

PE1562/D

**The Scottish Human Rights Commission**

**PE 1562 (Perverse Acquittal)**

**The Public Petitions Committee**

**26 May 2015**

---

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is a public body and is entirely independent in the exercise of its functions. The Commission is the national human rights institution (NHRI) for Scotland with a mandate to promote and protect human rights for everyone in Scotland. The Commission is one of three NHRIs in the UK, along with the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission. In June 2010 the Commission was accredited with "A" status by the International Coordinating Committee of NHRIs and since May 2011 the Commission has been the elected chair of the European Network of NHRIs.

---

**INTRODUCTION**

1. The Commission thanks the Committee for its letter of 29 April 2015. First of all, International human rights law places a number of specific obligations on States to safeguard the rights of victims of crime, including obligations to investigate and provide effective remedy. The Commission notes the considerable amount of work that has been undertaken recently in terms of reform of criminal justice. The Commission also notes that one of the commitments under Scotland's National Action Plan on Human Rights is to will ensure that human rights are central to the reform of the criminal justice system in Scotland.
2. There are a number of State duties in relation to investigation and prosecution of crimes. First, there is a general obligation on the state "to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. Second, there is the "operational duty" to take "appropriate steps" to safeguard the lives of those within its jurisdiction including a positive obligation to take "preventative operational measures" to protect an individual whose life is at risk from the criminal acts of another. Third, there is a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing

substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated.

3. These obligations arise from Articles 2 and 3 of the Convention. For present purposes these do not require separate consideration.
4. There are a number of human rights principles involve in this petition, including the protection of public, fair trial and rule of law. Therefore, **the Commission considers** that any changes to the current criminal justice system should be implemented in compliance with the international human rights standards, in particular, but not exclusively, to the right to a fair trial (Article 6 of the ECHR).
5. There is also important to note that currently exists a prosecution right to appeal as set out in Sec 107 A of the Criminal Procedure (Scotland) Act 1995. If we have a look at similar legal systems, the Canadian Supreme Court has made clear that is not possible to appeal a jury verdict of acquittal simply on the ground that is unreasonable.<sup>1</sup>
6. As a departure point, both the rights of the victim and the rights of the accused must be respected in the criminal justice process. As the Council of Europe Committee of Ministers has said, measures to help the victims
  - a. *“need not necessarily conflict with other objectives of criminal law... such as the reinforcement of social norms and the rehabilitation of offenders, but may in fact assist in their achievement and in an eventual reconciliation between the victim and the offender”*.<sup>2</sup>
7. As explained above, the duty on the State is to provide an effective investigation and an effective remedy. The State must take all possible measures to create a system that provides an effective remedy, without breaching the absolute right to a fair hearing for the accused.
8. The State has a positive duty under Article 6 to put in place a domestic system that meets the requirements of a fair trial. Courts must therefore be in a position, as a matter of domestic law, to ensure the trial is fair and meets the requirements of Article 6. Allowing a jury to consider convicting an accused on the basis of poor evidence, or evidence where the ability of the defence to challenge it has been significantly restricted, jeopardises a fair trial. It is the Commission’s view that the issue of the petition raises wider issues in terms of the role of the jury within the criminal justice system and the need to improve the way in which the system supports jury members in their role.

### **The right to a fair trial**

9. The presumption of innocence is a fundamental right guaranteed by Article 6. In the course of judicial proceedings the presumption of innocence is part of

---

<sup>1</sup> *R v Biniaris* [2000] 1 SCR 381.

<sup>2</sup> Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure. Committee of Ministers of the Council of Europe. Para 6

the right to a fair trial. In *Barberá, Messegué and Jabardo v. Spain* (1988) the ECtHR held that the principle of the presumption of innocence:

*“... requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused.”*

10. The ECtHR has considered whether, after a determination which acquits an accused of a criminal charge, there can or should be any doubt as to the presumption of innocence by a court. The presumption of innocence must equally be upheld after acquittal as before trial. The Court held in *Sekanina v. Austria* (1993) that it is no longer admissible for the domestic courts to rely on suspicions regarding an applicant's guilt once an acquittal has become final. Therefore, any comments made by judges on the termination of proceedings or when the accused has been acquitted will violate the presumption of innocence.

11. The ECtHR went on to say that

*“The voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However it is no longer admissible to rely on such suspicions once an acquittal has become final.”*

The Court held that the approach taken by the national court was incompatible with the presumption of innocence.<sup>3</sup>

12. In a later case of *Rushiti v Austria*,<sup>4</sup> the ECtHR affirmed the general rule that following a final acquittal even the voicing of suspicions regarding an accused's innocence is no longer admissible, stating, *“The Court thus considers that once an acquittal has become final – be it an acquittal giving the accused the benefit of the doubt in accordance with A6(2) – the voicing of any suspicions of guilt, including those expressed in the reasons for the acquittal, is incompatible with the presumption of innocence.”*<sup>5</sup>

13. Article 6 does not necessarily prohibit presumptions of law or fact, but any rule which shifts the burden of proof or which applies a presumption operating against the accused must be confined within *“reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”* (*Salabiaku v. France* 1988).

14. In *Weixelbraun v Austria*<sup>6</sup> the ECtHR considered the issue of a “full acquittal and an acquittal in *dubio pro reo*” (which means where the accused receives the benefit of the doubt – arguably similar to our not proven verdict). The

---

<sup>3</sup> Paras 29-30, *Sekanina v Austria*

<sup>4</sup> App. No. 28389/95

<sup>5</sup> Ibid

<sup>6</sup> App. No. 33730/96

Court affirmed that once an accused was acquitted on either basis, he was entitled to the presumption of innocence.

15. It is important to mention that the Not Proven verdict in and of itself is not incompatible with ECHR. However the system must not allow for lingering doubts about the acquitted person's innocence when such a verdict is returned.
16. In a jury system such as Scotland, the Article 6 requirement of a reasoned verdict is achieved through a combination of measures, including the judge's directions and the jury's consequent verdict. It is therefore important that there is confidence that judicial directions are properly understood and applied. Written directions would assist with this. It is equally important that jurors are facilitated to participate effectively in trials. It is a serious concern that evidence suggests that significant numbers of jury members do not understand important elements of the trial and of instructions given. Regard will have to be had to those jurors who may have literacy or other challenges and measures will be required to be in place to support those jurors.
17. The Commission considers that the provision of accessible written jury directions could provide additional clarity as to how to consider evidence at trial.
18. Another issue that has been considered by the ECtHR is the lack of reasoned verdicts by juries in criminal cases. The Court held in a case against Austria<sup>7</sup> that there was no violation since the jury were given detailed questions to answer, counsel could apply to make modifications and this specificity made up for lack of reasons. In addition to that, the applicant could and did file grounds of nullity on the basis that the judge had misdirected the jury as to the law.
19. **In conclusion**, the Commission considers that the current system is not incompatible with human rights standards, and balances appropriately the rights of the victim and the accused. It is important, however, to consider methods of improving the way in which the system supports jury members in their role.

SHRC

---

<sup>7</sup> Appl. No. 25852/94.