
TRANSCRIPT OF PROCEEDINGS

MEDICO-LEGAL SOCIETY OF VICTORIA

“UNDERBELLY”- A TRUE CRIME STORY OR JUST SEX, DRUGS AND ROCK
AND ROLL?”

BY

JUSTICE BETTY KING, SUPREME COURT OF VICTORIA

HEARD AT

THE MELBOURNE CLUB

36 COLLINS ST

FRIDAY 13 NOVEMBER 2009

Chairman: Dr. Terence Little

President

As a Justice of the Supreme Court of Victoria I am probably responsible for the majority of suppression orders that have been imposed in Victoria in the last three years or so, including one that could be described as infamous – the suppression of the televising of the series “Underbelly” by Channel 9 in Victoria.

You are undoubtedly all here tonight due solely to the salacious title “Underbelly – a true crime story – or just sex drugs and rock and roll.”

Well the short answer to that is a bit of both.

The drugs – absolutely

The sex – every wannabe gangster’s dream of what the sex should be like

Rock and roll – not really that sort of lifestyle.

Most of the people involved in this heady scenario that overtook

Melbourne life for a while were frightened, lonely, drugged up crims with not much to look forward to in their lives.

The suppression order that I placed on Underbelly really seemed to surprise channel 9. As far as I could tell they never treated it as a serious application before the court, they gave me the strongest of impressions that in their view no petty supreme court judge from another state (remembering all of this was run from channel 9 in Sydney) would dare

to stop a program that had been so heavily marketed and anticipated just for a criminal trial.

In this Country we pride ourselves upon our concept of Justice and are often critical of the Justice systems in other countries, and by that I mean that the media and the public are critical of the systems in some other places and there is constant comparison of the good aspects of our system of justice with those in other countries.

The most fundamental tenet of that system of justice is that every person charged with a criminal offence has the right to a fair trial. In this country that includes a right to a trial by your peers, your fellow citizens uninfected with preconceived views.

More importantly that does not mean that the only people entitled to a fair trial are those that we think are not very guilty, or those persons that we like, or the famous or the wealthy, or police officers, but everyone.

Particularly including those who we might think or even strongly believe to be guilty of horrific crimes such as murder and sexual assault.

In addition to this fundamental of the justice system we have another fundamental – the right to free speech and a free press.

To put it at its most basic sometimes something has to give. Should it be the fair trial of a citizen of our country or should it be the right of the media to publish and comment upon whatever they wish to irrespective of the rights of persons charged with often very serious criminal offences?

HARD CHOICE ISN'T IT?

There is no doubt that a free press is a positive asset to democracy and to keeping all members of the public, if they wish to be, well informed.

Investigative journalists have uncovered many serious public misfeasances, such as the reporter who happened to be in court when Marcus Einfield appeared to contest a traffic charge of speeding and pursued the matter. They uncovered the loans scandal during the Whitlam years and the truth about the children overboard story during the Howard years. The list is really endless.

But for each of the wonderful, insightful, reports and articles that are shown in the media, there are equally matters that are inaccurate, salacious, mischievous, morally indefensible and just plain prurient.

There are now infinitely more sources of information available to people than at any time in our history, and clearly that is a good thing, it allows people to be well informed. But equally as a result of all of this new information technology and other scientific discoveries trials are becoming more complex and difficult as police and criminals travel down new paths of both trying to elude and detect crime.

As an example when I started in the criminal law 34 years ago, briefs for trials were small - came wrapped in a pink ribbon and you could usually carry a murder trial in one hand. A murder trial that I did not so long ago had over 9000 pages of depositions, occupying in excess of 20 arch lever files, and included telephone intercepts, call charge records, reverse call charge records, DNA evidence, and lengthy records of interview exceeding over a thousand questions and answers for each of the six accused men.

34 years ago none of that evidence existed or was even under contemplation, so accordingly trials are much longer and more complex. Juries need to understand and deal with all of this new and complex material as part of their decision making, and we the court try and assist them.

Make no mistake I am an unabashed fan of juries, they make what I perceive to be the right decision in the vast majority of cases, they are

robust, they are able to withstand quite a deal of pressure from community perceptions and media attitudes, but like everything there is a limit.

There is currently an organization called “Australia’s right to know”, which at first I thought sounded a bit like a Pauline Hanson type political party, but it turns out not to be that but another type of organization entirely. There was a little while ago a quite a large article headed “Judiciary must “lift its act” on gags”.

