

TRUTH, PROOF, RIGHTS AND THE RULE OF LAW IN CRIMINAL ADJUDICATION. A COMMENT ON SARAH SUMMERS «EPISTEMIC AMBITIONS OF THE CRIMINAL TRIAL: TRUTH, PROOF, AND RIGHTS»

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ABSTRACT: A Comment on S. J. Summers' «The Epistemic Ambitions of the Criminal Trial: Truth, Proof, and Rights».

KEYWORDS: criminal adjudication, truth, proof, rights, rule of law.

SUMMARY: 1. INTRODUCTION—. 2. A RULE OF LAW ACCOUNT OF CRIMINAL TRIALS—. 3. THE STANDARD OF PROOF—. 4. THE IMPLICATIONS OF A RULE OF LAW ACCOUNT OF ADJUDICATION —. BIBLIOGRAPHY.

1. INTRODUCTION

Sarah Summers (2022b, p 271) begins her article on the epistemic ambitions of the criminal trial by drawing attention to what she calls the «received» view that the aim of the trial is about rectitude of decision understood in terms of a high degree of confidence in the accuracy or inaccuracy of the probative facts. The consequence of this characterisation of the trial is that it is judged to have succeeded or failed purely in terms of whether it has managed to achieve an accurate outcome. Evidence

scholarship has been dominated throughout its history by the view that the central purpose of adjudication is rectitude of decision, that is the correct application of substantive law to facts proved to be true (Twining, 2006, p. 76, 199). This is not to say that other values have not been considered important, but these are seen as secondary to the principal aim of rectitude of outcome. A useful distinction is made in this respect by Hock Lai Ho (2021, p. 14-15) who has argued that there is a distinction between the goal of an enterprise and desirable features of an enterprise. It is widely accepted that trials should be efficient and not waste resources, and that they should promote confidence and fairness. On occasions exclusionary rules may even require the exclusion of probative evidence in order to satisfy these requirements. But trials do not exist in order to promote them and in that sense, they are extrinsic and not intrinsic to the trial.

In recent decades, however, alternative theories of criminal evidence and proof have been advanced which put more emphasis on the process by which decisions of guilt are arrived at and justified. A recent vein of literature has emphasised that in order for institutions to maintain a valid claim (for example, of guilt), they need to be perceived as legitimate and a key component of legitimacy lies in decisions being made within a shared normative framework of procedural justice¹. Evidence scholars have also begun to question the «unitary» effect of the orthodox common law model of evidence by which the rules of evidence are applied in an undifferentiated manner with insufficient attention given to the normative priorities of particular types of adjudication². With regard specifically to criminal adjudication, Summers (2022b, p. 269) makes the point that the «received» view of the aim of the criminal trial has also come under pressure from the rights-based regulation of criminal evidence developed by the European Court of Human Rights (ECtHR), which challenges the feasibility of the separation of process and outcome, although she questions the direction of recent decisions as espoused in its «fairness as a whole» doctrine which would seem to have downgraded the intrinsic value of certain rights such as the right of confrontation³. Another illustration highlighting the significance of process can also be seen in the way in which appellate courts reviewing the safety of a conviction pay attention not merely to the truth of the verdict but to the way in which it was obtained⁴.

¹ See *e. g.*, Bottoms and Tankebe (2012); Tyler (2007); Jacobson and Cooper (2020).

² See *e. g.*, Roberts (2014); Jackson and Roberts (2019, p. 790).

³ Although the «fairness as a whole» doctrine was articulated at an early stage of the European Commission and Court's jurisprudence (see Jackson and Summers, 2012, p. 82), it has become particularly pronounced within the last decade in certain leading Grand Chamber decisions: see *e. g.*, *Al-Khawaja and Tahery v UK* (2011); *Ibrahim and others v UK* (2016); *Beuze v Belgium* (2018). See Jackson (2019).

⁴ See Dennis (2003).

