

**Episode 8  
The Criminal Trial Process**

**Policewoman**

Fred Smith?

**Fred Smith**

Yes.

**Policewoman**

You are under arrest for the murder of Clifford Jones.

**Evan Martin**

Over the last decade, an average of 55 people a year have been arrested or summonsed for murder in Victoria.

But the arrest is only the beginning of what could be a very lengthy process.

They'll attend a raft of different of hearings in at least two different courts. It's complicated, exhaustive and thorough.

This episode is about this criminal trial process.

**[Main theme]**

**Evan Martin**

I'm Evan Martin and this is *Gertie's Law*.

Fred Smith's been charged with murder, launching him into the complex world of the Victorian justice system.

There'll be a filing hearing, maybe a bail hearing, then a committal hearing. He'll attend directions hearings and mentions. If he pleads not guilty, there'll be a trial. If he pleads or is found guilty, there'll be a plea hearing. Then a sentence. Perhaps an appeal.

Some of these hearings can be an hour or two long, while others can go for weeks, or months.

And there's one thread that runs through every part of this process - the right to a fair trial.

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It's a term you hear a lot around here, and for good reason. It really underpins everything that happens in a courtroom.

### **Chief Judge Kidd**

The right to a fair trial encompasses a number of concepts, but, perhaps, first and foremost, it involves the presumption of innocence. And what that means is that if somebody is charged with a criminal offence, they are presumed to be innocent until found guilty.

### **Evan Martin**

Justice Kidd is Chief Judge of the County Court and also a Judge of the Supreme Court.

### **Chief Judge Kidd**

So I'll give you one important example. What it means is that the Crown or the prosecution must prove the case. If someone's presumed to be innocent, they don't need to prove anything, of course, because they're presumed to be innocent. No burden lies upon them. It's the institution or body which brings the charges which must prove the case.

### **Evan Martin**

Justice Hollingworth, Principal Judge of the Criminal Division.

### **Justice Hollingworth**

It's interesting because very often, the criticism that there's too much emphasis on the rights of the accused is made by people who never actually envisage that they themselves will be in the position of being an accused person.

I think the important thing to think about is not an us and them situation where you look at someone who you believe is guilty and you say "Why is the system giving them a fair trial" or – or apparently bending over to help them. The way to really analyse the legal system or any system is to look at how would you want it to apply if it was you involved?

If you or someone you loved or cared about were accused of a crime, would you want them to have the fairest possible trial or would you want a trial in which the state uses all its force to get a conviction as quickly and as efficiently as possible, even if it means that your loved one is, in fact, innocent?

Of course, we would all want a fair trial and a trial in which the presumption of innocence actually has meaning. The state has enormous resources and if the state accuses someone of a crime and has all the resources of the state to pursue that

person, it's not unreasonable that the state should have to prove the charges and to prove them beyond reasonable doubt.

**Evan Martin**

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

**Justice Taylor**

So, there's a whole lot of things that go to make up a fair trial. Particularisation of the charges. An accused has the right to know what the charge is against him or herself. They have a right to know the evidence that the prosecution brings to support those charges. They have a right to test the evidence in front of the jury. They have a right to representation, and if they cannot afford their own representation, we have Legal Aid for a very good reason - so that an accused person is not disadvantaged.

**Tim Marsh**

My name is Tim Marsh. I'm Chief Counsel at Victoria Legal Aid.

Victorian Legal Aid is, I guess you'd call it, a very large, generalist legal practice. We do a substantial amount of work in the criminal jurisdiction, but also work across family law and some areas of civil law, and I think it's fair to say that Victoria Legal Aid does work in almost every court or jurisdiction in the State of Victoria, from administrative work at VCAT, all the way up to the Supreme Court and the Court of Appeal.

**Evan Martin**

We all know legal services are expensive.

Legal Aid is a government-funded organisation which provides counsel to those who can't afford it.

**Tim Marsh**

The first and most important thing that's looked at is eligibility in terms of a person's means. So do they meet the means test that applies to the relevant guideline?

