
TRANSCRIPT OF PROCEEDINGS

THE MEDIO-LEGAL SOCIETY OF VICTORIA

MELBOURNE

SATURDAY 17 NOVEMBER 2012

"ANYTHING YOU WANTED TO KNOW ABOUT SENTENCING, NOW'S YOUR
CHANCE TO ASK!"

PRESENTED BY: The Honourable Justice Curtain

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5 DR LYTHGO: It is my great pleasure to introduce to you the
6 Honourable Justice Elizabeth Curtain to speak to us. Her
7 Honour has been a Judge of the Supreme Court of Victoria
8 since 2006, and prior to that a Judge of the County Court
9 since 1993. She is the Deputy Principal Judge of the
10 Criminal Division of the Supreme Court and a judicial
11 member of the Adult Parole Board.

12 Justice Curtain was previously the alternative
13 Chairman of the Youth Parole Board and the Youth
14 Residential Board, and is also formerly the Deputy
15 Chairman of the Racing Appeals Tribunal, a member of the
16 Motor Accidents Board. Prior to her appointment as a
17 Judge, she was a crown prosecutor for six years and she is
18 also a past President of this Society.

19 When Her Honour was first appointed to the County
20 Court she was sent on circuit to Mildura. She arrived at
21 the airport to be mistaken for the new flight attendant
22 who hadn't turned up and had to fight off attempts to
23 throw her into uniform and send her to man the teapots.

24 She then arrived at Mildura and the mistaken
25 identity lesson continued. Her Associate was an older
26 dignified military gentleman. A New South Wales District
27 Court Judge who was also sitting at Mildura was very keen
28 to meet the newly appointed Judge from Victoria and warmly
29 greeted the dignified military gentleman in the way that
30 chaps do, leaving Her Honour behind presumably to deal
31 with the luggage.

1 But these times are long past and she was recently
2 spotted talking to Prince Charles and the Duchess of
3 Cornwall. Protocol decrees that private conversations
4 with the Royal Family remain private but I think we can
5 assume that she was telling them everything they ever
6 needed to know about sentencing. So after that trial run
7 I invite her now to speak to us.

8 JUSTICE CURTAIN: Thank you, Margaret, for that very fine
9 introduction and may I say what an honour it is to be
10 introduced to the Society by you, Margaret. Your late
11 husband, Justice Geoffrey Flatman, was a man who was
12 greatly admired. He was a very fine criminal advocate, he
13 was a very excellent Director of Public Prosecutions and
14 his untimely passing robbed the State of Victoria of what
15 would have been a very fine jurist.

16 Thank you members of the Society for allowing me to
17 discuss with you the exercise of the sentencing discretion
18 which is one of the most public and often criticised
19 aspects of a Judge's work, and yet perhaps the most
20 complex and least understood; and I am here referring to
21 the work of Magistrates and Judges of the County and
22 Supreme Courts whose duty it is to sentence offenders.

23 It may surprise you to know that in the year
24 2010/2011, 126,000 persons were sentenced by the
25 Magistrates Courts in Victoria alone, and 2,006 people
26 were sentenced in the County Courts and Supreme Courts in
27 that same year. That is, over one and a half thousand
28 sentences per week, 300 sentences a day.

29 In 2009 and 2010, 26 people were sentenced for
30 murder, 18 for manslaughter and 15 for culpable driving
31 and I cite those examples because they are often the type

1 of sentences that attract debate and criticism. But the
2 enormity of these numbers I hope puts the debate about
3 inadequacy of sentencing and consequent diminution of
4 confidence in the administration of criminal justice into
5 some perspective.

6 The second point I wish to make regards the
7 transparency of the sentencing process. Every sentence is
8 handed down in the court room, a public venue, in the
9 presence of the accused, the victim, the victim's family,
10 the media and anyone and everyone who wishes to attend.
11 Court rooms are open to the public. The time and place
12 and name of the matter is published in the law list and on
13 the Court's website. The Judge's sentencing remarks are
14 transcribed and are available to the public via the
15 website and the library. They are made available to the
16 media shortly after the sentence is imposed, and they are
17 reported to varying degrees in newspapers and broadcast on
18 radio and television.

19 In some instances, presently at the Judge's
20 discretion, the handing down of a sentence is streamed
21 live as it occurs so that anyone remote from the Court but
22 with access to the Internet can listen to a sentence as it
23 is being handed down. Indeed, in certain cases video
24 links have been established in regional centres so that
25 citizens in those areas who are interested in a particular
26 case can attend and observe the process so that the very
27 physical act of imposing a sentence is not only a
28 transparent one but it is accessible to all.