The Article was published in the Australian commenting on a report that had been recently published by this organization titled:

“Report of the Independent Audit into the State of Free speech in Australia”. The front page of the report says it was chaired by Irene Moss AO and commissioned by “Australia’s right to know”.

It is a coalition of interested groups and its members are;

Fairfax media

News Limited

ABC

Free TV Australia

SBS

Sky news

AAP

Astra

The West Australian and

APN media

I googled Irene Moss and it appears that she is a former Commissioner of ICAC, NSW, married to Allan Moss who was the CEO of Macquarie bank, and she is currently chairperson of Australia's Right to Know Coalition.

Some independent audit isn't it?

The orders in respect of the Carl Williams matters were unsurprisingly the subject of a deal of criticism in that report. I will just refer to one of the statements made in that report relating to that.

“In addition Carl Williams was found guilty of the Michael Marshall murder on 14 November 2005. However, no report of that result was permitted until 28 February 2007. Even though Williams faced later charges (including murder), the passing of time, together with the huge public interest in reporting his result, meant that the suppression order should not have been made. Reporting of the Michael Marshall matter should have been permitted and as time passed, any prejudice that would attach to the matter would have dissipated.”

Let me take you back in time, At the time of the Michael Marshall murder trial, I had that trial, and four other murder trials involving a total of 5 murders, another conspiracy to murder with a further two in the pipe

line coming through from the magistrate's court. They were going to be my work for the next five to seven years.

At that stage Carl and Roberta Williams, his parents, their child, their dog, their cat, and any member or hanger on of the so called "ganglands" were on Television at least three to four times a week, with mentions of the trials he was due to face, usually on programs such as Today Tonight or a Current Affair. Williams and his family were in my view actively seeking publicity. The press were either being duped into supplying that publicity or were pandering to that desire, I have a view about that but I have never had to actually decide that issue.

Once I was seized of the matters a joint application was made by the crown and the defence for a suppression order on any more publicity, so that there would be some prospect of a trial actually being heard. I had been a Judge of the Supreme Court for about four weeks at the time, and although new to that Court, I had no doubt that a permanent stay would be sought by the defence on the basis of continuous and unrelenting publicity thus prejudicing his ability to obtain a fair trial, I was only surprised it had not been made earlier. I made the order. That matter went to the court of appeal, and they determined that the order I had made was too wide and reduced it, making it apply only to him, a much more sensible result.

That was in August 2005 and the first trial commenced in October 2005 with a verdict in November 2005. I should add that the first application I had to deal with in the trial was an application for a permanent stay of the proceedings due to adverse and continuous publicity. The trials were to be continuous from that time, but circumstances conspired against the situation. Two days before the next trial which was the murder of Jason Moran and Barbaro at the Auskick clinic (due to start in February of 2006,) one of the two co - accused decided to plead guilty and give evidence for the prosecution. He made 18 statements about six different murders and other serious offences relating to perverting the course of justice and major drug matters, and the trial had to be adjourned. When the trial next came on for hearing the other co accused decided to plead guilty and give evidence – he made 8 statements. Williams then argued the first case under the Human rights legislation which also had to be determined and that again caused delay.

The criticism that is made is that the public would just have forgotten that he had been convicted of one gangland execution which occurred in front of a five year old child. Now I am unsure if any of you remember the publicity that attached to the pleas of guilty of Carl Williams in March of 2007, but I have to say that it didn't appear that either public or media

interest had waned at the time that the suppression orders were lifted. The first 16 pages of the Herald Sun were devoted to the fact that he had pleaded guilty. The Age did a wrap around the same as they do for the grand final. There was extensive coverage of the Michael Marshall murder trial, and the press sought to be able to televise the sentence.

I didn't allow that application and I published reasons for it. They were extensive but some of the major factors to which I referred were

- 1 That the judge who passes sentence is not the important part of the process. It is the court that is passing sentence merely through the agency of the individual judge.
- 2 It would be tragic to see the cult of personalities start to attach to the office of judge of any court in this country.
- 3 The process that is being requested may have the potential to turn the spotlight on to the judge, rather than where it belongs, which is on the criminality involved and the appropriateness of the sentence being passed.