There are some cases where a grant of legal aid may be given to a person, but with an obligation that some or all of those funds that are used to provide legal representation are repaid at a later date.

**Evan Martin**

Though it is rare, the court itself can step in if it's concerned someone may not receive a fair trial.

**Tim Marsh**

Courts can order Legal Aid to fund representation in certain cases where they believe that an accused person would not receive a fair trial if they didn't have that representation. So there are some cases where a person has not been provided with a grant of legal aid. Perhaps they have failed a means test or there is some other reason, but then a court forms the view that it would not be possible for this person to receive a fair trial if they didn't have access to counsel. And Legal Aid, accordingly, is then directed by the court to fund the case.

**Evan Martin**

Why is it important for people accused of crimes to have legal representation?

**Tim Marsh**

Well, I think your question, Evan, touches on one of the important aspects of it. Being accused of a crime is not the same as being guilty of a crime, and whilst there can be circumstances where reporting tends to suggest that it's almost a fait accompli, nevertheless it's still very important that everybody who is accused of a crime has a right to participate fairly in the trial process.

**Evan Martin**

Are you allowed to represent yourself? Would that be an option for somebody charged with a criminal offence?

**Tim Marsh**

It's often said that a person who chooses to represent themselves has a fool for a client, but putting that to one side, indeed, it is a person's right to do that, and there have been a number of very high profile examples of people who've chosen to represent themselves, even in the Supreme Court. Again, it's something which I think carries with it an enormous level of risk and, fortunately, there are probably fairly few examples of that.

It shouldn't come as any surprise that the criminal law can be very complex, particularly when there are issues of the admissibility of evidence or, perhaps, a large number of witnesses or some complexity to the evidence, say, medical or scientific evidence. And in many cases, it's simply not reasonable to think that a person would be able to adequately represent themselves in those circumstances. Lack of representation could not only lead to a much longer trial. It could lead to a scenario where an accused person is cross-examining victims directly, which could be very confronting, and it could also lead to circumstances where the outcome is then affected by the person's ability to properly represent their own interests. So the outcome could be called into jeopardy.

Not everybody can afford to fund the cost of legal representation, and one of the main purposes of Legal Aid, certainly in the criminal context, is to ensure that

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everybody is, effectively, on a level playing field. So whether you are able to privately fund your defence, or whether you are a person with a long history of homelessness or mental illness, that you still have the practical capacity to exercise those same rights to challenge the prosecution case against you and to ensure that a conviction is effectively achieved at the same standard, and that you're not subject to a different sort of justice if you simply can't afford it.

Although it's tempting to think of that as just being something that benefits the accused, ultimately, I would argue, and I think many people would support this, that the overall quality of the justice that we end up with is something that is far higher, and there's a real interest in pursuing that.

The one thing that's almost universal across criminal cases in the Supreme Court is that there has been a death and that there's a grieving family. And over the years, I've seen many of those families and seen the incalculable grief that they go through, and I completely understand why they find it difficult to sit in court and listen to me advocate on behalf of a person who has done them and their loved ones so much harm, and I completely understand that.

But in advocating on behalf of people who are accused of serious crimes, or people who have pleaded guilty to them, what we're trying to do is ensure that there is a robustness to the outcome, that the endpoint that we get to is the final point, and that we end up with a result that everybody can move on from. And as convenient as it might be to imagine that this process would be better if defence counsel weren't involved, it's just not the reality. The process wouldn't be any better. It wouldn't be any quicker and it certainly would be any easier for the families of victims if accused people weren't represented by competent, ethical counsel who are able to play their role in bringing the proceedings to a final and just conclusion.

### **Evan Martin**

Because Fred Smith's been charged with murder, his case will end up before the Supreme Court, but there are a couple of steps before he gets here.

Chief Judge Peter Kidd.

