

**Gertie's Law  
Episode 2 - Crime and Punishment**

**Justice Hollingworth**

Punishment is a tricky concept because we don't live in a lawless society in which vengeance or lynch mobs rule.

**Justice Taylor**

Sentencing is very complex, and it's very hard to communicate the complexity of it to people who aren't intimately involved in the particular sentencing.

**Justice Lasry sentence (court recording)**

*...Therefore as I've indicated - the sentence of the court is that for charge one - //you are sentenced to be imprisoned for life. On charge two - the charge of incitement to murder you are sentenced to be imprisoned for eight years....*

**Carmel Arthur**

I think we have a great expectation that sentences will deliver a lot more than what they're capable of delivering.

**Justice Lasry sentence (court recording)**

*....There's obviously no utility in making orders for cumulation because the total effective sentence is life in imprisonment. I decline to set a minimum period...*

**Arie Freiberg**

One of the basic misunderstandings of sentencing is that the focus is on judges as being the central player in sentencing, and indeed they are in the sense that they're the ones who imposes a sentence in an individual case however sentencing is far more complex.

**Justice Lasry sentence (court recording)**

*.....I record pursuant to section 6F of the sentencing act that on the charges of murder and incitement to murder you are sentenced as a serious violent offender. Pursuant of section 78-1 of the confiscation act I order (fade out)....*

**Greg Muller**

What punishment for taking a human life?

How many years, months, days? It's a tough question - but one Supreme Court judges carry out on our behalf.

What if the death was accidental but still violent? What if the victim was a child, or a spouse?

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Was the offender a teenager or elderly? Was it a hate crime, or a random, unexplainable act of drug fuelled violence? Was a weapon used?

The result may be the same - someone is dead - but the range in culpability is enormous.

It doesn't take too long watching trials at the Supreme Court to realise no two crimes are ever the same. And as each crime is individual - so too is each sentence.

I'm Greg Muller and this is Gertie's Law. This episode is about sentencing.

## **Justice Hollingworth (court recording)**

*I have determined that it is appropriate to set a non-parole period for the public policy reasons articulated by Justice King. I fix a period of 30 years before you become eligible for parole. But for your age, I would have fixed a longer non-parole period. I declare that pursuant of section 6aaa of the Sentencing Act that but for your pleas of guilty I would have sentenced you to life imprisonment without parole.*

## **Greg Muller**

That's Justice Hollingworth, Principal Judge in the Criminal Division handing down a particularly long sentence a few years back.

## **Justice Hollingworth**

Look, one of the most difficult times in the criminal trial process is sentencing, and it's difficult for a number of reasons. In most of the cases we have in this court - somebody has died. Often in very violent circumstances. And what makes our task particularly difficult is that there's never a sentence that we could deliver - a sentence that we could impose that would bring back the deceased person, that's going to make the lives of their loved ones healed or whole again.

The one thing we can't do is undo what's actually happened and of course if you're the victim or the loved one of a victim of a violent offense the thing you most wish for is that it hadn't happened.

## **Justice Taylor**

I'm Lesley Taylor. I'm a judge with the Supreme Court of Victoria.

## **Greg Muller**

Justice Taylor was appointed a Supreme Court judge in the Criminal Division in 2018.

## **Justice Taylor**

The pressure to get things right is enormous, and so it should be. This court deals with, in my particular jurisdiction, crimes that are the most serious that are committed in this state. Inevitably you are making judgments about what is going to happen to someone's life for the next – up to life – decades. Often, someone has died, so there are at least two families who are devastated by that. Those are very weighty and difficult things to judge.

## **Greg Muller**

Formerly the Director of Public Prosecutions - Justice Champion has been a Criminal judge here since 2017.

**Justice Champion**

The decision to send someone to jail is a huge decision. I've been into jail to see what they're like. They're not hotels. They're awful places.

And people who are in jail are at risk, remain at risk until they're sentences are over.

The bottom line of it is they can't walk out the front door, get in their car and go and buy a pizza. You know, their liberty is deprived every day of their life and they live sometimes 23 hours a day in a room that's, well six by four. Imagine that. I mean, it's just unimaginable to think of those circumstances.

**Justice Hollingworth (court recording)**

*...the two of you exchanged further insults and threats.....*

**Greg Muller**

At the end of a trial - and if the accused has been found guilty - comes the sentence. The jury's role has finished and they've gone home. The defence and prosecution have done their job - the arguments are all over.