Now I said that because my experience in doing these cases demonstrated quite clearly that the media were focusing on any part of the case, and there were constant articles being written about me, my life, and my background. I am not a particularly reticent person, in fact I am usually described as outgoing or even more commonly outrageous, but I equally have strong views as do many others that in the Court the focus needs to

be on the crime and the punishment, not the person imposing the sentence.

The Sunday Age devoted a complete page to me, my background, my family and my history as a barrister and a Judge. I had refused to be interviewed and requested my friends not to co operate. I had no complaint in that it was all very flattering material. I was not frightened or worried about the publicity I just believed and still believe that it is inappropriate to focus on the Judge, it should be about the victims, the seriousness of offences and the hopefully just and appropriate punishment that is ordered.

The media are the eyes and the ears of the public who cannot be present at the trial, and it is indeed a positive matter if proceedings are reported, it helps to inform and keep the public aware that the police and the criminal justice system is working hard to deal with persons who breach society's laws. But clearly there must be occasions when that need must be put aside in the interests of justice. No one argues that the persons who are the victims of blackmail for example should not be named, or victims of sexual assault.

There is often a comparison drawn between our justice system and that of America's. No doubt some of you have seen programs such as Boston Legal or the ubiquitous Law and Order programs where the District Attorney or the Defence counsel stand on the very famous Supreme Court steps and pontificate about the guilt or otherwise of the accused, the reliability of witnesses or the shortcomings of the police officers. Our system of justice is in many aspects quite different to that of America, our jurors are anonymous, we do not interrogate our jurors at length, illegally obtained evidence is not automatically excluded, and confessions can not be tricked or coerced from people. We as a legal system have followed far more the British legal system, and despite what is said by the media, suppression orders are not the norm.

There used to be something that was used by the law and respected by the media in Victoria called "sub judice" which means if a matter is still under consideration by a court; or still subject to active litigation, accordingly the media could not report on the matter, in any detail as to unproved allegations or arguments in advance of the hearing. Somewhere along the way the DPP and the courts dropped the ball, and ceased prosecuting or convicting people for contempt of court for publishing matters that were sub judice.

This ultimately led to the necessity of making suppression orders to prevent what would be contempts of court.

In relation to the underbelly matter, I was running a murder trial at Geelong, I had commenced my charge to the jury in that trial and an urgent hearing was organised on the Thursday evening before the series was to commence the following Wednesday evening. At that stage there was no application on foot as no one involved in the prosecution or defence had seen any episodes in the series. I requested that channel 9 supply copies of the series to the court and parties - they refused. Said they were not in a version that was appropriate to be seen - they were "uncut". Despite my continued requests they maintained they were unable to supply the items, but said they would try and provide episodes 1 and 2 by early next week. Accordingly I suggested that the crown subpoena all of the episodes and I granted short service and return of that subpoena by Monday of the next week.

I was still charging the jury in my murder trial, the other applications being heard before and after the trial, and we received copies of the underbelly series on Monday evening. I went back to my accommodation and proceeded to view the 13 episodes. First thing, there is only between 41 and 43 minutes in each hour of viewing, all much better ad free, and only about 10 hours of viewing. Started at 6.00 pm and continued non stop

until all episodes had been viewed, then back to court and delivered an ex tempore judgment at 9.00 am.

I have to say I thought the ban was likely when I was sitting watching episode 5 and a particular thing occurred on the show I turned to my tipstaff and said “I didn’t know that happened”. I figured if I was treating it as a documentary what hope a jury.

Was it accurate – in many parts it was. The actual killings, in that who died, where and in what circumstances was mainly accurate. For those of you who have seen it take two examples – firstly the murder of Moran and Barbaro picking up the children from Auskick – very accurate, there were many witnesses to those murders, many statements were taken and a very accurate picture of what occurred was able to be obtained. By contrast Benjy’s murder of Dino Dibra where he is walking around the body of Dibra repeatedly shooting him and crying is from the imagination of the scriptwriters, no one else was there apart from Dibra and Benjy - that is dramatic licence. What could never be accurate was most of the dialogue, as that was unknown to the police, that again is the figment of script writers with the occasional addition of listening devices and telephone intercepts.