29 You will appreciate, of course, that a sentence is
30 imposed following upon a plea of guilty, or a verdict of
31 guilty returned by a jury, or a finding of guilt by the

1 Magistrate. What then follows is referred to as a plea in
2 mitigation where the community represented in the higher
3 Courts by counsel for the Crown and by a Police Prosecutor
4 in the Magistrates Court. All aspects of the offending
5 and of matters personal to the offender are litigated
6 during the course of that plea which might take anywhere
7 from an hour to a couple of days in the higher Courts, and
8 a succinct number of minutes in the Magistrate's Court.

9 In the County and Supreme Courts a Judge will
10 inevitably adjourn the case to enable time for reflection.
11 Although in the Magistrate's Court the pleas are generally
12 considerably shorter and the dispositions more readily
13 decided upon. But in the County and Supreme Courts the
14 Judge's sentencing remarks cover comprehensively the
15 matters which are taken into account, both in aggravation
16 and mitigation, and the reasons for doing so are
17 articulated by the sentencing Judge.

18 So the act of sentencing is a comprehensive one and
19 necessarily explains the Judge's reasons for arriving at
20 the particular disposition. So it is that the process of
21 reasoning is exposed to the public and subject to public
22 examination and thereby permitting any error in the
23 process of sentencing reasoning to be readily apparent and
24 consequently subject to appeal. So also if the sentence
25 is regarded as manifestly inadequate by the Crown who on
26 behalf of the community may appeal it and, conversely, if
27 regarded as manifestly excessive the offender can appeal.

28 The act of fixing upon the appropriate sentence is
29 an exercise of the Judge's sentencing discretion and
30 because it is a discretion reasonable judicial minds may
31 vary as to the appropriate sentence. For this reason

1 there is no such thing as a right sentence or the one
2 correct sentence. In sentencing a Judge does not fix upon
3 a sentence arbitrarily, vindictively or capriciously. The
4 sentence imposed is as a result of what is referred to as
5 the instinctive synthesis. That is where a Judge
6 identifies all of the facts that are relevant to the
7 sentence, discusses the significance of each factor and
8 makes a decision as to the appropriate sentence given all
9 the facts of the case, and it's at the end of that process
10 that the Judge then determines what is the appropriate
11 disposition.

12 Sentencing is not treated as an arithmetical
13 exercise. It would be wrong according to law and contrary
14 to principle to simply fix upon a figure and then add or
15 subtract depending upon matters which are favourable or
16 unfavourable to an offender. To do so does not take
17 account that there are many conflicting and contradictory
18 elements which bear upon the sentencing of an offender.

19 As the High Court observed in Veen v. The Queen (No.
20 2), "Sentencing is not a purely logical exercise, and the
21 troublesome nature of the sentencing discretion arises in
22 large measure from unavoidable difficulty in giving weight
23 to each of the purposes of punishment. The purposes of
24 criminal punishment are various: protection of society,
25 deterrence of the offender and of others who might be
26 tempted to offend, retribution and reform. The purposes
27 overlap and none of them can be considered in isolation
28 from the others when determining what is an appropriate
29 sentence in a particular case. They are guideposts to the
30 appropriate sentence but sometimes" the Court said "they
31 point in different directions."

1 The criminal justice system must be systematically
2 fair and this requires a reasonable consistency in
3 sentencing. But consistency in sentencing does not
4 require numerical equivalents, what is required is
5 consistency of application of relevant legal principles,
6 the treatment of like cases alike and different cases
7 differently.

8 The instinctive synthesis is guided and informed by
9 the provisions of the Sentencing Act and common law
10 principles. The Act provides amongst its purposes to
11 promote the consistency of approach in the sentencing of
12 offenders, and to that end section 51 provides that the
13 only purposes for which a sentence may be imposed are to
14 punish the offender to an extent and in a manner which is
15 just in all the circumstances to deter the offender and
16 others from committing offences of the same or similar
17 character, to provide for conditions conducive to
18 rehabilitation, to manifest the denunciation of the
19 conduct and to protect the community from the offender and
20 a combination of two or more of those purposes.

21 Pursuant to section 52, the sentencing Judge must
22 also take into account the maximum penalty for the
23 offence, current sentencing practices, the nature and
24 gravity of the offence, the offender's culpability and
25 degree of responsibility for the offence, whether the
26 crime was motivated by hatred or prejudice, the impact of
27 the offence on any victim, the personal circumstances of
28 any victim of the offence, any injury, loss or damage
29 resulting from the offence, whether the offender pleaded
30 guilty, the offender's previous character and the presence
31 of any aggravating and mitigating factors. A court must

1 not impose a sentence that is more severe than that which
2 is necessary to achieve the purpose or purposes for which
3 the sentence is imposed, and this is referred to as the
4 principle of parsimony which explicitly applies to
5 sentences of imprisonment.

