'Amirault': Judicial Tension Over 'Injustice'

VIEWPOINT

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Is the Supreme Judicial Court moving — some would say regressively — toward quelling a very public revolt against a miscarriage of justice by some of the commonwealth's most seasoned Superior Court judges?

As the tenures of four SJC justices end, the health of the Massachusetts criminal justice system and of the trial court/appellate court relationship may well turn on the SJC's imminent decision in the long-running and highly visible child sex abuse case involving the Amirault family's Fells Acres Day School.

In recent cases, the justices have been struggling over a fundamental morally freighted legal question: When does the law recognize that "a miscarriage of justice" must be rectified? This in turn implicates the larger question of how our system of criminal laws should be described – as a "legal" system, or as a "justice" system.

In the past several years, the SJC has seen Massachusetts (and other) convicts exonerated by DNA technology and revelations of prosecutorial misconduct, often long after erroneous jury verdicts were affirmed on direct appeal.

Illinois has seen half of its death row convicts exonerated by scientific evidence unavailable at the time of trial and appeal. In some instances, proof of police and prosecutorial misconduct has emerged belatedly. These events underscore that the conviction of the innocent certainly qualifies as "a miscarriage of justice."

Is it enough, however, in a civilized society, for the law to recognize a miscarriage *only* when the post-conviction habeas court is satisfied to a scientific certainty, before a re-trial, that the convict is clearly innocent?

Or, should the law recognize a miscarriage when the court concludes simply that guilt has not been fairly adjudicated and that a new jury, presented with different evidence or jury instructions, might well acquit?

The latter standard offers a greater degree of assurance against the conviction of the innocent. Not every actually innocent convict can prove his innocence without a new trial. The cases in which DNA technology can be used to exonerate the innocent are limited to those in which certain types of physical evidence have been preserved. There is no reason to believe that the rate of wrongful convictions is any lower in cases that do not involve such evidence.

Should a gross failure of judicial, prosecutorial or jury integrity in the conduct of a trial warrant relief from a conviction without a threshold showing of actual innocence?

Are all errors in the admission and exclusion of evidence or in jury instructions insufficient, no matter how egregious, to establish a miscarriage of justice if the court cannot be satisfied to a scientific certainty, prior to a re-trial, that the convict is actually innocent?

Resolution of these questions ultimately implicates issues of moral conscience concerning the omnipresent vulnerability to error of human judgments.

DNA evidence cannot exonerate or convict in the *Amirault* case. However, the Superior Court findings under SJC review in the Fells Acres case have concluded, based on a different kind of scientific evidence that was unavailable at the time of trial, that the child accusers' testimony was rendered completely unreliable by the commonwealth's (and the children's parents') grossly unfair and suggestive interviewing and investigative techniques.

Notwithstanding the SJC's rejection of the defendants' two prior appeals, the Superior Court ordered a new trial because the "newly discovered evidence" proves that "justice was not done" and also because the error created "a substantial risk of a miscarriage of justice."

The SJC's interpretation in the Fells Acres case of these three quoted phrases will determine the degree to which Massachusetts courts will remain open to consideration of the merits of collateral attacks even as to convicts' claims that are raised long after convictions have been declared final.

Legacy Of Sacco And Vanzetti

As a result of continuing controversy surrounding the SJC's insistence that it had power to conduct only a very narrow review of the Sacco-Vanzetti convictions, including belatedly uncovered evidence that others had committed the 1920 payroll robbery and murder, the SJC was granted very broad power by a 1939 statute, G.L.c. 278, §33E, to review the entire record for error, re-weigh the evidence and grant relief from unfairly obtained convictions in *capital* cases.

When the Massachusetts death penalty statute became unenforceable due to its non-compliance with U.S. Supreme Court standards in the 1960s, the SJC continued to conduct the same painstakingly thorough §33E review in first-degree murder cases, even though it had become a non-capital offense.

Further, the SJC decided in *Commonwealth v. Freeman*, 352 Mass. 556 (1967), that it would consider any error that created a "substantial risk of a miscarriage of justice." Under *Freeman*, the merits of certain claims of error could be reviewed and, if warranted, remedied, notwithstanding the absence of a contemporaneous objection at trial.

In this respect, *Freeman* made all criminal convictions subject to a similar level of scrutiny as murder convictions, except that in first-degree murder cases the SJC has the obligation sua sponte to comb the trial record for important errors. In the eyes of some, *Freeman* stood for the goal of *fairness* in the adjudicatory process and *justice* in the result, not merely *finality*.