2. A RULE OF LAW ACCOUNT OF CRIMINAL TRIALS

Summers' distinct contribution in this article is to develop a particular «rule of law» account of the criminal trial which recognises the importance of process but insists also on the relevance of the veracity of the verdict. As she puts it, «any suggestion that outcome is essentially irrelevant, providing that the procedures followed are appropriate or fair, seems intuitively wrong» but equally a broadly instrumental position according to which accurate decisions themselves constitute an important element of fair treatment «might be criticised for paying insufficient attention to the intrinsic importance of the fair treatment of individuals in the rule of law» (2022b, p. 254). A rule of law account of criminal adjudication draws attention not only to the importance of fair participation (which has been stressed in much recent literature⁵) but also to the need for equal treatment within the rule of law, something that has tended to be more neglected, albeit that the first sentence in art. 14 of the International Covenant of Civil and Political Rights, whose provisions have been incorporated into the statutes of many international criminal courts and tribunals, states that «all persons shall be equal before the courts and tribunals»⁶.

The importance of equality within the rule of law comes strongly to the fore when courts are applying standards of procedural fairness. Although there are certain fundamental principles of fairness such as the right to an impartial and independent tribunal and the right to be heard that have long been considered fundamental to a fair trial, fairness has been described as «a constantly evolving concept» and «standards and perceptions of fairness may change over time»⁷. Courts reviewing alleged historic miscarriages of justice have deemed it relevant to consider whether the appellant lacked protections which are now considered she should have enjoyed but they have resisted the idea that they should give retrospective force to provisions that reflect modern day standards of fairness⁸. The principle of equality, however, requires that any appellate court gives anxious consideration to whether the appellant was treated in accordance with the standards of fairness that were applicable to all appellants in her position at the time and reaches a judgment on whether the conviction is safe against that background which is a «very different thing» from concluding that the appellant was necessarily innocent⁹.

⁵ See *e. g.*, Jackson and Summers (2012); Owusu-Bempah (2017); Jacobson and Cooper (2020).

⁶ See *e. g.* ICTY Statute, art 21.1, ICTR Statute art 20.1, ICC Statute art 67

⁷ See Bingham (2010, p. 90-91). See also Jackson (2020, p. 262-263).

⁸ In a recent case considering an appeal against conviction dating back before detailed codes were introduced to regulate the conduct of police interviews, the English Court of Appeal stated: «The proposition that the fairness of a trial or of the treatment of a suspect is to be judged by modern standards, whilst generally correct, cannot possibly mean that retrospective force is to be given to the raft of very detailed new provisions (including for example the compulsory audio recording of interviews) introduced by the several codes promulgated under PACE» (*T v R*, 2022).

⁹ *R v King* (2000) per Lord Bingham. See also *R v Brown and others* (2012).

Summers (2022b) suggests that the equality dimension of the rule of law provides an alternative explanation for the need for a high standard of proof in criminal cases to the one more commonly given that it is a recognition of the fact that wrongful convictions are more problematic than wrongful acquittals. Within the distinctive context of criminal procedure in which the State imposes punishment, however, the need for a high standard of proof may also be seen as an obligation from fairness and equality to ensure that the State does not impose on any «individual a greater risk of harm (such as the harm of being wrongfully convicted and punished) than it imposes on other individuals» (p. 265), albeit that there may be some imprecision in defining what such a high standard entails (Ferrer Beltrán, 2021, p. 40).

3. THE STANDARD OF PROOF

This leads on to a central theme that Summers (2022b) develops in her article which is how a high standard of proof should operate in criminal adjudication. She argues that the trial must have higher epistemic ambitions than simply requiring that fact finders have a high degree of confidence in the accuracy of the guilt of the accused before convicting. The fact finder must do more than simply have a belief in the accuracy of the verdict; the fact finder has to believe in the right way, principally by being «bound by the normative demands of adjudication in the rule of law» (p. 258). The way in which this is demonstrated is through the giving of reasons for verdicts. One of the distinctive aspects of the legal verdict and with it the idea of truth or true belief is the way in which it calls to be justified (p. 254). She refers to rulings of the ECtHR which illustrate that giving reasons is more than a formal procedural requirement; the reasons given by fact finders must also be reasonable and free from arbitrariness (p. 255)¹⁰.

