

# New Zealand barrister defends principle of presumption of innocence

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Michael Bott, a prominent Wellington barrister and civil rights lawyer, last month issued an important call for the defence of the presumption of innocence. In an op-ed piece in the *Dominion Post* on March 28, Bott noted that some New Zealand politicians had called for “radical reform” of the justice system to ensure that rape accusers are believed as a “starting point” of any police investigation.

In 2014, the then-opposition Labour Party advocated reversing the onus of proof in rape cases to do away with the long-standing legal principle, protected in the NZ Bill of Rights Act, that an accused person is presumed innocent until proven guilty. Spokesman Andrew Little, now the Minister of Justice, proposed that in cases where the prosecution proved a sexual encounter occurred, it would be deemed rape unless the defendant could prove it was consensual.

Bott noted that with the promotion of the #MeToo campaign, “the cry ‘believe the victim’ has become further popularised.” He wrote: “To presume that all sexual assault complainants tell the truth imposes a presumption of guilt on defendants.” The reversal of the presumption of innocence “would encourage police to cut corners rather than dispassionately and thoroughly investigate complaints,” he said.

“I have great sympathy for people who suffer sexual abuse,” Bott explained, but an automatic ‘believe the victim’ starting point in a prosecution “can and must have no place in criminal trials.” Calls to radically change laws, he warned, “protect no one and increase the risk of people who are innocent being both charged and, worse, possibly convicted.”

Bott cited two cases in which he had been involved that highlighted the risk of innocent people being wrongly convicted.

In the first, Bott successfully defended a male who

faced several counts of rape relating to allegations made by his former partner when they were in a relationship, six years previously. The complaints were made in 2015 within days of the male applying to the Family Court for full custody of the children from the relationship. “This scenario,” Bott wrote, “is not uncommon.”

The complainant made an extensive four-hour evidential video interview detailing severe sexual and physical violence that included her being chased around a property with a samurai sword. When the case proceeded to trial, it became apparent that police had failed to attend the addresses where the alleged incidents occurred in order to corroborate her complaints.

The woman also identified a Wellington hotel where she claimed to have sought refuge and the male arrived and threatened her. However, no attempt was made to obtain a copy of the hotel register to confirm she was even there. Her allegations of sexual violence were contradicted when a former friend testified that the complainant introduced the male to her as a “great catch,” just weeks after they had broken up.

The second case also involved serious flaws in police procedures. Bott’s female client was charged with sexual offending against the 14-year-old son of her partner (also a woman). The client had fallen asleep mildly intoxicated on a couch and was woken by the 14-year-old raping her.

After a week of struggling with what to do, she told her partner and it was agreed that she should make a complaint. Police interviewed the boy, his mother, some other guests and the boy’s friends. The boy agreed that sex occurred but claimed it was consensual.

The police declared they believed the boy’s version of events and Bott’s client would be charged with

having sex with an under-aged person. Further, she had told lies to have the teenager arrested, and therefore would also be charged with conspiring to make a false accusation.

At trial, flaws emerged in the evidence. Extensive bruising on the woman's body was not documented, as the police had never investigated it. Police also failed to undertake a DNA analysis on critical areas of the couch. Contradictions between the boy's account and evidence given by his friends, including false claims that the woman had "plied him with alcohol," were never considered by police. The jury returned not guilty verdicts on all charges.

Speaking to the WSWs, Bott said that these were just two examples of how "the presumption of innocence is being eroded all the time." In cases of alleged child abuse, an "a-priori assumption now prevails that police should believe anything a child says," he said.

Bott pointed to another recent case in which a school teacher was cleared by a jury in the Auckland District Court of indecently assaulting three schoolgirls. The students admitted in court they had concocted the allegations in order to get the teacher sacked. The Criminal Bar Association sharply criticised the police handling of the case, declaring that the "widespread assumption that complainants are always telling the truth" can have a "catastrophic" effect on those falsely accused.

Bott said that he had become familiar with "certain types of complaint"—particularly involving sexual assaults—being "whipped up in a rush and a clamour for the authorities to be seen to be doing something." He explained: "My proposition as a defence lawyer is that basic contradictions in evidence are not being followed up by the police." A growing police practice of "'once over lightly' is not good enough. Evidence has to pass the test of scientific reliability," Bott emphasised.

The barrister condemned "politicians of all hues" for the escalating attacks on the presumption of innocence, pointing to a "politically driven agenda to get tough on crime and achieve a greater number of successful prosecutions." Bott noted that changes to the 2006 Evidence Act had now made it impossible for defence counsel to get access to evidentiary interviews conducted by the police in sexual offence cases.

Bott agreed that these developments dovetailed with the anti-democratic and right-wing trajectory of official

politics. He compared the situation with the "anti-terror" witch-hunts following the September 2001 attacks on the World Trade Centre in the US. In 2007, a massive police operation was mounted in New Zealand against members of the Maori Tuhoe tribe, based on concocted allegations of a terrorist plot that were later dropped.

On the #MeToo movement, Bott said: "It is not to say there is not truth or weight behind some allegations, but the pendulum has swung in the other direction" against the presumption of innocence. "We now have a modern version of declaring someone to be a witch—just throw them in the water and see if they sink or float. If they float, they must be a witch."



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