It's now between the judge - up on the bench, and the offender - down in the dock. Facing each other. Sentencing is where the rubber hits the road in the justice system. And they're by far the most misunderstood aspect of the court's work.

**Justice Hollingworth (court recording)**

*..he put his hands up - arms stretched and said words to the effect of, "come out on the road." He was alone and unarmed at the time...*

**Greg Muller**

They include extensive background of the offender and victim.

**Justice Hollingworth (court recording)**

*The two of you began a relationship in late 2013. The relationship was a turbulent one, with times of happiness interspersed by frequent arguments, occasional physical violence, and the regular use of cannabis and ice.*

**Greg Muller**

And give a blow by blow description of the crime, and what lead to the offending.

**Justice Hollingworth (court recording)**

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*A number of neighbours heard the sounds of a man and woman yelling, screaming and swearing at each other, coming from your house. They also heard numerous doors being slammed. It was difficult to hear exactly what was being said, although several people heard a woman yelling words to the effect of "give me my phone back." Someone heard a man calling someone "a stupid bitch." Some of the neighbours also saw you. A short time later you left the house with blood on your arms, legs and clothes. You appeared hysterical and were asking for someone to call an ambulance....*

### **Greg Muller**

They're comprehensive, often gruesome and excruciating in detail.

### **Justice Hollingworth (court recording)**

*...or whether the knife was being held horizontally or vertically when you stabbed him. The pathologist described it as a somewhat obliquely oriented single stab wound to the upper left chest immediately behind the middle of the left collar bone. The blade entered the left chest cavity to a depth of about 40 to 50 millimetres and cut part of the left upper lobe of the lung on the subclavian vein leading to external blood loss and a large collection of blood in the left chest cavity...*

### **Greg Muller**

A reading of a sentence in court will regularly run for up to 45 minutes. But the subsequent news item will likely run for no more than two minutes - or a couple of hundred words.

### **Justice Hollingworth (court recording)**

*Please stand Mrs Walker. Balancing the best I'm able the competing the considerations laid down in the sentencing act and having regard to the matters I've just discussed - for the offense of manslaughter I sentence you to imprisonment of seven years. I fix a period of four years I fix a period of four years as the period you must serve before becoming eligible for parole. But for you plea...*

### **Chief Justice Ferguson**

How do you explain that the judge has taken 30 minutes to describe what the crime was and to tell the criminal what they've taken into account and why they're getting the sentence that they're getting, because that's what the criminal judges do? They really speak to the person who has committed the crime, and you can't do that in two minutes if you're going to do it properly.

### **Greg Muller**

Chief Justice of the Supreme Court - Anne Ferguson

### **Chief Justice Ferguson**

Sentencing requires the judge to take into account so many things, and it's hard to explain all of the things that you have to take into account to get to what's the just and appropriate sentence. It's a bit like a melting pot. There's a lot of things that go in to make up a sentence.

**Justice Bell (court recording)**

*The maximum penalty for the crime of manslaughter is imprisonment for 20 years.*

**Greg Muller**

This is Justice Bell delivering a sentence in 2018.

**Justice Bell (court recording)**

*Under the sentencing act the only purposes for which sentences may be imposed are to impose a just punishment, to deter the offender specifically and other people generally from committing the same or similar offences, to rehabilitate the offender, to denounce the offender's criminal conduct and to protect the community.*

**Greg Muller**

Determining a sentence begins with these five purposes.

**Arie Freiberg**

I'm Arie Freiberg, chair of the Sentencing Advisory Council of Victoria.

**Greg Muller**

Arie has been a law academic for more than four decades, published books and articles about sentencing - and in 2009 he was made a Member of the Order of Australia for his contributions to criminology and sentencing law. There's not much Arie doesn't know about sentencing

**Arie Freiberg**

There are a number of purposes and they're all set out in the *Sentencing Act*. And this is the challenge for judges. They've got to balance about five purposes. Retribution, or the imposition of just punishment for the crime.

**Greg Muller**

Justice Hollingworth again.

**Justice Hollingworth**

We're meant to look at punishment. Now, punishment is a tricky concept because we don't live in a lawless society in which vengeance or lynch mobs rule. We have an idea of just punishment and, of course, the concept of what is a just punishment is going to vary enormously from person to person.

