

# Fair trial for all

By Tom Molomby SC

Over the past year, the *Sydney Morning Herald* has published several articles by Paul Sheehan attacking the criminal justice system. Their tone can be gauged from the following excerpts:

Packaged in silk and horsehair, two judges, Keith Mason and James Wood, managed, at a single stroke, to damage the public's faith in the judiciary, impugn the professionalism of the crown prosecutor's office and psychologically brutalise a young woman who had already been brutalised by criminals.

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Mason and Wood ... presented a judgment based on nothing more than a stew of speculation cooked on a flame of insularity. Their bald finding that there was a miscarriage of justice is saturated with the subtext that ordinary people, jurors, are malleable drones.

'The contempt is mutual, your honour', 8 March 2004, p.12.

What the public saw ... was a rape victim in tears, more road kill in the legal system's fetish about appearances.

'Scales fall when a jury isn't trusted', 15 March 2004, p.17.

Our Frankenstein criminal justice system is engaged in a cultural war with the society it has failed.

'Cold-blooded law heats up cultural war', 7 February 2005, p.15.

Other articles (there may be more) in the *Sydney Morning Herald* were:

'Victims sacrificed to god of due process', 14 June 2004, p.17

'Ass of a law means the rights of rapists override those of their victims', 6 September 2004, p.13.

'The law adjourns and rapists win', 29 November 2004, p.15

After the most recent attack, I sent an article to the editor of the *Herald*, with a covering letter which said:

You've given a large amount of space over many months to attacks on the criminal justice system by Paul Sheehan.

It seems to me time for another view. I enclose an article.

My article was not published. Here it is:

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A friend of mine used to say that the health of the criminal justice system required that every year a prominent politician and a prominent policeman be put on trial for a serious offence – and acquitted. To that should be added a prominent journalist.

It is a mystery that the *Sydney Morning Herald*, a newspaper which often has a sense of social responsibility, should through Paul Sheehan be so set on destroying public confidence in the criminal justice system. 'Cold blooded law heats up cultural war' (7 February 2005) is only one in a series of almost demented diatribes by Mr Sheehan against the system.

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Much of his criticism is motivated by the difficult, sometimes tragic, position of victims of crime, in particular serious sexual assaults. He highlights the trauma to them of delay and having to give evidence. All that is true.

He disregards, however, two fundamental points. First, the only proper test for a fair trial is how well it serves the innocent person wrongly accused. Second, in any true system of justice, the same standards apply to all. This means among other things that the guilty are tried according to the same standards as the innocent.

Just as there are ruthless and cynical people who commit crimes, there are on occasion ruthless and cynical people who make false allegations. Some victims do not tell the whole truth, and some who claim to be victims are not victims at all. Some are mistaken.

This produces another sort of victim: the innocent person who is interrogated, arrested, locked up, refused bail, tried and convicted (or any of these).

A little exposure to the criminal justice system alerts one to the fact that there are rather more people willing to make false allegations than one normally imagines. It is not easy to sort them out. Stereotypes do not hold; truth tellers are not always the ones with the forthright and sincere manner, and liars are not always shift. Sometimes the person telling the truth is one whose manner is the least convincing.

What this means is that there is no escape from the rigours of the trial system for the true victims, because that is the only way the false victims can be discovered.

Even then, they are not always exposed. In my own experience I can cite two people acquitted on appeal after being convicted on obviously false complaints. One had spent 14 months in gaol. There is no compensation at all for people wrongly accused.

These sorts of victims of the justice system have no voice. They do not know each other. They have no organisation to speak for them. Nearly always, they want to keep their misfortune quiet, because they can only lose from any publicity. The occasional exception, such as Lindy Chamberlain, has had so much publicity that more makes no difference.

Their lives are often shattered. After even a few months in gaol, jobs are lost, houses sold because mortgages can no longer be paid, families split up. I have seen all this. It can be inflicted on someone who is refused bail after being charged, and acquitted at the trial.

Victims of crime have a justifiable cause, and a number of beneficial changes, long overdue, have been made in their interests in recent years.

But some of the changes made in their name have seriously undermined the chance of a fair trial. Too often, so called reforms have been made in a knee jerk fashion in response to outbursts of shock jock criticism similar to Mr Sheehan's in all but his veneer of civil language.

There is one striking example in Mr Sheehan's favourite area of sex crimes.

There used to be a common complaint that victims of sexual assault were questioned about their sexual history generally. That was a justified complaint in many cases, though not in all. The sensible solution would have been to require trial judges to disallow such questions unless shown to be necessary in the particular case. Unfortunately the sledgehammer to crack a nut approach produced a rigid statutory amendment barring such questions except in very limited circumstances. This section was interpreted by the Court of Criminal Appeal in 1993 to exclude even questions designed to show that the witness had made previous false complaints of sexual assault against others. This cannot have been the intention of the section, but it was the result of the way it was drafted. Nevertheless, for the last 12 years the section has remained

unchanged. Who knows if there is anyone in gaol now because he was not allowed to prove that his accuser had made previous false complaints.

Restrictions on committal hearings have substantially reduced the chances of catching out the liar.

Progressive restrictions in bail laws mean that larger numbers of people spend months if not years in gaol before being acquitted.

The most recent 'reform' in this area by the guardians of liberty in Macquarie Street is to allow the evidence of a complainant from a first trial to be read from the transcript at a later trial. Test the sense and justice of this by imagining a trial in which all the evidence is dealt with this way. If that seems absurd, why is it any less so to deal with the most important witness that way. Not to speak of the conundrum if the reason for the second trial is the incompetence of the accused person's representative at the first.

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A major subject of Mr Sheehan's recent ire is the Court of Criminal Appeal's order for a retrial because two jurors made a private investigation of lighting at the scene of a crime where identification was a key issue.

It is practically impossible that the jurors were not influenced by what they saw. The defence had no chance to challenge the results of their investigation. Say, for example, the lighting had changed since the time of the attack?

Mr Sheehan attacks the retrial order because of its effect on the victim. So, do we demand a fair trial when there is no traumatised victim, but no fair trial when there is?

Mr Sheehan has yielded to the same impulse which has corrupted many crime investigations: this one looks guilty - fix up the evidence and fix up a confession and move on. The problem is that sometimes people who look very guilty are not, sometimes even the usual suspect did not do this one. The only protection for the innocent is a fair trial process for all.



Deaf mute Darryl Beamish, who served 15 years for the 1959 murder of heiress Jillian Brewer, pictured outside the Supreme Court in Perth, after his conviction was quashed. Photo: Ross Swanborough / News Image Library