice Maria Bentley-Dingwall. Why should his neice have the right to put the law in motion in this way? Suppose there had been no neice, nor any other surviving relative? It is a mere accident that in 1998 there are any known relatives of the long-dead Bentley. Jurisdiction should not hang on accidents.

At the time, Bentley brought an appeal against his conviction. It was heard by the Court of Criminal Appeal (now abolished) and dismissed. Bentley was then hanged. Under the long-standing policy of the law, that should have been an end of the matter. Why does our generation think it has the right to overthrow that wise policy?

The Bentley jury sat in the days when qualifications were required for jury service. It was not, as now, open to every 18-year old school leaver with or without O levels. The Bentley jury sat in the days when a jury's verdict had to be unanimous. Nowadays dissent is allowed.

So the jury of mature citizens of those post-war days sat in court, heard the evidence, assessed the demeanour of the witnesses, and unanimously found Bentley guilty. Half a century later the Court of Appeal, relying only on paper records and sitting in a different age, presumes to say their verdict is 'unsafe'. Why should this be?

It happened because today's Court of Appeal think the experienced Lord Goddard did not instruct the jury adequately on the burden of proof resting on the prosecution and the fact that they had to be satisfied of guilt beyond reasonable doubt. The Times untruthfully proclaims 'Bentley is innocent'. Why was this untruthful? Because quashing a verdict of guilt as 'unsafe' is very far from saying that the accused was innocent. The overwhelming likelihood is that despite any supposed deficiencies in the judge's direction, the 1952 jury came to a true and fair verdict on the evidence as they were sworn to do.

Awareness of the unreal nature of what he was about comes through in the judgment of Lord Bingham. He admits that in considering anything like the Bentley appeal the liability of a party to a joint enterprise has to be determined according to the common law as now understood not as understood in 1952. The conduct of the trial and the direction of the jury have to be judged according to the standards which the court would now apply and not according to 1952 standards. Worse, the safety of the conviction also has to be judged

according to the standards which the court would now apply. Finally Lord Bingham said-

> 'Where between conviction and appeal there have been significant changes in the common law, as opposed to changes effected by statute, or in standards of fairness, the approach indicated requires the court to apply legal rules and procedural criteria which were not and could not reasonably have been applied at the time.'{Emphasis added.}

Conclusion

It is scarcely necessary to say more to indicate what a travesty this so-called appeal was, but one point may be added. The reasoning behind the appeal would have applied equally if the 1952 Home Secretary, Sir David Maxwell-Fyfe, had responded to public pressure and reprieved Bentley. If that had happened Bentley would by now, like his accomplice Craig, have served his prison sentence and been long at liberty. Would it really be right that a man with his record should have his conviction retrospectively quashed nearly half a century later and thereafter rank as a victim of gross injustice entitled to massive compensation from today's taxpayers? I think not.

Should we excuse the Court of Appeal in Bentley because they were merely performing a function wished on them by statute? Again, I think not. There is nothing in Lord Bingham's judgment to show that he and his two colleagues found their task in any way objectionable.

Our generation needs to be reminded of that pregnant saying of L P Hartley's in The Go-Between. The past is a foreign country: they do things differently there. Or to put it even more succinctly: you can't change history, and you shouldn't even try.

1998(10) ‘Rewriting history in the Court of Appeal’ [the Bentley case] 148 NLJ (1998) 1228.

This article is referred to as ‘trenchant’ in Richard Nobles & David Schiff, ‘The Criminal Cases Review Commission: Reporting Success?’ 64 MLR (March 2001) 280, 284.