

# The Origins of the English Court of Criminal Appeal\*

By Ken Whiteway\*\*

## Introduction

This year marks the one-hundredth anniversary of the operation of the Court of Criminal Appeal for England and Wales which began sitting on May 15, 1908.<sup>1</sup> Until then, although appeals in civil cases had been allowed since the mid-17<sup>th</sup> century, there was neither judicial support nor political will to create a forum for criminal appeals. The prerogative of mercy, exercised after 1837 by the Home Secretary, could be invoked; however, the only form of judicial review of a verdict was the rather limited one provided by the legislation of 1848.<sup>2</sup> This act provided for the creation of a Court of Crown Cases Reserved to which trial judges, if they were so inclined, could “state” a case. “If the Court...thought that the point of law had been wrongly decided at the trial, the verdict was set aside and the conviction quashed. But it will be observed that a case could be stated on a point of *law* only and that the judge could not be compelled to state it if he did not wish to do so.”<sup>3</sup>

Parliament considered thirty-one bills on the subject between 1844 and 1906, but all were either withdrawn or died on the order paper.<sup>4</sup> Judges in particular believed that the prerogative of mercy, exercised by the Home Secretary who could commute sentences or grant pardons in appropriate cases, constituted a sufficient safeguard. There was also a widespread belief that appeals would undermine the long-established role of juries in the criminal trial process.

Even some lawyers were not eager to provide an additional mechanism for overturning hard-won victories. The biographer of one notable barrister commented:

What was the use of briefing [him] in a civil case? However signal his victory before a jury in the court below, it seemed almost a rule that these verdicts would be set aside in the Court of Appeal; and this was more disastrous than initial failure. Many solicitors who still admired and were personally fond of [him] felt themselves unable in their clients' interests to send him briefs. With crime it was different; there was no Court of Appeal to interfere with the verdicts obtained by his daring rhetoric. The worst

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\*\* Law Librarian, University of Saskatchewan.

<sup>1</sup> The court was created by the *Criminal Appeal Act, 1907* (U.K.), 7 Edw. VII, c. 23.

<sup>2</sup> *Act for the further Amendment of the Administration of the Criminal Law, 1848* (U.K.), 11 & 12 Vict., c. 78.

<sup>3</sup> Pendleton Howard, “The English Court of Criminal Appeal” (1931) 17 A.B.A.J. 149.

<sup>4</sup> Rosemary Pattenden, *English Criminal Appeals 1844-1994: Appeals against Conviction and Sentence in England and Wales* (Oxford: Clarendon Press, 1996) at 6-16.

that could happen would be a “stern judicial reprimand,” which might very likely be turned by him into an advantage with the jury.<sup>5</sup>

By the middle of the 19<sup>th</sup> century, however, several newspapers had taken up the cry for reform. *The Times*, for example, ran an editorial on November 13, 1847, “in the interest of that numerous class of persons who have been condemned contrary to law and justice, and who are left to languish out the best years of their life in imprisonment or banishment for want of such power of appeal”.<sup>6</sup>

The *Criminal Code (Indictable Offences) Bill, 1878*, drafted by Sir James Fitzjames Stephen, had provisions which would have created an appeal court. The bill was withdrawn but it was his work on the bill that led, in part, to his elevation to the bench. Ultimately it was the public clamour arising from four criminal cases that resulted in the establishment of the Court of Criminal Appeal. Perhaps ironically, Stephen figured prominently in two of them.

### ***R. v. Lipski***

On June 28, 1887, Miriam Angel was found dead in her room in the East End of London. She had been murdered by having nitric acid poured down her throat. Found unconscious under her bed, and also suffering from corrosive poisoning, was twenty-two-year-old Israel Lipski. A recent immigrant from Poland, Lipski lived and worked on the top floor of the house in which Angel's body was discovered. The evidence indicated that Lipski had purchased an ounce of nitric acid on the morning of the murder. However, Lipski claimed that two men named Rosenbloom and Schmuß, employed by him in the manufacture of walking sticks, had killed Angel during the course of a robbery, and had then attacked him when he returned to the house. Some of the evidence seemed to support this story: Lipski had abrasions on his elbows that might have been caused when the two men held him down and administered the poison; there also seemed to be more acid used in the incident than could be accounted for by the small amount that Lipski was known to have had in his possession.