6 An offender falls to be sentenced in respect of an
7 offence which he or she has been convicted and no other,
8 and there are a hierarchy of offences beginning in
9 ascending order with a bond without conviction, then a
10 bond with conviction, a fine, a community corrections
11 order, a drug treatment order, a sentence of imprisonment
12 suspended and finally a sentence of imprisonment actually
13 to be served which is always regarded as the disposition
14 of last resort.

15 The Sentencing Act provides that a particular
16 disposition may only be imposed if the purpose cannot be
17 achieved by imposing the disposition immediately below it
18 in the hierarchy of dispositions. So it is that in
19 sentencing every case depends upon its own facts and
20 circumstances, and no two cases are like.

21 There are a number of fundamental considerations
22 which will always be present in the sentencing process.
23 These are: the maximum penalty for the offence, the nature
24 and gravity of the offence committed, whether the offender
25 has pleaded guilty and has expressed remorse, his
26 prospects for rehabilitation and the impact of the
27 offending on the victim.

28 The maximum penalty is Parliament's clearest
29 intention of the seriousness of the offence. A sentencing
30 Judge is always required to give careful attention to the
31 statutory maximum. Parliament has legislated for it and

1 it invites comparison between the worst possible case and
2 the case before the Judge, and the maximum penalty taken
3 and balanced with all other relevant factors provides the
4 yardstick for where the offending conduct sits. But
5 maximum penalties are indeed rarely applied and this is so
6 because it is to be applied in respect of what is regarded
7 as the worst example of that conduct likely to be
8 encountered in ordinary practice, and it is always
9 possible to countenance a worst case, but having said
10 that, it is not rare for a sentence of life imprisonment
11 to be imposed in respect of murder.

12 The Judge, in fixing a sentence, must have regard to
13 the nature and gravity of the offence and where it fits in
14 the spectrum of offences of that kind. For example,
15 although all murders involve the loss of life and the
16 Courts must protect the sanctity of life and impose a
17 salutary and condign punishment in respect of its unlawful
18 taking, it is possible nonetheless to categorise cases of
19 murder as to their seriousness, examples of which are:
20 pre-meditated killings as distinct from spontaneous
21 killings, killings which may be said to be an attack on
22 government authority and indeed society itself, for
23 example, the Russell Street bombing, and the execution of
24 police officers.

25 Execution-style contract killings are treated as
26 very serious because the killer may be taken to have no
27 conscience, no sense of remorse and is very dangerous to
28 society. Thrill killings or sadistic killings,
29 relationship killings which involve a breach of trust -
30 for example, the murder of a child by their parent - all
31 would fall into the category of serious examples of the

1 crime of murder; whereas a spontaneous and impulsive act,
2 perhaps one fatal act of stabbing in the heat of the
3 moment, may be regarded as a less serious example of the
4 offence.

5 Factors which may also serve to aggravate the
6 seriousness of the offence are its location. If it occurs
7 in the sanctuary of the victim's home or in a public place
8 where ordinary members of the community are at risk of
9 being endangered and are entitled to expect to be able to
10 go about their business in safety; the manner in which
11 this murder was effected may also denote its seriousness.
12 If it is a particularly callous brutal murder, if it
13 involves defilement or mutilation of a deceased's body, it
14 if it involves the disposal of the body, or indeed if the
15 location of the body has never been disclosed, if the
16 victim was subjected to brutal treatment, such as torture,
17 rape and the like prior to the murder being effected these
18 are all factors which would impact upon the assessment of
19 the seriousness of what is a serious offence.

20 So it is that the Judge must seek to categorise the
21 nature and gravity of the offence and the offender's
22 responsibility for it. That is where the case fits in the
23 spectrum of offences of that kind. The Judge must also
24 take into account current sentencing practices which
25 include sentencing statistics, that is, penalties which
26 have been imposed in previous cases for these are
27 obviously of limited efficacy because bare statistics do
28 not tell you why a particular sentence was imposed.

29 Another fundamental consideration is whether an
30 offender has pleaded guilty. Although an offender is not
31 to be sentenced to a greater sentence because they've

1 pleaded not guilty and because they are not to be
2 penalised for standing their trial, nonetheless an
3 offender who pleads guilty is entitled to a discount on
4 the sentence to be imposed and the earlier the plea is
5 entered the greater the discount.

6 Section 6AAA of the Sentencing Act obliges the
7 sentencing Judge to quantify how much discount the
8 prisoner has received and to tell the prisoner. This is a
9 matter of public policy because an offender who pleads
10 guilty, irrespective of the strength of the case that he
11 or she faces, by pleading guilty saves the community the
12 cost of a trial and facilitates the administration of
13 justice because Court time is not taken up litigating the
14 cases and other cases in which issues may be more
15 appropriately litigated can be brought to trial sooner.