**Arie Freiberg**

## **SUPREME COURT OF VICTORIA**

It's about specific and general deterrence. That is, deterrence of the individual and deterrence of others.

### **Justice Hollingworth**

Specific deterrence, which is meant to look at deterring this particular offender from committing another act like this. General deterrence. That is the idea of imposing a sentence that will stop other people who might be thinking of performing a similar act.

### **Justice Hollingworth (court recording)**

*There remains a clear need for specific deterrence in this case as well as general deterrence and just punishment.*

### **Arie Freiberg**

It's about rehabilitation.

### **Justice Hollingworth**

Rehabilitation, the extent to which this offender is capable of still being a – a worthwhile and contributing member of the community.

### **Arie Freiberg**

It's about denunciation. That is, the court saying that what you have done is wrong, and making that statement both to the offender and the community, and ultimately for the protection of the community.

### **Greg Muller**

This is where the motivations of the judge can differ from the desires of the public...

### **Justice Hollingworth**

The problem is that from the different perspectives of different people, those assume greater or lesser weight. So if, for instance, you are one of the victims or members of a victim's family, obviously the things you're most interested in are punishment and the idea of general deterrence.

### **Arie Freiberg**

Probably the most important factor has been just punishment - that is the idea that the punishment must fit the crime that there should be some degree of proportionality between the harm caused and the sentence imposed on the offender.

One of the basic misunderstandings of sentencing is that the focus is on judges as being the central player in sentencing, and, indeed, they are in the sense that they're the ones who impose the sentence in an individual case. However, sentencing is far more complex.

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It's made up of the legislature, who writes the statutes, who sets maximum penalties or mandatory penalties, who creates the sanctions, whether it be probation or community correction orders or intensive correction orders or drug treatment orders and provides the money for all of these sanctions.

And the third arm is the executive. That is, the Corrections Departments and the Parole Boards or the Post Sentencing Authorities.

And the relationship between those in terms of who has the dominant power changes over the centuries and changes over the decades.

### **Greg Muller**

Also our values - society's values are constantly changing - and in turn the laws, and then the courts reflect that.

### **Arie Freiberg**

We have a changing society. We also have views about new technologies. There was nothing in the Bible about internet porn. There was nothing in the Bible about insider trading. So for many new offences we have to decide how serious they are because there were no precedents.

So some examples of that, a study done by the Sentencing Advisory Council of sentencing practices of sex offences against children found that the – the average or the most common sentence was about four years. And people considered the public, the Royal Commission – various others considered that to be an inadequate response simply because it didn't reflect the gravity of the offence – the violence inherent in a crime against the child.

So the response was the standard sentence which is now much higher, 8 to 10 years and the Supreme Court, the Court of Appeal has now said on a number of occasions that sentencing standards have to change.

And in a number of very recent cases they've upheld sentences well above 10 years for these offences saying they are appropriate, that current sentencing practices previously were – were not appropriate.

So, yes, we do change our views. Sometimes we change them the other way. In Queensland abortion has been decriminalised - it was effectively done in Victoria, so, they're not bound by what judges did in the past. Judges should do what's appropriate in each case. So, once again, you have a tension between justice as consistency with other like cases and justice as doing the right thing in this case. And this is another one of those really difficult sentencing conundrums that the courts face.

### **Greg Muller**

Justice Bell has been a Trial Division judge at the Supreme Court since 2005.

### **Justice Bell**

I think we can observe, over time, that the courts attach different weight to those principles and I can give you a very good example of that.

Sentencing for crimes of violence by men against women. Sentences in relation to crimes that have a gender-based quality, I think have increased and rightly increased over time because crimes of violence against women invoke a sense of horror.

**Justice Bell (court recording)**

*You as an individual and others who might likewise offend must be deterred from acting on disrespectful, contemptuous and misogynistic views and opinions about women in that or any other matter.*

**Greg Muller**

That's Justice Bell delivering a sentence on a case where a woman was killed by her ex-boyfriend.