Lipski's case was not strengthened by the fact that he was represented at the trial by a barrister who specialized in commercial law. (The criminal lawyer who acted as Lipski's counsel at the preliminary hearing was no longer available to conduct the defence.) As one commentator noted:

The entire cross-examination was remarkably restrained and polite, considering that Rosenbloom was the person Lipski said committed the murder. The style of cross-examination seemed to be that of a careful

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<sup>5</sup> Edward Marjoribanks, *For the Defence: The Life of Sir Edward Marshall Hall* (New York: Macmillan, 1929) at 192-193.

<sup>6</sup> *The Times* (13 November 1847) p. 4, col. D. Available in *The Times Digital Archive 1785-1985*.

civil lawyer, not that of a vigorous defence counsel trying to break down the witness's story. It was completely ineffective.<sup>7</sup>

Justice Stephen at some point during the trial decided that Lipski must be guilty and, although there was evidence that might have raised a reasonable doubt in the minds of the jury, he chose to downplay it. In his summing-up he stated that it was more probable that lust was the motive for the crime and that, if so, it was a crime more likely to be committed by one man rather than two. There was, of course, nothing in the evidence to support either of these assertions. The jury members, however, seemed more than willing to adopt this reasoning and, within eight minutes of retiring, had returned a verdict of guilty.

In the late 19<sup>th</sup> century there was a mass migration to Britain's major cities by Jews fleeing pogroms in Eastern Europe. The influx coincided with a period of high unemployment in London and the two factors led to frequent expressions of anti-Semitism. Many observers believed that Lipski was a victim of this societal bias. Among them was W.T. Stead, editor of the *Pall Mall Gazette*, who launched a long and acerbic campaign in his editorials against the trial, Justice Stephen, and the Home Secretary, Henry Matthews.<sup>8</sup> Thousands of people, including over one hundred Members of Parliament, signed petitions advocating Lipski's reprieve. His solicitor, John Hayward, was particularly diligent in attempting to have the death sentence commuted. The cause was taken up by other newspapers and the furore created put a great deal of pressure on Stephen and Matthews, both of whom began to doubt the fairness of Lipski's conviction.

Then, just hours before his execution on August 22, 1887, Lipski confessed. This initially resulted in a collective sigh of relief from Stephen and the members of the government, and consternation among Lipski's supporters; but, soon, even the validity of the confession came under question. Speculation began that Lipski, realizing he was doomed, had confessed in order to avoid creating even more hostility toward the Jewish community and to refute the allegation that Miriam Angel had been sexually assaulted prior to her murder. Whether that was true or not, the retrial of this case by the press focussed public opinion on the need for a court in which criminal appeals could be considered.

### ***R. v. Maybrick***

Florence Maybrick was a young American woman who, in 1881, had married the considerably older James Maybrick, a Liverpool cotton broker. James had a long-standing habit of taking daily doses of arsenic as a "tonic"; he also, before and during his marriage, kept a mistress by whom he had several children. Increasingly unhappy with this state of affairs, Florence herself, in March 1889, engaged in a liaison with Thomas Brierley, a business associate of James. In late April of the same year Florence bought several dozen fly papers which contained arsenic. She soaked these in a basin in her bedroom with the intention (she later claimed) of using the extract as a cosmetic. At about the

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<sup>7</sup> Martin L. Friedland, *The Trials of Israel Lipski* (London: Macmillan, 1984) at 44.

<sup>8</sup> Grace Eckley, *Maiden Tribute: A Life of W. T. Stead* (Philadelphia: Xlibris, 2007) at 115-118.

same time James fell seriously ill. During the course of the illness, suspicion rose among some of the family members that Florence was tampering with James's medications, and a compromising letter from Florence to Brierley was intercepted by one of the servants and shown to James's brothers. By May 11, James was dead and, a week later, Florence was arrested and charged with his murder.<sup>9</sup>

Once again the judge in the case was Sir James Fitzjames Stephen. Unfortunately by this time he was beginning to exhibit the signs of mental deterioration that were to lead to his retirement from the bench in 1891. There was no direct evidence to establish that Florence had administered arsenic to James or, for that matter, that arsenic was even the cause of death. In his summation, Justice Stephen began by pointing this out but then, over the course of a two-day speech, appeared to lose his way. He made several errors in his recapitulation of the evidence and seemed to indicate that Florence was more likely to be guilty because of what he viewed as moral turpitude on her part. After deliberating for less than an hour, the jury found Florence guilty of murder and she was sentenced to death.