### **Chief Judge Kidd**

Well, the law requires that every person taken into custody for an offence must be brought before a bail justice or before the Magistrates' Court, within a reasonable time of being taken into custody, and as a matter of practice, at least with the Magistrates' Court, that's within a day or so. And then they'll have this opportunity to apply for bail.

### **Evan Martin**

Justice Champion, who has been a judge in the Criminal Division since 2017

### **Justice Champion**

If he's been charged with murder, he won't be admitted to bail, but he will be required to be brought before a court as soon as possible so that the court then gains some control over the process of how he's dealt with.

### **Evan Martin**

Fred Smith can later apply for bail at the Supreme Court, but for a murder charge, the accused must show exceptional circumstances for it to be granted.

So, Fred's being remanded in custody, but his dealings with the Magistrates' Court aren't done yet.

### **Justice Taylor**

At the Magistrates' Court, a matter will go into what's called a Committal Hearing. The purpose of that is for the evidence to be tested. It's not about determining whether someone is guilty or innocent of the charge laid.

So, an accused person has the right to test by cross-examination some of the prosecution witnesses with the leave of the Magistrates' Court. And at a Committal Hearing, a Magistrate will determine whether a reasonable jury, properly instructed, could on the basis of all the evidence to convict the accused. Not 'would' convict the accused, but 'could.'

The Magistrate must make that determination, whether there's a contested preliminary hearing or not. If that test is satisfied, the matter is then referred to the Supreme Court for trial.

The other thing that happens at the Committal procedure is, through that testing process, there's often resolution of matters.

So, it can be a plea to the charge, it can be a plea to the later charge, it can be a withdrawal of the charges if the prosecution find that their evidence would not sustain a conviction or unlikely to sustain a conviction in a higher court.

### **Evan Martin**

Fred Smith fronts the Committal Hearing and is presented with the prosecution's case against him. Let's assume the evidence is overwhelming, and he, accompanied by his lawyer's advice, decides to plead guilty.

### **Magistrates Court associate**

Fred Smith, you have been charged with the murder of Clifford Jones. How do you plead?

**Fred Smith**

Guilty.

**Evan Martin**

Because Fred has pleaded guilty, the next major step in the process is the plea hearing.

**Justice Champion**

On the day of the plea, what will happen is that the prosecution will open the case verbally, and will tell the court, basically, what the case is about. A little bit about the person that's deceased, the victim, the offender, about his or her background. Will address the facts and circumstances of the killing, and then may move on to present people who are putting forward victim impact statements.

**Evan Martin**

You can hear more about victim impact statements in episodes 2 and 7.

**Justice Champion**

Once the prosecution is finished, then it's the turn of the defence to stand up and make a plea,

**Defence counsel**

It is our submission that Mr Smith's prospects must be characterised as, at least, good...

A lengthy parole period would assist Mr Smith facilitate his reintegration into the community...

**Justice Champion**

And the plea will address the nature and gravity of the offending. The plea will address sentencing factors that need to be taken into account. There will be some law discussed during the course of the hearing. The defence counsel will tell the court quite a bit about the background of the offender, from childhood right up until the present day. Things, of course, that are relevant to the consideration of an appropriate sentence.

**Defence counsel**

He is without any prior criminal history...

Mr Smith continues to have the support of family and friends, and with no history of drug or alcohol...

Mr Smith has shown immense remorse for his actions, both by his words and actions...

**Justice Champion**

There may be expert reports that are used to explain certain factors about the offender. It may be that a psychologist or a psychiatrist is called to give evidence before the judge and be examined and cross-examined in order to discern what sort of mental health factors might have been in play at the time of the offending or perhaps even in play at the present time, such that those things need to be taken into account in the distillation of an appropriate sentence.

**Evan Martin**

And the entire purpose of the plea is to give the judge as much information as possible to sentence?

**Justice Champion**

Yes. The judge needs to take into account really all of the relevant factors that go to a consideration of the type of offending that it was, the gravity of the offending, the culpability or the level of moral culpability of the offender, the whole range of questions to do with the factors set out in the Sentencing Act that, by law, have to be taken into account.