**Justice Bell (court recording)**

*You described Karen as a thing and a creature. There are other similar statements that I will not repeat. I do not accept your counsel's submission that this is to be treated as bluff, bluster trash and rubbish talk. It dehumanises women, blames them for male violence, normalises the abuse of male power and contributes to circumstances in which a woman maybe violently harmed or killed by a man as occurred in this case.*

*The crime you have committed must be unequivocally denounced by the court - not just because it was an aggravated manslaughter but because it is directly associated with those views and opinions.*

*Mr Smith I ask you now to stand.*

**Justice Bell**

Murders of women in the domestic violence situation are crimes of a kind to which the court has had to respond because there is just so much of it. If we had not done that, I think we wouldn't have been playing the kind of role that we should.

**Greg Muller**

As well as the five purposes of sentencing, judges are also required to consider sentencing principles. These principles have been developed through both legislation as well as previous court decisions – that is, Common Law.

The act as a guide to help judges reach a decision.

These include parity - which means co-offenders of the crime should receive similar sentences. There's parsimony - that is, the sentence must be no more severe than is necessary. Proportionality - basically, the sentence must fit the crime. So excessive punishment can't be dished out without justification.



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And totality - that's when the offender is facing more than one sentence. The overall sentence must fit the offender's overall behaviour. Then there's the circumstances of the crime to consider. What happened, how it happened, the background of the offender? Again, these vary from case to case.

Justice Taylor.

### **Justice Taylor**

If you were looking at a – a murder, for example, and you'd look at the circumstances of the murder, and you could say that this is a particularly bad example of murder if it's premeditated, it involves weapons, something like that. That – that would mean that it's a very serious example of the crime of murder.

But then if you look at the circumstances of the accused. If, for example, they have a physical disability which means that their time in custody is going to be more difficult for them because of that physical disability, you have to take that into account in assessing how long it is right that they spend in custody. Now they're pretty stark examples - it's often a lot more subtle than that.

And sometimes it's very hard to reconcile the horrendous impact upon the loved ones of, for example, a deceased person in a murder trial, and their need to see that justice is done with all of the factors that you have to look at with respect to the accused person and – and – and judging those.

### **Greg Muller**

Justice Whelan is one of the more experienced judges here - now sitting on the Court of Appeal. He's handed down some pretty lofty sentences in his time in the criminal division. Here's how Justice Whelan approaches sentencing.

### **Justice Whelan**

If it's a trial, if you're sentencing someone after a trial, you're going to know a lot about the circumstances of the offence before you come to the sentencing side of it, because you will have heard the whole trial about what had happened. You start with what the offence is and what the maximum penalty is, which tells you how serious Parliament regards it. Then, you look at the particular offence and look at that in the context of the range of behaviour that might constitute that sort of offence, like some are obviously going to be worse than others. Everybody's got a story to tell.

The offender, you've got to go through the offender's past history and their personal circumstances. There's a whole series of things that you have to take into account under the Sentencing Act. We have to write down what we find relevant and what we find irrelevant about all of those specific things which is why the things we produce are longer than the press releases that politicians produce.

You've got to be able to put the arguments both sides and why you've come to the conclusions that you do. And then, of course, you've got to look at what's happened in other cases that are relevant to yours, and the answer comes out.

It's a mechanical process, but then it's an exercise in judgment within that sort of process.

**Greg Muller**

The role of the victim in the court process is something which has changed recently. Justice Whelan again.

**Justice Whelan**

Victim impact statements is a big change and I've also thought they've been very – they've always been very important, I think, but their importance has increased over time. I think they add a perspective that was missing previously. And I think it's been a pretty valuable addition to the system.

**Greg Muller**

Why do you say it's been an important addition? What's it added?

**Justice Whelan**

Well, I think it's added a perspective. The nature of the crime has always been something about which we've known a lot. The circumstances of the offender has always been something about which we've known a lot. Whilst we've always known about the impact of the crime as it occurs, there's never really been an avenue for victims to say something about the impact of the crime after the event and how it's affected them subsequently.

I think that's been a valuable perspective to be added. I think it's added an element was probably underutilised previously.

**Greg Muller**

Chair of the Sentencing Advisory Council of Victoria, Arie Freiberg.

**Arie Freiberg**

It has changed sentencing in the process, and I think the process of sentencing is very important because sentencing involves not just the Crown or the state against the offender... The victim is a very important participant. I won't say a "party" because victims aren't parties to the proceedings, but victims are an important participant in the process and it's important that their voice be heard.

Now, all of the studies of victim impact statements tend to indicate that they may not have a major effect on the ultimate outcome.