The accuracy of these matters was quite easy to ensure as I have no doubt that the producers had the full co operation of Victoria police – when I was watching the episodes we came to an episode on the formation of

Purana task force which was organised to try and stop the gangland murders, and they showed them doing all the traditional task force things, organising a stubby holder, a tie, a scarf for the ladies - all with the taskforce logo and finally a task force team photo on the steps of where the task force was located, as I watched it I had it rewind a couple of times just to make sure that I was right. Sure enough in the back rows of the shot of the taskforce on the steps were the actual Purana police officers - they had got themselves some lasting fame, they were in 'Underbelly' And right at the end of the show as the officers walk triumphantly over the hill having arrested Williams there they are again. I have to say I couldn't stop laughing at that bit of vanity.

Now as to the sex that all these criminals have – well really – prostitutes, mistresses, wives, girlfriends, doubles, swaps, girl on girl - two girls - three girls all in spas and all these sexy and beautiful girls – in their dreams. Has anyone ever had a good look at say Roberta Williams or Judy or Trish Moran or any other of the women actually involved with these men. Most of the males in these killings were seriously drug addled, fearful of being shot or killed, ripped off by other drug dealers, bad business men, who often when they died owed a lot of money despite turning over millions in drug sales. Not a group to be envied or admired, a matter to which I shall return shortly.

Channel 9 appealed from my decision to ban Underbelly and there is a lengthy judgment for those who may care to read it on the web. I will refer to just some small parts of what the court said.

This was not a circumstance of some prejudicial television program being shown to an audience containing potential jurors many months ahead of trial as in R v Yau Kim Lam (No 1), nor was it the circumstance of some newspaper article dealing with events the subject of a trial some months before the trial. Circumstances such as those are commonplace nowadays and judicial experience is that normally such circumstances can be dealt with by appropriate directions being given to a jury. The judicial experience is overwhelmingly that the corporate integrity of juries can be relied upon and that juries do comply faithfully with directions given by judges to put aside prejudicial material and to consider their verdict on the basis of the evidence put before them. As stated by Spigelman CJ in John Fairfax Publications Pty Ltd and Another v District Court of New South Wales and Others:[\[20\]](#)

There are now a significant number of cases in which the issue has arisen as to whether or not an accused was able to have a fair trial in the light of substantial media publicity ... Those cases have

decisively rejected the previous tendency to regard jurors as exceptionally fragile and prone to prejudice. Trial judges of considerable experience have asserted, again and again, that jurors approach their task in accordance with the oath they take, that they listen to the directions that they are given and implement them. In particular that they listen to the direction that they are to determine guilt only on the evidence before them.

The experience of trial judges in Victoria accords with those observations. In the light of that experience we turn to the circumstances before her Honour. What was proposed in this case was that a 13 part series dealing with the background to the ‘Gangland Wars’ and portraying in graphic detail as central characters the very persons associated with the trial of A was to commence being broadcast approximately six weeks before the trial of A. Not only was that so, but the intention of the applicant was that the television series would run contemporaneously with the trial. In our view whilst the judicial experience is that juries do listen to and comply with directions to put aside prejudice, the particular and heretofore unexplored presentation of circumstances placed the trial judge in an impossible position. By the time of empanelment,

the series would have been at episode 8. The directions to be given to the jury panel would have been complex and would no doubt have resulted in large numbers of jurors being excused. Although judicial experience dictates that the trial judge would have a reasonable prospect of managing the empanelment of a jury notwithstanding some viewing of Underbelly by members of the Victorian community[22] the situation would be impossible for the trial judge if the program went to air generally in Victoria so as to run at the same time as the trial of A.

Had a jury been empanelled the trial would have commenced with the prosecution case effectively being supported every Wednesday evening by the weekly ‘docu-drama’. The fact that the deceased, his family and the alleged ‘employers’ of X are depicted so graphically in the series would render it difficult for any juror to separate fact from fiction. Certainly what was seen on television by any juror would contemporaneously put colour and drama into the evidence being led by the prosecution. It would also introduce a mass of inadmissible material about B, D and F and their relationships with each other and others. The police who were involved in the

investigation of the ‘gangland killings’ are portrayed as being heroic figures in the series. No doubt police will give evidence in the trial of A. The effect of the television series is to enhance their integrity and professionalism. Likewise the alleged victim of A is given a human face in the television series. The contemporaneous effect of these matters upon a jury cannot be measured. Her Honour concluded that those circumstances were such that it would make a fair trial impossible. It was open to her Honour to reach such a conclusion. In our view, and notwithstanding the great confidence the judiciary has in the integrity and fairness of properly directed juries, the insidious nature of such prejudicial and irrelevant material as would be likely to exist in this case in such circumstances, cannot be overstated.

