

# Overtaking of trader verdicts poses questions for prosecutions

From the Post Office scandal to the wrongful convictions of Andrew Malkinson and Peter Sullivan, the UK's criminal justice system has recently grappled with multiple miscarriages of justice.

Last week, the Supreme Court [overturned the convictions](#) of two traders, Tom Hayes and Carlo Palombo, for fraud over the alleged manipulation of Libor and Euribor. Other convictions, for the same conduct, are now likely to be quashed.

Unlike other miscarriages of justice, Hayes and Palombo were not wrongly convicted because of missing or misleading evidence. They were criminalised because the Serious Fraud Office and the crown court got the law wrong — and the Court of Appeal repeatedly failed to correct it.

As the Supreme Court's judgment begins: "The history of these two cases raises concerns about the effectiveness of the criminal appeal system in England and Wales in confronting legal error."

The "legal error" in question concerned the fundamental difference between the roles of judge and jury: judges decide the law and juries decide the facts. However, in Hayes's and Palombo's trials, this did not happen. Instead, judges instructed jurors that requests to consider trading positions when estimating rates rendered those estimates, as a matter of law, automatically false. This, the Supreme Court said, was an "obvious mistake".

The Court of Appeal upheld that wrong approach on five occasions. Until last year, it prevented any of those cases reaching the Supreme Court — unlike civil cases, criminal appeals can only reach the Supreme Court if the Court of Appeal allows it.

The Supreme Court's judgment corrects this error, and underlines the importance of juries being left to decide all factual questions. It is also a timely intervention, for two reasons.

First, the Law Commission is considering reform of the criminal appeals process. The case of Hayes and Palombo highlights the need for reform of the architecture of criminal appeals itself: starting with removing the Court of Appeal's ability to prevent criminal appeals reaching the Supreme Court.

Secondly, Sir Brian Leveson's recent review of the criminal courts recommended that "serious and complex fraud cases" should be tried by judges sitting alone. These cases were about whether individuals agreed, dishonestly, to lie when submitting estimates to a trade organisation. Those are questions juries are well placed to decide.

A jury remains a valuable check on executive power. But whatever the role of juries, these cases also highlight that a fair trial requires fair prosecutors and a robustly independent judiciary.

Hayes and Palombo are now innocent men again. But their cases leave uncomfortable questions for the criminal justice system to answer.

**Ben Rose is a partner at law firm Hickman & Rose; he represented Carlo Palombo in his appeal and is representing Jay Merchant, Jonathan Mathew, Philippe Moryoussef and Christian Bittar, who intend to appeal their convictions**