What the victim impact statement has done is provide a more formal mechanism for that voice to be heard and it could be personally. It could be in writing. It could be in a poem. It could be in all sorts of forms which are accepted. And I think as a form of procedural justice – that is, that the victim has the feeling that they've been heard, in effect a cathartic effect that they are listened to in court, I think that's probably the most important outcome or effect of victim impact statements rather than producing more severe sentences.

**Greg Muller**

Now comes the difficult part of attributing each of these factors - the purposes, the principles, punishment, the victim impact statements and so on to the specific circumstances of the crime.

## **SUPREME COURT OF VICTORIA**

Justice Macaulay - appointed to the Supreme Court Trial Division in 2010 - starts like this.

### **Justice Macaulay**

We're probably all familiar with the graphic equaliser; that is, that electronic display with a whole lot of vertical bars which jump up and down as the sound is occurring in various waves. And if you imagine that all of those tick box things, if each one of those was a bar on the graphic equaliser display, the judge's role, having taken into account all of those bars, is to assign, in a sense, a nominal or notional value to each bar.

How much value do I place on the individual's personal circumstances? What sort of value do I place in this synthesis on the victim impact? What sort of value do I place on the grade of seriousness of this type of crime? Etcetera, etcetera, etcetera.

And, in fact, if you added them all up, you would have a graphic equaliser set of bars that extended very widely across the screen. And our job is, in a sense, to notionally assign those values to all of those elements, and then, at the end, arrive at a sentence which we think properly respects the direction in which all of those values lead us.

So that's – in the end, if you can imagine each individual judge might give a different value to each one of those bars, and so in the end might come up with a different analysis – a different synthesis of where that leads – and that's the personal judgment which is involved in the sentencing process.

### **Greg Muller**

So with so many statutory requirements to consider - could judges be replaced by artificial intelligence? A process completely void of human bias. Changing the length of a sentence would be as simple as adjusting some code.

So does Justice Bell think he could be replaced BY an algorithm?

### **Justice Bell**

No, I don't. I don't. No, you can't sentence by algorithm because it would be impossible to specify the values in the algorithm.

### **Greg Muller**

Chief Justice Anne Ferguson thinks it's one of the biggest challenges facing the court.

### **Chief Justice Ferguson**

In all areas, we're looking towards changes that are external, so AI is the big one. I don't know what impact that's going to have on the courts and the work of the courts and the legal profession generally, and that's something that I think would be a challenge for us, but how big a challenge, I don't know. But we sentence for individual circumstances, the individual, the individual crime, the circumstances of that particular crime and that particular person. I don't know how well AI would deal with that.

### **Greg Muller**

Justice Macaulay again.

**Justice Macaulay**

The process is mechanical in the sense that you must go through the statutory purposes, you must make sure that you have adhered to the statutory requirements for the particular crime and the particular circumstances which are before you.

That said, after that – and you will have heard this expression possibly before – we have to intuitively synthesise.

**Greg Muller**

Justice Champion

**Justice Champion**

What the High Court calls it is sentencing by instinctive or intuitive synthesis. And that's the way we do it. It's not designed to be a mechanical process like adding up a balance sheet.

**Justice Hollingworth**

Instinctive synthesis is an acknowledgement of the fact that sentencing isn't just an arithmetical exercise. We don't start with a particular number for this offence and then add a certain number of years or months because of this particular feature and then take off a – a certain number for some other feature. It's not a mathematical exercise.

It involves an exercise of judgment based on balancing many different and often competing considerations, and that's why we describe it as a synthesis because it really involves a judgment call based on a whole load of different factors.

**Justice Whelan**

It's a consider everything and see what answer is produced by that consideration of everything. The alternative is in America they have this, sort of, grid system where you have, you know, a type B offence with mitigating factors 6, 12 and 13 and you can look up a grid and come to an answer.

**Carmel Arthur**

When I first heard the term "instinctive synthesis", I thought it was 80s rock band

**Justice Hollingworth**

I think the word "instinctive synthesis" or intuitive is unfortunate language because it makes it sound a little bit as if we just pick numbers, you know. It's – it almost makes it sound like it's the vibe as if we just pick numbers out of the hat and that's not the case.

It has still got to be guided by other authorities, by the legislation, by principles of law. So in that sense it's not entirely instinctive or intuitive. And that probably is an unfortunate expression.