In recent years, the SJC appeared to have begun whittling away at *Freeman* and at the Superior Court's power to grant new trials under Rule 30. It started to discourage Superior Court judges from even reaching the merits of prisoners' new trial motions after the initial appeal had failed. *Commonwealth v. Curtis*, 417 Mass. 619 (1993).

The trend culminated in the court's controversial 6-1 ruling (authored by Justice Charles Fried, with only Justice Francis O'Connor in dissent) vacating the grant of a new trial ordered by Superior Court Judge Robert Barton, a seasoned, highly respected, and by reputation tough "law and order" trial judge, who had ruled that a confrontation clause violation had deprived the defendants of a fair trial even though there had been no objection at trial to the constitutional violation. *Commonwealth v. Amirault*, 424 Mass. 618 (1997).

These and other SJC rulings appeared to be moving toward the federal model which values, after a prisoner's initial appeal has been rejected, draconian consequences for non-compliance with procedural rules and elevates "finality" over fairness and a just result.

The U.S. Supreme Court has stripped state prisoners of virtually any meaningful federal review of the constitutionality of their incarceration after the failure of their state appeal.

The federal courts are commanded to be deaf to even a meritorious claim of constitutional error unless "the state court's rejection of the constitutional challenge was so clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist." *Butler v. McKellar*, 494 U.S. 407, 417-18 (1990).

The deafened federal judiciary means that, for all practical purposes, the SJC is the Massachusetts convict's court of last resort.

For whatever reason, resistance to this retrograde trend of aping the federal "finality trumps justice" model has seeped from the Superior Court and has appeared very recently within the SJC.

In a case argued a few weeks before the most recent Fells Acres case, *Commonwealth v. Alphas*, 1999 WL 454640 (July 7, 1999), the controversy broke into the open. In the majority opinion authored by Justice Roderick Ireland, the court returned firmly to the *Freeman* doctrine. The opinion reached (and, it happened, rejected) the merits of the defendant's claims of error concerning the jury instructions even though there had been no defense objection at trial.

Justice Fried, although by then very close to his announced retirement date, wrote an unusually vehement concurring opinion, in which only Justice Lynch joined, protesting the court's unwillingness to deem the claim waived and lecturing his fellow justices that the *Alphas* ruling was a retreat from the court's *Amirault* "finality" ruling.

The imminent SJC ruling in the latest case in the Amirault wars, the case of Cheryl Amirault LeFave (the late Violet Amirault's daughter and co-defendant), will tell us whether Justice Fried was correct in concluding in *Alphas* that the SJC experiment in retreating from the *Freeman* "miscarriage of justice" model was as short-lived as Justice Fried's four-year tenure on the court.

As far as we can determine, the *Amirault* case is unique in the history of Massachusetts criminal justice. Three experienced Superior Court judges have been unable to reconcile the jury's verdict and eight- to 20-year sentences with both the law and their seasoned judicial consciences. Each of the three ordered the judgments to be either modified or vacated for different reasons.

The first two judges' rulings were reversed by the SJC and the original judgment reinstated each time. We are soon to learn whether the third Superior Court judge's effort to rectify the manifestly unjust outcome will be reversed yet again.

Superior Court Judge John Paul Sullivan presided at the 1987 jury trial of Violet Amirault and Cheryl Amirault LeFave. Both were convicted, as was Violet's son,

■ continued on PAGE 34

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OVER

'Amirault': Judicial Tension Over 'Injustice'

■ continued from PAGE 11

Gerald, who was tried separately, of sexually abusing in 1985 several pre-school-aged children who attended the Amiraults' nursery school.

Upon learning that the defendants had been denied parole after serving two-thirds of the eight-year minimum term of their sentences, and even though the Amiraults' initial appeal had been rejected by the SJC in *Commonwealth v. LeFave*, 407 Mass. 927 (1990), and his conduct of the trial had been upheld in all respects, Judge Sullivan allowed their motion to revise and revoke the sentences so as to free them.

Judge Sullivan reduced the sentences to 64 months, saying that he had calibrated the eight- to 20-year sentence to his expectation that the two women would be paroled after they had served two-thirds of the eight-year minimum term, which was then the parole eligibility period for sex crime convicts.