Summers, however, goes further and, along with Duff *et al.* (2007) and others, claims that a conviction is appropriate only if the fact finder knows that the defendant is guilty. Whether verdicts should aim for knowledge has been much debated in the literature, often in the context of the law's ambivalence towards naked statistical evidence¹¹. Summers (2022b, p. 266-267) claims that a rule of law account of trial and punishments supports the view that the State authorities will only be justified in convicting the accused and imposing punishment if they know the accused committed the offence. More could have been said to substantiate this claim. She argues (it is submitted correctly) that justified punishment depends on the fact finder establishing true belief for distinct reasons following a particular process (p. 265). A guilty verdict is more than a statement of belief about the defendant's conduct; it is a speech act that licences punishment requiring fact finders to justify their verdict by appro-

¹⁰ Summers cites cases illustrating that the ECtHR has read a «substantive» element into the obligation to give reasons.

¹¹ See, *e. g.*, Pardo (2010); Levanon (2019).

appropriate reasons in the context of a fair process. But it is not altogether clear why the kind of epistemic support required beyond belief must be knowledge. She takes the example of the recent Supreme Court case of *Shinn v Ramirez* (2022) where a majority of the Court held that in capital cases federal courts could not consider evidence of ineffective counsel if that evidence had not been presented to a state court even if the failure to do so was on account of the ineffectiveness of counsel¹². The effect was to preclude the federal courts from reviewing new evidence of innocence. If the aim of the original verdict was simply to ensure a sufficient degree of confidence in the accuracy of the probative facts, she states that the original verdict might be considered to have succeeded even though it was subsequently called into question at the federal level. But if the aim of the verdict is true belief guided by appropriate reasons in the context of a fair process such as to amount to knowledge, the verdict clearly failed. But arguably it is not necessary to require knowledge in order to conclude that the verdict failed. The verdict failed because in the light of subsequent evidence it fell short of a justified true belief.

The argument for knowledge is teased out by Duff *et al.* (2007, p. 91) in an example where a defendant is convicted on the basis of evidence that is, as presented at the trial, rationally persuasive such as to justify a conviction but it turns out later that the evidence was in fact tainted or unreliable. If the defendant was innocent, this would be a case of justified or warranted false belief. But what if the defendant was in fact guilty so that the belief was true? Although the original fact finder's judgment was both true and warranted or justified by the available evidence, it arguably did not constitute knowledge. Rather it was an example of «fortuitously» true belief and as such Duff *et al.* argue the conviction should be overturned. Arguments have been made that there is something wrong about verdicts that are based on fortuitously true beliefs that fail to constitute knowledge¹³. But on what rule of law ground might it be said that the conviction was wrongful? The conviction was grounded, it is true, on unreliable evidence. But it is not unusual for unreliable evidence to be presented at the trial, as Summers (2022b, p. 269) acknowledges at the end of her article when she refers to the limitations and inherent fallibility of adjudicative fact finding, recalling Frank's (1949, p. 22) words that facts in the courtroom are «twice refracted». If though in Duff *et al.*'s (2007) example subsequent investigation confirms the guilt of the accused and if the original conviction was based on a fair process and justified persuasively on the basis of the available evidence at the time, in what sense can it be said to be wrongful in rule of law terms? Fact finders have a responsibility to make a decision based on whether the material facts prescribed by law as warranting guilt have been proven to a robust standard by all the evidence that has been admitted at the trial. But this responsibility is necessarily set within the confines of the fallibility of adjudicative fact finding which is why effective postconviction remedies need to be instituted and why the US Supreme Court has been justifiably criticised in its de-

¹² *Shinn v Ramirez* (2022).

¹³ See *e. g.*, Gettier (1963); Pardo (2010).

cision in *Shinn v Ramírez* (2022) for closing the door to many death row defendants who now have no court to hear their innocence claims (Greenfield, 2022).