**Carmel Arthur**

## **SUPREME COURT OF VICTORIA**

It's a great word, isn't it? But what does it mean? So to the average punter, which I am the average punter, it just means "gut feel" I don't think "instinctive" (stumbles) – see, I can't even say it.

I'm Carmel Arthur and I'm currently a full-time board member on the Post Sentence Authority but I'm also a sessional board member and community member on the Sentencing Advisory Council.

### **Greg Muller**

Carmel's been involved in the courts now for about 20 years.

### **Carmel Arthur**

It wasn't until my husband was murdered that I was catapulted into the justice system and I was put on a very quick learning curve around what justice looks like, what, you know, the court's process is and what the pathway for me would be.

### **Greg Muller**

When you first started that process, what did you want?

### **Carmel Arthur**

It's a really interesting question. When I first started, I actually wanted the toughest of tough penalties delivered to the offenders. I wanted a guilty verdict and I wanted the offenders to be put in prison and never to be released. I didn't want to hear from them or see them again.

### **Greg Muller**

And do you still feel like that?

### **Carmel Arthur**

It's interesting. I don't know what I feel. What I desperately tried to do was not focus on the offenders. I focused more on the behaviour of the offenders because I didn't want to become emotionally connected to them because I felt that that could be quite dangerous for me, in terms of never letting them leave me. You know, Rod and I had been married but we'd only just given birth to our first child, so Jimmy was only seven weeks old and I was really conscious of a commitment that I made Rod after he died and that was that the best way to honour him would to be ensure that Jimmy didn't lose two parents that night.

One of my biggest learnings was to understand – I remember sitting down with our prosecutions and being told that this was about – this was the accused against the State and that you really didn't have any role other than passive observer.

And so judges understand that. The community don't.

So we don't get it when we see a victim, you know, almost being discarded or not having a voice because they didn't have a place in the system. Now they do.

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I had these great expectations after our trial that it would be the panacea to ease my pain and it wasn't. And I could remember after the verdict, everybody was just elated and they were elated with the sentence and we all went to a pub in the city to, you know, celebrate the end of the trial and, you know, for moving on.

And I remember going into a corner and standing there. It was about 20 minutes after. And I just burst into tears and I just thought, "Why I am still feeling this way?" I really thought once I got the sentence, it would all be over for me and I would have this physiological reaction of relief and I didn't get that.

I just realised that my journey had only just begun, in terms of, you know, my new world. And that all that we got that day was the end to a legal process.

### **Justice Bell (court recording)**

*I accept your counsel's submission that the sentence to be imposed should come with a parole period and that it should not be crushing and should not connote destruction of any reasonable expectation of useful life after release...*

### **Greg Muller**

As well as ensuring the sentence is in line with the law - judges avoid what's called a crushing sentence.

### **Justice Whelan**

A crushing sentence is a sentence that leaves a person without hope, with any reason to look to the future, because the only future they can see is the inside of a cell. Of course, for some offences, like murder and that, sort of thing, - you're going to be in that realm, no matter how you work it out, and that's the case also for large scale drug trafficking and repeated sex offenders as well nowadays.

So, I suppose, a crushing sentence is more for people in the sort of middle range that you don't want to create a situation where they have no hope and no incentive to change.

I accept that you wouldn't want to deliver a crushing sentence for a younger offender versus an older offender because the view of the courts, and it's actually in the principles of sentencing that you do need to take into consideration the age of somebody and whether or not there is an element of rehabilitation capable within that person.

### **Carmel Arthur**

So I get why a judge doesn't want to deliver a crushing sentence to a younger person, but, I also get why people want to see crushing sentences. It's because it's the only thing that they can probably relate to.

That I was crushed, you were crushed. Done. Whereas it's not the purpose of sentencing and it's not the role of the judge.

### **Greg Muller**

Locking people away for excessively long periods is also known as warehousing.

**Justice Whelan**

“Warehousing” has its supporters. Some people, if you went to the United States, you’d probably get the best data on that, because they are certainly warehousing on a massive scale in that people serve very long sentences there for not necessarily terribly serious crime. I don’t have the perception that the USA is a safer place as a result, and yet they’ve probably got 10 times the number of prisoners per head of population that we have. I think it would be something like 10 times.

**Greg Muller**

So, are judges getting it right?

Arie Freiberg again from the Sentencing Advisory Council.