In *Commonwealth v. Amirault*, 415 Mass. 112 (1993), the SJC reinstated the eight- to 20-year sentences, holding that Judge Sullivan could not re-shape the sentences to conform to his expectations concerning parole because, the high court ruled, the Superior Court would otherwise be usurping and overriding the executive branch's exclusive power over parole decisions.

This was the first of two post-conviction decisions in which the SJC thwarted, by procedural means, a Superior Court judge's conscientious scruples about some aspect of the troublesome case.

After reflection, judges sometimes approach a perceived miscarriage of justice somewhat obliquely, as in the case of Judge Sullivan's sentence reduction. The Rule 29 power to reduce the sentence served as an infrequently used safety valve for sentencing judges to use when they had qualms about a case's outcome.

After the SJC reinstated their sentences, the Amiraults filed their first new trial motion, based on the claim that the seating arrangements of the child witnesses at trial violated their constitutional right to confront their accusers.

Judge Sullivan having retired, Judge Robert A. Barton heard the motion and allowed it in August 1995. He ordered both women released from prison pending the commonwealth's appeal. Judge Barton granted a new trial on the ground that the defendants had been deprived of the right to confront the child-witnesses who testified while seated in a way that allowed them to avoid making direct eye-contact with the accused.

Judge Barton explicitly linked this apparently "technical" right with the age-old, constitutionally recognized understanding that it is easier for an accuser to bear false witness against the accused if he need not do so face-to-face, eye-to-eye.

In one of its most controversial decisions ever, the SJC, in a long and tortured opinion written by Associate Justice Fried, vacated Judge Barton's new trial order. *Commonwealth v. Amirault*, 424 Mass. 618 (1997).

The first overt sign of tension brewing over the *Amirault* case between Superior Court judges and the appellate court emerged at this point. Upon learning that his order granting a new trial on confrontation grounds had been reversed, Judge Barton abruptly recused himself from further proceedings, stating on the record: "I believe I am right. These women did not receive a fair trial and justice was not done."

VIEWPOINT

These were extraordinarily strong words from a just-reversed Superior Court judge. Judge Barton's words were particularly powerful because he is widely known for having spent his long judicial career presiding almost exclusively in criminal cases. He has built a reputation for being the opposite of a "bleeding heart" judge — very "tough on crime" at sentencing and far from easily convinced by any convict's plea that he or she was not fairly convicted.

The ground for the SJC's action — that at some point the public is entitled to "finality" — provoked Judge Barton's extraordinary and visible recusal in protest. He signaled his unwillingness to personally accept and implement the injustice that the remand mandated. Judge Barton's loud on-the-record disagreement with the SJC about the fairness of the outcome left no one in doubt as to the message he intended.

Judge Barton was not the lone Superior Court judge to publicly protest the SJC's ruling. At the time he ordered the women freed by attempting to reduce their eight- to 20-year sentences, Judge Sullivan gave no indication that he had developed conscientious scruples concerning not only the punishment but also the verdict.

Judge Sullivan's ostensible reason for attempting to free the women was that they would otherwise suffer more punishment than he had intended when he had sentenced. After Judge Barton likewise was reversed by the SJC, Judge Sullivan made it clear that the sentence reduction was more than an attempt to ameliorate an overly harsh sentence.

By then-retired Judge Sullivan allowed himself to be quoted in The Boston Herald (April 27, 1997), protesting Justice Fried's *Amirault* "finality" opinion that denied a new trial on procedural grounds. Said the judge who presided over the trial that the SJC had *twice* declared to be fair:

"Personally, I think there has to be a new trial. There has been a well-established principle of constitutional law that when a defendant's rights have been deprived, the fact there was no objection from his defense counsel should not allow it to remain in place."

And in an interview with Dorothy Rabinowitz of the Wall Street Journal, Judge Sullivan, commenting on his belated realization that the case had been tried in an atmosphere of panic, pointed out that "there were no acquittals in cases of this kind — involving children — for years." Nor did he have to add that such prosecutions have not recurred.

A widely respected jurist's public repudiation of a jury verdict returned to him as presiding judge does not have the force of law. However, when an experienced Superior Court judge publicly states, apparently from conscientious scruples, that the trial over which he presided deprived the defendants of a fair trial and that justice miscarried, the SJC should recognize such an extraordinary, if not unique, judicial confession of error as a strong signal that justice will be imperiled if the trial judge's message is not heeded.