The verdict was received with disbelief around the world. Editorials, letters to the editor, and numerous petitions called for her reprieve.<sup>10</sup> The verdict was still being discussed several years later by legal academics, one of whom stated that:

...the Judge ought to have told the jury that even if they were satisfied that the arsenic in the body had been introduced by crime they must further be satisfied beyond all reasonable doubt that it had caused the death before convicting the prisoner...and that...the prisoner's motives and her moral character were wholly irrelevant to the issue.<sup>11</sup>

Prolonged conferences were again held between Justice Stephen and the Home Secretary. This time, however, they resulted in the commutation of the prisoner's death sentence. Florence served fifteen years' imprisonment before being released in January 1904. Her release renewed the debate over whether her ordeal could have been avoided had there been a court for criminal appeals in existence.

### ***R. v. Edalji***

George Edalji was the solicitor son of a Parsi clergyman who lived in the village of Great Wyrley northwest of Birmingham. In 1903 he was arrested and

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<sup>9</sup> H.B. Irving, ed., *Trial of Mrs. Maybrick*, 2d ed. (Edinburgh: W. Hodge, 1927). Reprint: Gaunt, 1995.

<sup>10</sup> A description of the public's opposition to the decision can be found in George Robb, "The English Dreyfus Case: Florence Maybrick and the Sexual Double-Standard" in George Robb & Nancy Erber, eds., *Disorder in the Court: Trials and Sexual Conflict at the Turn of the Century* (New York: New York University Press, 1999).

<sup>11</sup> Clark Bell, "The Charge of Mr. Justice Stephen in the Maybrick Case Reviewed and Criticised" (1897) 6 Mich. L.J. 27 at 29-31.

charged with several counts of mutilating animals and sending threatening letters.<sup>12</sup> Edalji was sent to trial on the basis of a flawed police investigation and dubious evidence; however, as in the case of Israel Lipski, his conviction may have been the result of an underlying local prejudice. The finding of guilt was harder to accept in view of the fact that animals continued to be maimed and killed even while Edalji was in custody. In any event, he was sentenced to seven years of penal servitude and struck from the roll of solicitors.

The apparent injustice of his conviction led thousands of people to sign petitions calling for his pardon. Eventually bowing to public pressure, the Home Office released Edalji in October 1906. Among the more notable supporters attracted to the cause was Sir Arthur Conan Doyle, creator of Sherlock Holmes, who was able to establish that the physical and handwriting evidence were faulty, and, in addition, that Edalji was too myopic to have been able to mutilate animals at night. Doyle voiced his concerns in a series of articles published by the *Daily Telegraph* which ultimately led to the creation of a three-man panel to review what were by then widely perceived to be the injustices of the case.

The members of the panel concluded that there was no evidence that Edalji had killed any of the animals and that he should, therefore, be pardoned. On the other hand, they still seemed to believe that he had written at least some of the threatening letters and so they denied him any compensation. Fortunately, the Law Society took a less narrow view and readmitted him to practice as a solicitor.

Doyle continued to advocate for Edalji in the press, but to little avail. However, the publicity he gave to the plight of the successful professional man who had been falsely arrested and imprisoned helped to increase public discontent with the inadequacies of the existing judicial system.

### **R. v. Beck**

Adolf Beck was not as respectable as George Edalji. Beck, in fact, was a shadowy figure who spent most of his career operating on the fringes of the Victorian and Edwardian underworld.<sup>13</sup> Nonetheless, he was the rather unprepossessing figure who finally focussed public attention on the need for a method of dealing with criminal appeals.

