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There clearly is a case to answer for Lord Clarke

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THE World's End murder trial collapsed on 10 September, following Lord Clarke's decision that there was "no case to answer" because the evidence was "insufficient in law". The unexpected ruling produced a shocked public response - hardly surprising, considering the circumstantial evidence put before the court, the evidence that the accused had sex with the murder victims after they left the pub and within hours of the finding of their naked, murdered bodies, and the realisation that other forensic evidence judged important by the police was not led by the prosecution. Matters were made worse when the analogous criminal record of Angus Sinclair was revealed.
There were criticisms of the judge, the Crown Office and the prosecutor. There were calls for new laws to prevent repetition of what the public thought blatant injustice.

Confidence in the justice system is of the greatest importance. When it is shaken so dramatically, everyone involved needs to think carefully about what needs to be done. Should a judge have the power to deny the jury the right to draw the inference of guilt from such powerful circumstantial evidence? Was the judge right to refer to the test of "reasonable doubt", a test which most lawyers believe does not apply to a "no case to answer" submission? Should it be left to a single judge to take such a momentous decision? Should the court be told of the accused's history of sexual, violent crime? Should the Crown have a right to appeal the judge's ruling if they conclude that he got it wrong? Behind all other questions lies the basic one: did the judge err in denying the jury the chance to decide the case?

Before 1980, "no case to answer" did not exist: a judge could not take a case from the jury on the ground of "insufficient evidence" until all evidence had been heard. When this new procedure was introduced by Parliament in 1980, Lord Justice General Emslie said it was "entirely novel to our accustomed and well-tried procedure", pointing out that it was borrowed from England. Debating the Bill in the House of Lords, I expressed my disquiet. It even created an extra hurdle that did not exist in England because, unlike England, Scotland has a rule requiring corroboration in all criminal cases - so "insufficiency" of evidence means something different.

One unseen result is that prosecutors have to drop cases because they fear they may not be able to jump this hurdle. So this procedure, allied with an accused's right to silence, enables guilty men to escape justice every day of the week. I believe we should revert to our "well-tried" procedure, at least until we reconsider the rule, dating from the days when suspects were tortured, giving an accused the right to remain silent, however powerful the evidence against him.
In most cases, a judge has little difficulty in deciding the "sufficiency" test. But in a narrow, difficult case he has the right to call in two colleagues. This is seldom done unless the question is a purely legal one, and it is less appropriate when the issue requires a grasp of the whole evidence, but that is not an insuperable problem, given the instantaneous recording of all the evidence.
In a case such as this, where the evidence clearly places the accused with a victim in the hours before her murder, having taken her in his car and had sex with her shortly before she was strangled with her own tights, where there is no evidence of any stranger being involved, no-one could have criticised the judge if he had openly consulted other judges to test his own reading of the situation. The issue as to what inferences a jury might legitimately draw from a mix of direct and circumstantial evidence is never easy.

Judges make mistakes: that is why we have vigorous and busy appeal courts. A judge's ruling against the Crown on the "no case to answer" plea ought to be appealable. The accused can appeal against it: and either side can appeal in minor cases prosecuted in the lower courts. There

is no time problem: I know of cases where a judge's procedural decision against the Crown in a High Court jury trial has been appealed, and overturned, within 48 hours.

Did this trial judge get it wrong? The reasoning that he gave in open court is careful, thorough and coherent. The Lord Advocate, in a comprehensive, powerful and convincing statement to Parliament, has nevertheless argued strongly that he was mistaken. The issue between them should not be left in such an inconclusive state, especially as the judge has no right of reply. The Lord Advocate can still refer this case to the Appeal Court for a conclusive ruling on the issue, using a "Lord Advocate's Reference". Though the acquittal would stand even if the Crown won the argument, a Reference ought to be made. That would settle the well-publicised differences between the Lord Advocate and the judge, and enable the Appeal Court to give guidance on the extremely important interplay between direct and circumstantial evidence in a case where the victim is dead, the accused is silent, and the rule requiring corroboration before the end of the case can so readily wreak injustice.

I disagree with those who suggest that, in her parliamentary statement, the Lord Advocate should not have said the judge was wrong. Public outrage in this case demanded the Lord Advocate explain the Crown's position publicly, even if the explanation disclosed disagreement with the judge's legal ruling. If it had to be done, it had to be done fully and honestly. It was. Nor is it unusual: every time the Crown announces an appeal against a judge's ruling (for example, regarding unduly lenient sentences) it amounts to a public assertion that the judge erred.

Judges should not be criticised unfairly. But fair and reasoned criticism is perfectly justified, indeed necessary, in a democracy. The best, indeed the only, way to evaluate the criticism that the judge took too narrow a view of the evidence is for the Lord Advocate to take a Reference to the Appeal Court now. That would enable senior judges to deliver a judgment potentially of immense value to those who have to address possible reforms of the criminal trial system. The victims of these appalling crimes surely deserve no less.