

Samira Taghavi: Criminal defence lawyers - vilified yet vital



Samira Taghavi is a barrister and practice manager, based in Auckland. Photo / Dean Purcell

NZ Herald
By Samira Taghavi

OPINION

Last week, a very able and dedicated colleague, lawyer Nick Chisnall, appeared before the Supreme Court to successfully clear the name of wrongly-convicted "murderer" Alan Hall.

Hall served nearly 20 years in jail after police officers doctored and concealed evidence that pointed to Hall's innocence. As Chisnall told the Herald, "To me, it's an example of what is seldom proved; police altering evidence and the rules of disclosure to convict someone."

The final achievement of some justice took 30-plus years of fighting - much of it done by defence lawyers.

Putting aside the forging of witness statements by police, the case was, as said, apparently one of intentional non-disclosure of exculpatory evidence – that is evidence that points to the defendant's innocence – and evidence the police have a duty to disclose to defendants.

Readers will have already presumed that that sort of jailable criminality – on the part of police officers, no less – is hopefully rare.



Defence lawyer Nick Chisnall. Photo / Supplied via RNZ

However, criminal defence lawyers know they will frequently confront non-disclosed evidence of potential innocence because of an officially-tolerated repository of banal police and prosecutorial excuses.

But defence advocates also face a tangle of other "baked-in" systemic knots that seem almost designed to hog-tie officers of the court in extremely important work. That is if you agree that living in a free society is important.

Hall's case makes it apposite for me to seize the moment and explain why all intelligent citizens should see defence advocacy as I do; vital to the maintenance of societal rights and freedoms.

Explaining our function, the challenges we traverse and the principles which we fight for can only help.

It could happen to you

First, let's accept that most people reading this have never been charged with a crime. But very bad fortune may yet come your way.

The "crime" might be your fault, but it also might not. You thought, for instance, that your force was reasonable when a drunk in the pub attacked you and the police say that you hit him too hard.

A cyclist ran the red light and you were charged with injuring them (seemingly, the police default position in car-versus-bicycle accidents).



A moment in time can put an otherwise faultless motorist in the full glare of prosecution. Photo / NZ Police, File

A custody dispute suddenly raises a never-before-mentioned sexual allegation from your ex-wife – soon followed by a life-shattering criminal charge.

Or you calmly reclaimed materials for which the "purchaser" ultimately didn't pay and then find yourself charged with "theft".

In these and hundreds of other ways, citizens come before the courts, often for the first time. Once the huge machinery of the State has you in its crosshairs, the one pushing back for a fair outcome will be a defence lawyer.

I say "fair outcome" because most charges do not go to trial and thus do not result in a verdict. Yet there is still serious advocacy to be done.

Everyone deserves a fair outcome

Defendants often face multiple charges (even in traffic cases), only some of which are grounded in the evidence, so charge and plea negotiation is needed and then sentencing; the latter being a complicated area of law needing time and expertise.

Sentences in our system are tailored to the gravity of the particular offender's actual behaviour with specific discounts computed for mitigating matters.

Victim reparation needs to be organised, rehabilitative efforts advanced, restorative justice processes completed and then submissions written - all with defence lawyers impelling momentum.



Barrister Samira Taghavi in her Auckland office. Photo / Dean Purcell

Suitable sentences have to be fought for as tenaciously as with a full trial - even guilty people need fair outcomes.

As do innocent people.

It is not just the big names such as Alan Hall, Teina Pora, David Dougherty, Aaron Farmer, Arthur Allan Thomas, et al, who are wrongly accused.

It happens regularly, particularly to the poor and ill-educated and often for prosaic reasons you might expect; witnesses can be honestly wrong (or actually dishonest), investigations can be inadequate and prosecutorial impressions can be ill-founded.

Somebody has to look with a cynical eye at the State's case and probe the weaknesses.

Defence advocacy is an enormous amount of work and, while other professions are overworked too - hat tip to my surgeon sister – those professions don't tend to garner the antipathy that many seem to reserve for the defence bar.

Helping guilty people get acquitted

I have found that nearly all client outcomes are bought at a physical and emotional cost – and I mean (forgive me) - this lawyer.

I cannot recall the last time I finished work before midnight; didn't have to work on the weekend; or went to bed without thinking about my clients.