16 A plea of guilty saves the witnesses and indeed the
17 victims or the victims' families the ordeal of a trial.
18 It obviates the need for those persons to go into the
19 witness box and be subjected to cross-examination and
20 perhaps more importantly having to re-live the ordeal of
21 the offending behaviour. It is not to be underestimated
22 that a plea of guilty brings certainty of outcome to the
23 proceedings.

24 Whether an offender has expressed remorse and indeed
25 contrition is relevant, not only so as to provide some
26 appeasement to the victim but also impacts upon an
27 offender's likely prospects for rehabilitation. It is
28 also indicative of empathy for the victim and insight into
29 the consequences and impact of their offending conducting.
30 Of course, the fact that an offender has demonstrated no
31 remorse is also a relevant consideration. A guilty plea

1 may be taken though as an indication of remorse, and
2 remorse should be distinguished as far as possible from
3 self-pity.

4 Another fundamental aspect of the sentencing process
5 is of course the victim's voice in the court room. Very
6 often victims are present or their families are, and
7 surviving victims are supported by the Victims Support
8 Agency. They are entitled to make Victim Impact
9 Statements which are statutory declarations, and they are
10 assisted in that task by that Agency.

11 The statements are subsequently tendered in evidence
12 and are read and considered by the Judge. They may be
13 read to the Court by the prosecutor or by the victim
14 themselves or a person nominated by the victim. It is not
15 uncommon for victims - particularly in murder trials, the
16 victims being the surviving family members - to go into
17 the witness box and read from their Victim Impact
18 Statements. In this way they are able to confront the
19 offender in a public place and publicly state, and have it
20 brought home to the offender at least in some way but no
21 doubt just to some small degree only, the impact that his
22 or her offending has had upon the victim and their
23 families.

24 You can appreciate that these can often be very
25 powerful, poignant and heartrending statements, but it is
26 very important in the sentencing process because after all
27 in a sense all crime is personal.

28 So to recap, there are many and varied factors which
29 are taken into account in sentencing. They will include
30 but are not limited to the nature and gravity of the
31 offence committed and matters which go in aggravation of

1 it, whether the offender has pleaded guilty and the stage
2 of the proceedings when he or she did so, whether they
3 cooperated with the police in the investigation, whether
4 they made a full and frank admission in the record of
5 interview, whether they cooperated in the running of the
6 trial, whether the offender has expressed remorse and
7 contrition for his conduct, displayed insight and victim
8 empathy. The Court also takes into account the age of the
9 offender, the offender's personal circumstances and
10 antecedents including prior convictions, whether the
11 offender was suffering from any serious psychiatric
12 illness short of insanity, or intellectual disability, or
13 psychological disorder and, of course, the offender's
14 prospects for rehabilitation.

15 The Court will also take into account the effect on
16 the victim, the victims' families, the nature and
17 seriousness and resolution of any injuries suffered by the
18 victim and, in the case of murder, of course, the effect
19 of that is apparent enough. But it is also relevant of
20 course, therefore, to take into account the way the victim
21 died, if the victim suffered a particularly horrific death
22 or died in brutal circumstances or in the sanctity of
23 their home, or killed by a person whose duty it was to
24 love and protect them, such as a parent or spouse.

25 However, even after taking into account the
26 subjective features of the offender and all of the other
27 matters which are relevant to the sentencing, the sentence
28 imposed must nonetheless reflect the objective seriousness
29 of the offence and be proportionate to the criminality
30 involved.

31 Of course, it is not uncommon for a Judge to have to

1 sentence an offender for more than one offence. Sentences
2 are very often imposed in respect of any number of
3 offences and by operation of law those sentences are
4 served concurrently unless ultimately otherwise directed.

5 But what is achieved ultimately is referred to as
6 the total effective sentence which is a head sentence, and
7 then a non-parole period will be fixed where appropriate
8 unless the Court considers the nature of the offence or
9 past history of the offender makes the fixing of such a
10 period inappropriate. That minimum term is not the period
11 at the end of which the prisoner is released, it is a
12 period before the expiration of which, having regard to
13 the interests of justice, the prisoner cannot be released.

14 To Members of the Society, to see how this task
15 might be performed so that you now having been informed of
16 a number of the considerations that a sentencing Judge
17 must take into account in arriving at the appropriate
18 sentence, I will invite you now to participate in a short
19 interactive program that is available to you on the
20 Sentence Advisory Council website and my Associate, Kate
21 Hamilton, will assist us in that task because you can
22 readily appreciate that Kate's of a generation where
23 technology is a second language to her.

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