**Evan Martin**

The judge will then adjourn the court and prepare the sentence. This could take anywhere from a day to a number of weeks.

We explored sentencing in episodes 2 and 3 of this series. But it won't surprise you that for the charge of murder, Fred is looking at a very lengthy stint in custody.

The maximum sentence for murder is life-in-prison, but Fred will likely be sentenced to less than that, as his plea of guilty acts as mitigation.

**Justice Champion**

That's one of the factors that needs to be taken into account, and it's quite clear that the law states that a plea of guilty needs to be taken into account.

**Evan Martin**

As a recognition that a trial has been avoided, this typically results in a discount in the sentence.

Why is it so beneficial to avoid a trial?

**Justice Champion**

Well, there are a number of reasons for that



From the point of view of the prosecution, it may be that there are weaknesses in the primary charge that's brought, and quite often, a prosecutor will look at a case that's been charged as a murder and determine that it is going to be particularly difficult to succeed on a charge of murder. There may be weaknesses in the case for all sorts of reasons, or there simply may be gaps in the case that will prevent, in the prosecutor's view, a successful outcome so far as a murder charge is concerned. So, that's one factor.

The other benefits that come from a plea of guilty is that it removes the pain of the family, relatives and friends of the victim of having been put through the ordeal of a trial, and my experience tells me that is frequently an extremely painful process.

One of the other reasons, of course, is that if by a plea of guilty that might occur that might inevitably result in perhaps a day – one day or two days of hearing a plea, that's a lot different from conducting a trial that might take up to six or eight weeks. So there is a massive economic benefit to the community as a result of a decision to plead guilty.

**Evan Martin**

So, Fred is sentenced.

Excluding life sentences, in 2017-18 the average length of imprisonment imposed on people sentenced for murder was 23 years, 7 months.

The time Fred has already spent in custody, from the very first day, counts towards this period.

**Policewoman**

You are under arrest for the murder of Clifford Jones.

**Evan Martin**

Fred will then be taken to one of the 12 men's prisons in Victoria, where he will begin to serve the remainder of his sentence.

But what if, back at the Magistrates' Court, Fred had pleaded 'not guilty'?

Let's rewind.

**Magistrates Court Associate**

Fred Smith, you have been charged with the murder of Clifford Jones. How do you plead?

**Fred Smith**

Not guilty.

**Evan Martin**

So, the Magistrate has concluded that there is sufficient evidence to send Fred Smith to trial at the Supreme Court.

But there's going to be a pretty long wait before that happens, in which Fred will be held in remand.

**Justice Hollingworth**

One of the problems is that the prosecution, in particular, have to rely on evidence that's going to be given by experts who are as overstretched as everyone else in the criminal justice system.

**Evan Martin**

Justice Hollingworth.

**Justice Hollingworth**

So unlike shows like CSI, where you can get a DNA test back within about 24 hours, you can wait six months or more, even for a top priority DNA test, and the more complicated the case and the more tests you need, the more dependent you are, if you're the prosecution, on getting material from people who are outside your control, and then once you've provided that material, of course, the defence want an opportunity to assess it to see if they want their own expert, and defence experts are also under the same sort of constraints.

And whilst forensic evidence is one obvious area, we often have also psychiatric or psychological evidence that's going to be relevant, and there are similar backlogs in those cases.

**Evan Martin**

Like any organisation, the Supreme Court also has its own body of work it has to get through.

**Justice Lasry**

The Supreme Court doesn't have an endless supply of judges, and a fairly ever-increasing workload. So, of course it takes time.

**Evan Martin**

Justice Lex Lasry was the Principal Judge of the Criminal Division. He retired in 2018 but is currently back at the court as a reserve judge.

**Justice Lasry**

It would be good to improve the system, and everyone's been trying to over the years, but our workload is increasing. The County Court workload is increasing and the Magistrates' Court workload is enormous. I don't know how they do it.

**Evan Martin**

Chief Judge Peter Kidd.