Beck, a classic victim of mistaken identity, was convicted not once, but twice, of crimes committed by someone else. In 1877, William Weiss, alias John Smith, was sentenced to a term of penal servitude for defrauding several women of their jewellery and other valuables. In 1896 a similar series of crimes was committed and, this time, Adolf Beck was arrested. The police officer who was in charge of the 1877 case, and another witness, identified Beck as the convicted

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<sup>12</sup> Further details of the case are available in Charles Higham, *The Adventures of Conan Doyle: The Life of the Creator of Sherlock Holmes* (New York: Norton, 1976) at 199-203, and in Bruce Heydt, "Sir Arthur Conan Doyle: the Case of George Edalji", online *British Heritage* <[http://www.historynet.com/magazines/british\\_heritage/3025636.html](http://www.historynet.com/magazines/british_heritage/3025636.html)>

<sup>13</sup> Eric R. Watson, ed., *Adolf Beck (1877-1904)* (Edinburgh: W. Hodge, 1924). Reprint: Gaunt, 1995.

criminal known as John Smith. Part of the evidence in both cases consisted of documents which, both the Crown and the defence agreed, were written in the same handwriting. "Mr. Beck's defence was that he was in South Africa in 1877 when Smith was convicted; therefore he could not have written the documents of 1877; therefore he did not write those of 1896; therefore he was not guilty."<sup>14</sup> Beck was found guilty, sent to prison and ultimately released.

In 1904 he was arrested on a similar charge, again identified by witnesses and, again, convicted. This time, however, the judge seemed to have some qualms about the whole process. He delayed sentencing until the following session and, in the meantime, John Smith was arrested and confessed to both series of crimes. Beck was consequently released with a full pardon.

Once again, the English press and public demanded an investigation into how such a gross miscarriage of justice could occur. A commission of inquiry was established and promptly concluded that the responsibility lay primarily with the trial judge in the 1896 case. It was believed by many observers that, had an appeal from his ruling been possible, Beck's unfortunate experience could have been avoided.

Although this case was the final catalyst that led to the creation of the Criminal Court of Appeal, it is interesting to note that, over four decades later, a Lord Chief Justice of England was of the opinion that, even if the Court had existed at the time of Beck's trials, it would probably have been of no benefit to him:

But I am bound to say that had Beck been brought before the Court of Criminal Appeal I doubt if that Court could have interfered with either verdict unless the fresh evidence had been placed before them; identity is eminently a matter for the jury and without fresh evidence I cannot see how they could have said that the verdict was wrong.<sup>15</sup>

## **Conclusion**

So what could not be achieved by repeated attempts in Parliament, pressure from within the legal profession, and generations of editorial writers, was finally brought about by public and government reaction to four cases. Israel Lipski began the process, but it was really the publicity surrounding the release of Mrs. Maybrick (1904), the second trial of Adolf Beck (1904), and the release of George Edalji (1906) that brought matters to a head.

As one commentator recently noted:

Each case contributed a different ingredient into the mixture that finally emerged as the "unsafe and unsatisfactory" standard of review. From Beck came the necessity of providing a judicial forum to consider new evidence of actual innocence, since executive clemency through the

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<sup>14</sup> "The Adolf Beck Case" (1905) 4 Can. L. Rev. 60 at 61.

<sup>15</sup> Rayner Goddard, Baron, "The Court of Criminal Appeal in England" (1950) 67 S. African L.J. 115 at 117.

Home Office was too political and unpredictable.... From the Maybrick case came the necessity to provide a forum to review judicial errors and excesses, as represented in that case by the scandalous address to the jury by the aging giant losing his grip, Sir James Fitzjames Stephen.... And from the Edalji case came the necessity to provide a forum to review the sufficiency of the evidence....<sup>16</sup>

These are all concepts that we now take pretty much for granted. They seem to have imbued English criminal law for centuries, but they are, perhaps surprisingly, only a hundred years old.

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<sup>16</sup> D. Michael Risinger, "Boxes in Boxes: Julian Barnes, Conan Doyle, Sherlock Holmes and the Edalji Case" (2006) 4:2 *International Commentary on Evidence*, art. 3 at 88-89, online: <<http://www.bepress.com/ice/vol4/iss2/art3>>