**Arie Freiberg**

If you judge it by the number of appeals that come from the County Court or the Supreme Court or even from the Magistrates’ Court, they’re very, very small, and it’s about three per cent of cases that are appealed, and not all of those are successful. So you could say that judging on that criterion, 97 per cent of cases are probably right.

**Greg Muller**

A study from the Sentencing Advisory Council, Sentence Appeals in Victoria - done in August 2018 found...

Of the 1,910 sentences in Victoria’s higher courts - that’s the Supreme Court and County Court – 230, or 12 per cent were appealed.

Twenty-three of those appeals were from the crown - that is, the prosecutor wanting a tougher sentence. Now, of those 23 appeals, 16 were successful.

So out of more than 1900 sentences, 16 were found to be too low. That’s less than one per cent.

In contrast, 44 sentences were successfully appealed by the offender - that is, they were found to be too high.

So, from a legal perspective - judges are generally getting it right.

But what about the other major stakeholder in sentencing - the community?

**Vox Pops Bourke Street Mall**

*Person in the street 1:* Too lenient, mile too lenient

*Person on the street 2:* No. No I don’t. To be honest I think that they are too soft. I think some judges do get it right because they understand the situation for these particular



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offenders. But there are some cases that there are being a bit lenient and should be a little bit harsher.

*Person on the street 3:* No. I think we should - I watch a lot of crime shows on TV and I think the Americans get it right they are a lot harsher than we are and I think the courts and the laws are too soft in Victoria.

*Person on the street 4:* Probably not - I think there's been a feeling that the police are doing their job correctly but when it gets to the courts they're being a bit too lenient.

*Person on the street 5:* No not really. No not at all. I think they're going quite harsh on ones they shouldn't be quite as harsh and getting it wrong in other cases where it should be.

### **Arie Freiberg**

In the general public's view, they often think they get it wrong, that judges are far too lenient, and that's based on their perceptions of sentencing that they gain through the media which often picks up the unusual cases – those which are controversial, and those which are at the extremes, usually the ones that newspapers believe are too low.

### **Greg Muller**

Justice Taylor.

### **Justice Taylor**

What I think is one of the most interesting things about sentencing is that, despite the reasonably frequent criticisms that judges are out of touch, when all of the studies that have – show that when people are actually informed in depth, not – not in three paragraphs in a newspaper, but in depth about the sentencing process and what the judge had to take into account and not take into account, those criticisms tend to fall away.

So sentencing is very complex, and it's very hard to communicate the complexity of it to people who aren't intimately involved in the particular sentencing.

### **Greg Muller**

We've come to Tasmania to speak to someone who's looked closely at this issue.

We've come to Government House in Hobart. A palatial neo-gothic sandstone building surrounded by ornate English gardens, overlooking the Derwent River.

### **Professor Kate Warner**

I'm Kate Warner; Professor Kate Warner. I'm Governor of Tasmania, but I also still do some work at the university, particularly, in relation to the sentencing projects and public opinion.

### **Greg Muller**



## **SUPREME COURT OF VICTORIA**

Professor Warner recently did a study - called The Victorian Jury Sentencing Study - to find out if the public perception that judges are soft on crime - stacks up.

### **Professor Kate Warner**

The study really had its genesis in a comment made by the Chief Justice of the High Court and he suggested that, if politicians really want to know what the public think about sentencing and also policy makers, why don't they ask jurors.

### **Greg Muller**

The idea that a jury represents the community.

### **Professor Kate Warner**

Yes, two things, really. The jury represents the community and they're drawn from the community. It's quite representative of the general public. And also they're well informed about particular cases. We recruited jurors from trials where there had been a guilty verdict and we did this in a number of stages.

So first of all, after the guilty verdict, we asked them to suggest what an appropriate punishment would be for that offender before the judge had imposed sentence. So they didn't know what the judge was going to do. So it was their view and we said, "We want your view. We don't want you to guess what the judge might do. We want your view on what you think is the appropriate sentence".

So that was really the central question in the study.

We asked them about the aggravating and mitigating factors in the case; other sentencing factors and various other questions, repeating some of the stage one questions such as, "Do you think sentences, in general, are too lenient or too tough?"

### **Greg Muller**

And what did you find?