**Chief Judge Kidd**

Of course, the courts are always doing their best to make more of the resources which they have and to become more efficient, but there's a limit to what courts can do with the resources available and if the community and the government of the day considers that the delays are unacceptable, then at least part of the answer to that has to be more resources. And if there are not more resources then the courts can only do the best that they can do with the business that they have before them.

It's true though that delay, as a general concept, is something that we should be minimising, and we should be minimising that because delay does cause problems to the criminal justice system.

It diminishes the quality of evidence, As a matter of common sense, one could remember what happened yesterday with greater clarity than what happened five years ago. So we want to minimise that delay to ensure that the memory of witnesses is preserved as best can be done.

Of course, the other question that we have to consider with delays – we need to consider the complainants if it's a case where you have victims, such as victims of sexual offending or victims of assaults.

Any complainant in a criminal trial finds the criminal process traumatic and distressing. And the law and the criminal procedure has taken great steps in recent times to minimise that trauma and delay. Minimising the delay is one way in which to tackle that.

Likewise, an accused person who stands charged with serious criminal offences and is facing the prospect of conviction and maybe the prospect of imprisonment, that too is an incredibly distressing experience, as one could imagine.

If you're charged and on remand awaiting trial you are presumed innocent and they might, in fact, be found not guilty. In which case, they would have served time in a prison when they didn't actually commit the criminal offence. In fact, it's hard to imagine a more distressing prospect.

**Evan Martin**

Time passes - perhaps a year, maybe more.

The prosecution and defence work on their briefs.

A Supreme Court judge is assigned to the case.

Fred Smith remains remanded in custody.

During this time, there'll have been a series of directions hearings and mentions, in the Supreme Court. These are short proceedings between the judge, the prosecution and defence, without a jury present.

**Justice Lasry**

By and large, those mentions are designed to enable the court to manage cases.

We take the view – certainly I took the view as Principal Judge – that the only way we can get cases moving is to monitor their progress, rather than just have the case go into the Supreme Court list and wait for the trial to come on. So that's why we see the parties within 24 hours of committal, and those various mentions are designed to push the case along. Tell us what the issues are. Tell us how long the trial is going to take. If you want an adjournment, why do you want three months' adjournment? If a witness isn't available, why isn't the witness available?

**Evan Martin**

The hearings are also used to determine what evidence will be heard during the case, before it reaches a jury.

There should be no surprises in a courtroom. Every piece of evidence, from the prosecution or defence, is known by both sides.

Justice Taylor.

**Justice Taylor**

We don't do trial-by-ambush in Australia. It is therefore critical that an accused person knows the evidence upon which the state brings the charge, and if they don't know all of the evidence, they are not able to properly make decisions in advance of trial or, indeed, at trial, challenge that evidence. So, it's utterly critical that the prosecution serve the complete brief of evidence and disclose any other materials relevant to the matter to the accused.

Juries make decisions upon the basis of all of the evidence considered together, and juries are often told to consider the evidence like pieces of a jigsaw. That one piece

of evidence is not much help, but when you put them all together, suddenly the picture becomes clear. It's the same for barristers.

You cannot understand the potency or danger of a particular piece of evidence unless you consider it in light of all of the other evidence, and you need to understand that there's sufficient evidence or not sufficient evidence to prove the elements of the offence.

There's just simply no way around knowing all of the evidence.

### **Evan Martin**

It's time for the trial, which could run for up to a few months.

No matter the length, the steps are the same.

The first thing to do is empanel a jury. We covered the jury empanelment process in episode 6.

Once the jury is finalised and the judge has given them some information about the case and described how it'll run, the trial kicks off, starting with an address to the jury from the prosecution.

Justice Hollingworth.