4. THE IMPLICATIONS OF A RULE OF LAW ACCOUNT OF ADJUDICATION

In her article, Summers stops sort of examining the implications of her rule of law account for certain institutions and practices that have long been regarded as central to the common law criminal trial¹⁴. The requirement that verdicts are justified by reasons calls into question the unreasoned verdicts of juries as an unreasoned verdict exposes defendants to being convicted for the wrong reasons. Although the ECtHR has accepted that it is possible to understand the verdict through the direction given by the judge prior to the jury's deliberation and verdict¹⁵, it is questionable whether a logical reconstruction of the reasons for the jury's decision gives an understanding of what the jury's true reasons were (Jackson, 2016; Ferrer Beltrán, 2021, p. 49). A further concern lies in the jury's power to bring in a nullification verdict that effectively disregards proven material facts that mandate a verdict of guilt in law. At one point Summers (2022b, p. 265) refers to the obligation on the State to ensure that an individual is not exposed to a greater risk of being wrongly convicted or punished than that imposed on other individuals. But given the equality demands of the rule of law, it may also be argued that the State has an obligation to ensure that an individual is not exposed to a greater risk of being *rightly* convicted or punished than other defendants might be exposed to. Although the jury's power to acquit legally guilty defendants is seen as advantageous to defendants, it also exposes them to the risk of unequal treatment as it is difficult to predict whether juries chosen at random will exercise this power.

Another question is what implications Summers' rule of law account has for the vast majority of defendants who plead guilty in common law systems and are not exposed to any trial at all. Concerns have been raised in the literature as whether guilty pleas can be truly consensual given the pressures on defendants to plead within a case management environment¹⁶. But even assuming they pass muster with a dignitarian account of the trial which upholds an individual's dignity and autonomy, questions arise as to whether they pass muster with the participatory and epistemic requirements demanded by a rule of law account. Pleas are frequently made without defendants being provided with full disclosure of the evidence that has been generated by the criminal investigation and without the opportunity to confront those who have made allegations against them (Jackson and Weigend, 2021). Pleas are

¹⁴ Elsewhere, however, she has considered the relationship between fairness and different procedural forms. See Summers (2022a).

¹⁵ *Taxquet v Belgium* (2010).

¹⁶ See *e. g.*, McConville and Marsh (2014); Hodgson (2020, p. 16).

then accepted without a full evaluation by the court of the probative value of all this evidence and without reasons given to the defendant and the public at large as to why they are guilty.

This is not to say that defendants should be required to undergo a trial in order to satisfy the requirements of the type of process demanded of the rule of law account. The COVID emergency has brought home the potential for using video-technology to capture the taking of evidence outside the courtroom and there is no reason why this should not be used more widely for taking evidence before trial, including pre-recording cross-examination before trial. These could be overseen by a pretrial judge who would be responsible for preparing a judgment based on the pretrial evidence and proposing a sentence that could form the basis of any plea that a defendant might subsequently make (Jackson and Weigend, 2021). Although there would likely be resistance to such an approach within a common law culture where the trial is considered the apex of the criminal justice process, there would be many epistemic and fairness benefits to front-loading the taking of testimony in this way (not least the benefit of enabling evidence to be taken and tested at a time when events were much fresher in witnesses' minds) and the preparation of a written judgment would satisfy the rule of law demand for a reasoned judgment. Indeed it could be argued that the metamorphosis of the pretrial process into a fair, rights-oriented procedure with broad participation options for the defence culminating in a pretrial judgment satisfies the requirements of the kind of rule of law account argued for by Summers just as well, if not better, than any subsequent trial, making any such trial redundant (Jackson and Weigend, 2021, p. 292). Defendants who rejected such a judgment could still, of course, be given their day in court, with all the problems it has been argued that this entails to a rule of law approach if trial is by jury. But at least they would have been given the benefit of a rule of law-based procedure before their trial and any risk they take to have their fate decided by the jury would then lie in their own hands.

BIBLIOGRAPHY

- Bingham, T. (2010). *The Rule of Law*. Penguin.
- Bottoms, A. and Tankebe, J. (2012). Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice. *Journal of Criminal Law and Criminology*, 102(1), 119-170.
- Dennis, I. (2003). Fair Trials and Safe Convictions. *Current Legal Problems*, 56(1), 211-237.
- Duff, A., Farmer, L., Marshall, S. and Tadros, V. (2007). *The Trial on Trial* (Volume 3: Towards a Normative Theory of the Trial). Hart Publishing.
- Ferrer Beltrán, J. (2021). Proven Facts, Beliefs and Reasoned Verdicts. In C. Dahlman, A. Stein and G. Tuzet (Eds.), *Philosophical Foundations of Evidence Law*. Oxford University Press.
- Frank, J. (1949). *Courts on Trial: Myth and Reality in American Justice*. Princeton University Press.
- Gettier, E. L. (2006). Is Justified True Belief Knowledge? *Analysis*, 23, 121-123.
- Greenfield, N. (2022, June 27). Shinn v Martinez Ramirez: Making a Mockery of the Right to Effective Assistance of Counsel. *Oxford Human Rights Hub*. <https://ohrh.law.ox.ac.uk/shinn-v-martinez-ramirez-making-a-mockery-of-the-right-to-effective-assistance-of-counsel/>