### **Professor Kate Warner**

Well, the first thing to do was to compare the juror's sentence in each case with the judge's sentence that was imposed. So we wanted to see whether the juror's sentences would be more severe or more lenient than the judges. And we found, actually, that a majority of jurors came up with a sentence which was more lenient than the judge's sentence. Sixty-two per cent. So, you know, quite a clear majority.

### **Greg Muller**

This finding flies in the face of previous research. Studies in 1998 and 2001 found only 18-20 per cent of people believe that judges are in touch with public opinion.

## **SUPREME COURT OF VICTORIA**

But Kate Warner's Juries study found 90 percent of jurors thought that the sentence imposed by the judge was appropriate, and 83 percent also thought that judges were in touch with public opinion.

So how can this discrepancy be explained?

**Professor Kate Warner**

Well, there are various ways that you can try and explore public opinion. So you can give members of the public more information. So people have done this, getting them to read a case summary or reading out a case vignette. So that gives them a little bit of information but they would never have as much information as a juror would have after sitting through the case, so they're much more intimately concerned with the case and, also, they've seen the offender as a real person. So it's not a matter of just having a, sort of, stereotypical view of the offender for a particular type of offence. So, yes, it has much more of the human element involved.

**Greg Muller**

And so they saw more what a judge would see?

**Professor Kate Warner**

Yes, absolutely, what a judge would see.

**Greg Muller**

And that changed their idea of sentencing?

**Professor Kate Warner**

Well, we think so.

**Greg Muller**

There were some examples though where judges and juries parted ways.

**Professor Kate Warner**

Yes. Absolutely. So for sex offences, only 50 per cent came up with a sentence which was more lenient. But for violent offences it was something like 72 per cent came up with a sentence which was more lenient. So a big contrast between violence and sex offences.

**Greg Muller**

Do you think there's a discrepancy, then, between what the public thinks sentencing is for and what a judge thinks sentencing is for.

**Professor Kate Warner**

Yes, actually, that was another question that we asked. So we did ask about the purpose. And they preferred, you know, a deserved punishment. Sometimes we call this retribution or

just desserts, whereas that was the least favoured purpose for judges. So quite a difference there between the two.

**Greg Muller**

The study found that if someone sat in on a case from beginning to end - they generally tend to agree with the judge. But a jury is 12 people. The rest of us don't get that intimate knowledge of cases. And therein lies the problem. Public opinion, despite not being informed, still matters.

**Professor Kate Warner**

Yes, it does. It does. And see, some would argue that if you don't take public opinion into account then this is bad for the criminal justice system because, if it's too divorced from what actually happens in the court, it will lose its legitimacy and we want the criminal justice system to have legitimacy in the eyes of the public.

First of all, we want them to obey the law.

Secondly, we want them to cooperate with the criminal justice system. So we want them to come forward and give evidence to the police. If they're a witness of crime, we want them to give evidence in court. We want them to appear for jury service and if we're arguing that punishment is about showing public condemnation for offending, then surely it's argued the views of the public about that offending should be relevant.

**Greg Muller**

The Sentencing Advisory Council has just released another report called- Public Opinion about sentencing. It's an overview of ten years of studies looking into community attitudes about sentencing.

You can find it online. Basically all the research points to a consistent finding, quote: "informed members of the community are slightly more lenient than judges, not the other way around", end quote.

**Greg Muller**

Is there such a thing then as a perfect sentence?

**Carmel Arthur**

No, I don't think – is there a perfect sentence? It's not an exact science, you know. X plus Y doesn't equal Z. And everybody has a different view. I know, within my own family, that we all wanted different sentencing outcomes, so there was never going to be a perfect sentence.

**Greg Muller**

Justice Taylor.

**Justice Taylor**

## **SUPREME COURT OF VICTORIA**

Some people will never be satisfied with what – with what a judge decides. In a way that's completely understandable, because nothing that ever happens in this court will bring someone back from the dead. At the same time, there are very many people who, as long as they have had – have been heard, and can see that the judge has done his or her very best to achieve a just result, accept that.

### **Carmel Arthur**

I think we have a great expectation that sentences will deliver a lot more than what they're capable of delivering. But they are necessary and they must in line with expectations - managed expectations.

Sentences can ease your pain a little bit because it validates, but they'll never take away your pain. You can't undo what's been done.

### **Greg Muller**

Next episode we're going to take a look at some of the more controversial aspects of sentencing, mental illness, drugs and parole.

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***[Ends]***