Furthermore, it should be observed, as stated above, that not only is her Honour a most experienced criminal judge but she has a high degree of familiarity with and knowledge of both the background to, and the particular circumstances of the trial over which she is soon to preside. It is her obligation to secure the fair trial of A. In the particular circumstances of this case considerable weight must be accorded to her Honour’s conclusion that a fair trial was not possible without her

intervention. Not only do we consider that it was open to her Honour to conclude as she did, but we have little doubt that the broadcasting of Underbelly in the weeks leading up to and during the trial would create a serious risk of prejudice to the conduct of a fair trial. The contemporaneous and graphic nature of the portrayal of central figures in the trial, their relationships with each other and the relevance of these relationships to the alleged motive to murder B are the issues of most concern in this regard.

Although the applicant does not concede such a risk, except impliedly in relation to episode 12, it is appropriate to note that the applicant submits before us that her Honour's orders should be set aside, and that it should be allowed to broadcast the first three episodes. Counsel for the applicant informed us he had instructions to undertake to the Court not to broadcast any further episodes prior to 7 April 2004 and that seven days notice of intention to broadcast any further episodes would thereafter be given to the DPP in respect of each such episode. In our view such a proposal is completely unworkable. The prospect of the trial judge having to not only manage a complex and difficult trial and at the same time face the

possibility of hearing applications related to the applicant's television show is totally unacceptable. There would be a serious risk of interference with the orderly conduct of the trial in such circumstances.

One of my real concerns with the media over the gangland issue is with what I describe as the glorification of criminals. During the trial of Evangelous Goussis for the murder of Lewis Moran – who were A and B respectively - Today Tonight intended to broadcast a program called crime mums which was a full half hour of Mrs. Judy Moran and Mrs. Barbara Williams having a discussion about who's son was the person responsible for starting the gangland war.

Not surprisingly I stopped the program. Part of what I said was:

“The educational content of this program is, in my view, non-existent, the public interest in having it played is, in my view, equally non-existent, and the sight of the mothers and wives of two sets of criminal factions having a discussion about murders on national television is far from edifying. The glorification of the males of their family as some sort of celebrities is one that the

media should in fact examine closely. The endless publicity given to criminals responsible for horrific crimes against this society should be carefully examined. These women have contributed no more in terms of a public role than to be mothers and wives of persons involved in this tragic chapter of Melbourne's history.

I have to say that I view this as yet another example of glorifying and promoting of those with some connection to the gangland war as being somehow worthy of public attention. I cannot and will not stop that glorification, because that is not any part of my role as a criminal judge. In assessing the balancing exercise however I certainly take that into account.

What I will do is ensure that these unsubstantiated allegations and counter allegations do not go to air until this trial is concluded. I intend to direct that there be a prohibition on the publication of this program until the conclusion of the trial of Mr Goussis, at which stage you are free to air it to your heart's content.”

Juries are wonderful institutions, they have an ability to bring in verdicts that appal and amaze readers of the Herald Sun and other media. I will give you just a few examples. The Walsh street murders – they acquitted the accused despite them having been found guilty in the media. The recent terrorist trials in which they differentiated not only between each

of the 12 accused men, but convicted those they did on only some of the charges and acquitted on others, the trial of Mr. Horty Mokbel in which he was acquitted, despite being the brother of one of the most infamous criminals in Victoria. All of those decisions were right in law. But it must be hard. They really do deal with it in a properly intellectual manner.

So who comprises our juries?

Amazing snapshot

The media, in my view, should have a part to play in ensuring that a fair trial is accorded to each of our citizens and, I think the media need to take some responsibility for their actions. The courts are constantly being placed in the position of having to make suppression orders to ensure that persons accused of crimes receive a fair trial. It appears that the part the media wish to play in respect of these trials is to discredit that process by continually attempting to put before the public and via that process the members of the jury, untested, assertions as though they were fact. The court is then placed in the position of having to make suppression orders in respect of this material. It is then argued that what is happening is that the courts are hiding the truth from everyone and attacked for being out of touch with modern day realities and told that it needs to come into this century. We are certainly in this century, the members of the Court deal with the true reality of what is occurring on our streets and in our homes, it is impossible to remain “out of touch” with modern times when that is your daily grist.