Police officers on the other hand, have a work week often of under 40 hours and generous amounts of paid leave and despite episodic Alan Hall-like exposures, a large reservoir of public esteem.

Conversely, repeated conversations outside work underline that my profession's lack of popularity rests on the (very wrong) misapprehension that my job is all about getting guilty people acquitted.

Even the legal system acts as though the reasonable needs of defence lawyers are not worth reasonable respect.

Counsel with specialised niches – one of mine is the intersection of immigration and criminal law – attract clients from across the country.

Frustratingly, our 58 district courts often choose their own idiosyncratic and contradictory ways of making a lawyer's life inefficient, stressful and exhausting, with officialdom routinely forgetting who the most frequent users of court services actually are – lawyers.

No priority is placed on the optimal use of lawyers' time and energy, with bureaucracy being allowed to strangle us.

For instance, clients often, pointlessly, appear in court several times as their matter wends its way through the system. Most of these appearances take a few minutes, yet the lawyer has to travel to court and await their turn (there is often no appointment system) sacrificing a significant chunk of the working day, as if in the pre-technological age, and it's why my working days end at midnight.



A Bible for swearing oath sits on a clipboard in the Auckland High Court. Photo / Michael Craig

In other industries, the cure for this carnage of wasted time would be obvious. Court appearances are just another flavour of meeting and CEOs looking after shareholder funds (as it should be with stakeholder time) would make Zoom meetings the default.

One, albeit unexpectedly positive, consequence of the Covid pandemic in 2020 was everyone appearing in court via video-link. The efficiency was liberating. Log in at the time slot, then keep going on something else 10 minutes later, without three hours of commuting, parking and waiting for other cases to be called.

We could have been doing that for the past decade. It remains to be seen whether these welcome improvements in procedure will totally dissolve when the pandemic resolves. Some judges are openly hostile to videoed court appearances, although a convincing reason is yet to be tabled as to why the old, pre-video, steam-age system should be resuscitated.

Working overtime for safer laws

Some lawyers go the extra mile and lobby - another big demand on time.

When bills come up before Parliament that could damage the rights of defendants, defence lawyers are best placed to understand the true scope of how the legislation might work in practice. Countless hours must be put into meeting politicians, attending select committees, engaging every relevant person who will listen.

A little over a decade ago, a serious push was made by government bureaucrats, with the assistance of sadly-naive parliamentarians, to universally remove the citizen's right to silence, one of the most basic rights an accused person has, one that forces the State to prove its case by acquiring sufficient evidence without coercing the defendant to assist the State.



Samira Taghavi. Photo / Dean Purcell

This disastrous Soviet-style provision was only cast out during the bill's passage through the House, after sustained pressure was brought by a hardcore of defence lawyers who wouldn't let it go.

More recently, we [confronted](#) the Labour/Green's Sexual Violence Bill provisions that the prosecution could use to exclude a defendant's relevant exculpatory evidence from his trial and could damage his right to silence.

The legislation would increase wrongful imprisonments, potentially leading to more Alan Hall-style injustices. Therefore, it had to be fought, despite the ultimate capitulation of all political parties in defending the presumption of innocence.

Why would anyone be a defence lawyer?

In my case, it wasn't for the pay - contracts, incorporations and conveyancing would be more lucrative. One obviously doesn't do it for the public's gratitude or esteem.

Simply put, defence work is a passion.

Having grown up in the Middle East, I know what life is like when there is no effective opposition to the power of the State. But disturbingly, the differences are sometimes merely geographical and in the harshness of sentences.

I have been in the death chamber during "judicial" hangings, witnessing necks broken. Honest police officers and proper evidential and procedural protections could have saved those lives – like the many years that such safeguards could have saved Hall.



Alan Hall spent a total of 19 years behind bars for a crime he never committed. Photo / Greg Bowker, File

Thematically, these tragedies share similar pathology.

People here habitually think that the rights that constrain the police and the often "benign" attitude of the State's officers all exist automatically.

Countries such as New Zealand are an oasis of decency by second and third-world standards but there is nothing automatic about countries, even advanced ones, respecting human rights.

Defence lawyers know that we have such rights only because the fight that upholds them, continues to be fought.

• Barrister Samira Taghavi is a member of the Auckland District Law Society Criminal Law Committee.