Judge Sullivan's second thoughts were unusual but not unprecedented. After he retired, U.S. Supreme Court Justice Lewis Powell expressed with evidently anguished regret his votes to uphold statutes that criminalized private, consensual sodomy between consenting adults, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and to reject challenges to the death penalty based on overwhelming statistical evidence that the penalty was being applied in racist fashion, in *McCleskey v. Zant*, 499 U.S. 467 (1991).

Justice Harry Blackmun's dissenting opinion in *Herrera v. Collins*, 510 U.S. 1141, 1130 (1994), expressed his revulsion at having repeatedly voted to uphold death sentences against meritorious attack. "As a member of the United States Court of Appeals, I voted to enforce the death penalty, even as I stated that I doubted its moral, social and constitutional legitimacy ... From this day forward, I no longer shall tinker with the machinery of death."

After the SJC reversed Judge Barton's grant of a new trial, Cheryl Amirault LeFave in April 1997 filed her second motion for new trial, this time based on the ineffective assistance of appellate counsel for failing to raise the confrontation issue on direct appeal.

Upon Judge Barton's recusal, the case was assigned to Judge Isaac Borenstein, who allowed that motion and continued LeFave on bail pending the commonwealth's appeal.

This appeal was delayed, however, when LeFave filed yet a third new trial motion in October 1997, this time based on grounds of newly discovered evidence.

The SJC allowed the defendant's request that the commonwealth's appeal of Judge Borenstein's order of a new trial (based on ineffective assistance of appellate counsel) be deferred until the third new trial motion was decided.

The third new trial motion went to the heart of the problem that caused the *Amirault/LeFave* cases to become nationally known.

The motion charged that, according to a body of new and independently verified scientific studies, the interviewing techniques used to get the young alleged victims to testify to sensationally bizarre sexual abuse had produced false and completely unreliable accusations. The accusing children had been pervasively and repeatedly subjected to these techniques by parents, police and social workers.

Our firm experienced this phenomenon in representing Charles and Thea Stewart, married parents of four children, whose wrongful convictions for sexual abuse of several neighborhood children were obtained by the same Child Abuse Unit of the Middlesex County District Attorney's Office that prosecuted the *Amirault* case. The child accusers' testimony followed the same pattern of outlandishness, generated by the same grotesquely suggestive and unfair interviewing techniques.

After the Stewarts' conviction was reversed, *Commonwealth v. Stewart*, 34 Mass. App. Ct. 1115 (1993), the prosecutor who dismissed the case rather than retry it acknowledged that the interviewing techniques used by the Child Abuse Unit to build the *Stewart* and the *Amirault* cases had been abandoned.

Judge Borenstein heard the defendant's scientific experts present "newly discovered evidence" in the form of recently developed scientific knowledge of the psychological mechanisms by which the interrogative techniques produced false testimony by young children about sex. The commonwealth produced no expert witness; hence the defense evidence went unrebutted.

In his 140-page opinion, Judge Borenstein found that the four child-witnesses who testified to the bizarre allegations had been subjected to interviews that were grossly improper, unfair and suggestive. The new scientific evidence showed that these interview techniques would indeed cause children to report sexual events that never occurred.

Judge Borenstein concluded that the children's testimony was inherently unreliable and that LeFave's trial was unfair. "There is more than a substantial risk that the defendant was unjustly convicted," he wrote.

Will the SJC's seven members, several of whom have had very little trial experience (particularly in criminal child abuse cases), recognize and uphold the conscientiously held scruples of seasoned criminal trial judges — judges Sullivan, Barton and Borenstein — who separately concluded that "justice was not done"?

Trial Court judges, after all, are universally acknowledged to be better positioned, through their daily exposure to a far larger number of cases than come before appellate courts, to recognize factors which are present to such an unusual degree that a miscarriage of justice is likely.

In observing years of the daily flow of prosecutions, trial judges come to recognize the patterns of evidence and range of verdicts that recur in the "heartland" of cases of various kinds.

When the evidence and the jury verdict in a case (such as the *Amirault* case) stick out in ways and to a degree that deviate radically from the wide range of outcomes that experienced trial judges find acceptable even if not always agreeable, their efforts to rectify the injustice should be taken seriously.

We shall soon learn whether the SJC will show deference to the extraordinary and outraged reaction expressed by three of the Superior Court's most experienced criminal trial judges against the Fells Acres judgment. MLW