

DEFENDING THE GUILTY

If I had a dollar for every time I've been asked how I could defend someone that I know is guilty, I wouldn't even mind paying the taxes on the money. The question itself, however, belies a lack of understanding of the basic principles of criminal justice in this country. This article should put some of these misconceptions to rest.

To begin with, a person is presumed innocent until they have been proven guilty beyond a reasonable doubt. It is not enough for the police to say he's guilty, it's not enough for the prosecutors to say so, it isn't even enough for the newspapers and television to say so. Saying it is so does not make it so.

The person accused is not guilty until they have pled guilty or the crown has presented sufficient evidence on each element of the offence to prove guilt beyond a reasonable doubt. That is the way our system works. As Rumpole (and every other hack who ever donned a robe) says, it is the "golden thread" that runs through the entire history of English jurisprudence.

If the crown can't prove you guilty, then you are not guilty -even if you did it! I can already hear the cries of "foul", "unfair", "terrible". But consider the alternative! What if, as in some countries, you were presumed guilty as soon as the authorities said you were and it were then up to you to prove your innocence. Does that really sound like a better system? What if you're the one being accused? What if it were your son or daughter?

Part of the problem, of course, is that in every system there are bound to be anomalies. The larger the system, the more peculiarities there are likely going to be. The law of large number says that sooner or later every possible thing that can happen will happen.

Just because the system isn't one hundred percent reliable and accurate is no reason to scrap it. That's like throwing out the baby with the bath water.

However, it is the occasional anomalies and glitches that grab all the headlines. Not surprisingly, not many newspapers, television stations or radio stations devote a lot of time or space to the vast majority of cases that proceed exactly as they are supposed to.

No one is particularly interested in crooks admitting their guilt and taking their lumps. That doesn't sell papers or boost ratings (unless the crook is someone famous like Keith Richards or Winona Ryder). It is only when the system malfunctions that anyone ever takes notice. Most of the time the court system is like a good referee at a sporting event, doing its job properly and not being noticed at all

Another part of the general misconception results from our proximity to the United States and the pervasiveness of the American media. While the American and Canadian systems of justice are similar in many respects, they are definitely not the same. The Canadian system is much, much better.

The American rules of evidence (especially the exclusion and suppression of evidence rules) make it much more difficult for the prosecution to prove guilt, especially if the accused can afford a vigorous defence. In addition, the American system requires the cooperation of witnesses and even cooperating witnesses can refuse to answer on the grounds they may be incriminated. Not so in Canada.

As for plea bargaining, this is another area where there is a lot of confusion. In fact, even the name is misleading. Quite often, the accused will be guilty of an offence but not the one with which he is charged. For example, someone who is guilty of the offence of manslaughter will not want to plead guilty to murder. It is hardly a miscarriage of justice to arrange for a guilty plea to the offence that the crown can actually prove.

In point of fact, the criminal justice system in this country runs remarkably well. In this writer's humble opinion, it is the best system in the world. Of course, what happens to the nogoodniks once they get to jail, such as golf course and revolving doors, is a subject for another day.