### **Justice Hollingworth**

The prosecution opening is, really, the first chance that the jury have to hear what this case is about in a factual sense. So, what the prosecutor will do is explain what the charges are and, in broad terms, what evidence the prosecution are going to call in order to prove those charges. At this stage, this isn't meant to be argument. So this isn't one of those very flamboyant addresses, like you might see on television. And, sometimes, an opening address can appear almost a little bit dry, precisely because it isn't what you see on television. It's just a laying out of the prosecution case and, from a prosecution point of view, a bit of a roadmap of where they see the case going and the various bits of evidence they're going to call to prove their case.

### **Prosecution counsel**

It is alleged that Mr Smith entered the house of Mr Jones somewhere between the times of 7pm and 8.30pm...

When police found a number of shell casings in the floor of Mr Smith's...

You will hear evidence from many witnesses, including the victim's sister...

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If you apply common sense to the evidence, the prosecution believes you will be satisfied, beyond reasonable doubt, that it was indeed Mr Smith who shot and killed...

### **Evan Martin**

Depending on the complexity of the case, this might go for 20-minutes, or run over a couple of days.

### **Justice Champion**

In response to that, the law allows defence counsel to respond...

### **Evan Martin**

Justice Champion.

### **Justice Champion**

...It's not the same as a prosecution opening, but the design of it is to assist the jury to understand where the issues lie between the parties and what are the areas of battleground between the prosecution and defence.

### **Evan Martin**

Once the prosecution and defence have addressed the jury, the prosecution launches straight into their evidence against the accused.

### **Justice Hollingworth**

The most obvious type of evidence that people would think about when they think of evidence would be witnesses, and I'll come back to those in a moment, but evidence can also consist of photographs, documents, computer programs. It can consist of things like weapons, or clothing, or other physical objects.

Evidence can also include what we call a view. In some cases, we take the jury out to the location where the alleged crime occurred in order for them to get an assessment for themselves of the scene, and that's so that when they hear from the witnesses later, they can assess, for themselves – when the witness says, "Well, I ran there", or, "I hid there", or, "I was looking from this position and this is what I could see", they can assess that for themselves. So, all of those different things form part of the evidence that the jury can have regard to.

Witnesses fall into a number of categories. Once again, the most obvious one that probably comes to people's minds would be eyewitnesses, but, actually, there are many, many crimes where there is no eyewitness. In many cases, witnesses are people who are part of either setting the background scene and placing – getting either, in a murder case, the accused or the deceased, to the location where things are said to happen. Sometimes they're people who give evidence about what happened afterwards.

Often, they're experts. In a typical homicide case – we'd often hear from a pathologist who did the autopsy, perhaps a toxicologist, neuroscientist, someone of that sort if there are aspects in relation to the deceased's body or the cause of death. You might hear from DNA experts, blood spatter experts, ballistics experts. There are a whole host of people that might deal with some of the forensics of the scene.

You'll often have a crime scene examiner, evidence from the first responders, the police or the ambulance people, who first turned up about what they saw, and so on. So there might – within the body of witnesses, there can be a whole host of different types of witnesses.

**Evan Martin**

And some witnesses can be on the stand for quite a time. You had a case, a sexual assault case, where a DNA expert was on the stand for...

**Justice Hollingworth**

Five days.

**Evan Martin**

Five days.

**Justice Hollingworth**

And that's where I'm sure the jury, like the judge, prey for the witness to be interesting, and certainly the witness you're speaking about, who went for about five days, who was a DNA expert, thankfully he was a very interesting person.

That said, when it's difficult evidence, you often have to give the jury more breaks and make it clear to them that if they're having trouble concentrating, they should ask for a break.

**Evan Martin**

One by one, the prosecutor will take each witness through their evidence.

Once they're finished with a witness, it's the defence's turn to cross-examine.

Finally, the prosecutor will have the opportunity to re-examine the witness, to resolve any things that are unclear as a result of cross-examination.

**Justice Champion**

And so the process will go through the Crown case.