- Ho, H. L. (2021). Evidence and Truth. In C. Dahlman, A. Stein and G. Tuzet (Eds.), *Philosophical Foundations of Evidence Law*. Oxford University Press.
- Hodgson, J. (2020). *The Metamorphosis of Criminal Justice*. Oxford University Press.
- Jacobson, J. and Cooper, P. (Eds.) (2020). *Participation in Courts and Tribunals*. Bristol University Press.
- Jackson, J. D. (2016). Unbecoming Jurors and Unreasoned Verdicts: Realising Integrity in the Jury Room. In J. Hunter, P. Roberts, S. N. M. Young and D. Dixon (Eds.), *The Integrity of Criminal Process*. Hart.
- Jackson, J. D. (2019). Common Law Evidence and the Common Law of Human Rights: Towards a Harmonic Convergence. *William & Mary Bill of Rights Journal*, 27(3), 689-715.
- Jackson, J. D. (2021). Protecting the Right to a Fair Trial in an Era of Criminal Justice Transformation. In B. Dickson and C. McCormick (Eds.), *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore*. Bloomsbury Publishing.
- Jackson, J. D. and Roberts, P. (2019). Beyond Common Law Evidence: Reimagining, and Reinvigorating, Evidence Law as Forensic Science. In D. K. Brown, J. I. Turner and B. Weisser (Eds.), *The Oxford Handbook of Criminal Process*. Oxford University Press.
- Jackson, J. D. and Summers, S. J. (2012). *The Internationalisation of Criminal Evidence*. Cambridge University Press.
- Jackson, J. D. and Weigend, T. (2021). Witness Evidence in Pre-Trial and Trial Procedure. In K. Ambos, A. Duff, A. Heinze, J. Roberts and T. Weigend (Eds.), *Core Concepts in Criminal Law and Criminal Justice* (Volume II). Cambridge University Press.
- Levanon, L. (2019). Statistical Evidence, Assertions and Responsibility. *Modern Law Review*, 82(2), 269-292.
- McConville, M. and Marsh, L. (2014). *Criminal Judges on Trial: Legitimacy, Courts and State-Induced Guilty Pleas in Britain*. Edward Elgar.
- Owusu-Bempah, A. (2017). *Defendant Participation in the Criminal Process*. Routledge.
- Pardo, M. S. (2010). The Gettier Problem and Legal Proofs. *Legal Theory*, 16, 37-57.
- Roberts, P. (2014). Introduction. In P. Roberts (Ed.), *Theoretical Foundations of Criminal Trial Procedure*. Ashgate.
- Summers, S. (2022a). Trials and Punishments in the Rule of Law: The Influence of the ECHR on Criminal Law and Process. *ZSR/RDS*, 141(2), 275-354.
- Summers, S. (2022b). The Epistemic Ambitions of the Criminal Trial. *Quaestio Facti: International Journal of Legal Reasoning*, 4(1), 249-271.
- Twining, W. (2006). *Rethinking Evidence: Exploratory Essays* (2nd ed.). Cambridge University Press.
- Legislation
- Al-Khawaja and Tahery v UK [GC] nos 26766/05 and 22228/06, 15 December 2011.
- Beuze v Belgium [GC] no. 71409/10, 9 September 2018.
- Ibrahim and others v UK [GC] nos 50541/08, 50571/08, 50573/08, 40351/09, 13 September 2016.
- ICTY Statute. Art 21.1.
- ICTR Statute. Art 20.1.
- ICC Statute. Art 67.
- Shinn v Ramirez, 596 US ____ (2022).
- R v Brown and others [2012] NICA 14.
- R v King (2000) 2 Cr App R 391, 402.
- T v R [2022] EWCA Crim 108 [219](e).
- Taxquet v Belgium [GC] no. 926/05, 16 November 2010.