Witness after witness will give their evidence in that way, sometimes punctuated by objections or occasions when defence will want to address the judge about some

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issues of law that might arise during the course of the Crown case. So in those instances, the jury will go out and have a cup of tea or go to lunch or something of that kind, whilst those sorts of legal debates might happen in the absence of the jury. And so that will proceed through the whole of the Crown case which might take a day; it might take three months. It just depends on the scale of the case that the prosecution are bringing.

### **Evan Martin**

Once all of the prosecution witnesses have been heard and all of the evidence presented to the jury, it's the defence's turn.

But there's one important difference.

Chief Judge Peter Kidd.

### **Chief Judge Kidd**

They don't have to and the reason they don't have to, of course, is that they are presumed innocent. The accused person is presumed innocent. No onus lies upon the accused person to prove anything. So an accused person is entitled, at the end of the prosecution case, to, effectively, say, "We call no evidence, but the Crown has failed to prove its case". And that happens often enough.

### **Evan Martin**

If the defence does decide to call evidence, Fred Smith might even take the witness stand himself.

### **Chief Judge Kidd**

He or she would get into the witness box, give his or her account of things, but this time it's the defence leading that evidence and then it's the prosecution that have the opportunity to cross-examine the accused person. With the defence finally re-examining on any matters which require clarification.

### **Prosecution counsel**

Mr Smith, the car shown in exhibit 8 is your Ford, is it not?

### **Fred Smith**

It is.

### **Prosecution counsel**

And it's parked on the street of the deceased. Correct?

### **Fred Smith**

That's right.



**Evan Martin**

After sitting in on a bunch of trials over the last year, I'm not sure there's a more captivating time to be in court than when the accused person is on the stand being cross-examined by the prosecution.

**Prosecution counsel**

But you're not in the driver's seat in this photo, are you?

**Fred Smith**

No. I went for a walk. I was feeling...

**Prosecution counsel**

A walk?

**Fred Smith**

Yeah. I needed to clear my head.

**Prosecution counsel**

You needed to clear your head. While you were on this walk, did you hear gunshots?

**Fred Smith**

I honestly can't remember.

**Prosecution counsel**

You can't remember whether you heard gunshots? It's not like gunshots are an everyday occurrence on a suburban...

**Evan Martin**

It's like a game of cat and mouse between counsel and the accused, and it really does seem like anything can happen in that moment.

Indeed, only in December last year, a man accused of murder took the stand two weeks into his trial. While being questioned by the prosecution during cross-examination, he suddenly confessed to the murder, drawing gasps from every corner of the courtroom.

The jury was dismissed and his plea hearing was arranged.

This is obviously an unusual occurrence though.

If an accused is called, they'll usually be the last witness, leading to the closing addresses from the bar table.

**Justice Hollingworth**

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The closing addresses are actually, I think, the most interesting and entertaining. Entertaining might be the wrong word. They're the most interesting part of the trial. They're probably what resembles most what the layperson expects, from what they've seen on television, an address to be, because this is the stage at the trial where the barristers are allowed to argue.

They look back on all the evidence that's been led, and this is their chance to try to persuade the jury as to what conclusion they should or shouldn't come to from that evidence, and if you ever want to watch part of a criminal trial, I think watching the closing addresses is the most interesting and, often, the most inspiring part of it, because that's where you often see the best advocacy.

### **Prosecution counsel**

We have a motive. You've heard about the animosity between Mr Smith and the deceased. You've heard about how, one month prior to the...

### **Defence counsel**

Fred Smith may have been parked on the street that night, but in no way does that make him the shooter. In fact...

### **Prosecution counsel**

Mr Smith himself attested to making that phone call. But phone records show that the call was placed more than five minutes after the gun shots...

### **Defence counsel**

Mr Nguyen admitted in the dock that he lied in his original statement to police. Who is to say he has not lied from the dock...

### **Prosecution counsel**

Mr Smith admits he was on the road at the time of the shooting, but maintains he cannot remember whether he heard gunshots. I ask you, ladies and gentlemen that if...

### **Defence counsel**

So we urge you, ladies and gentlemen, to find Fred Smith not guilty of this murder.

### **Evan Martin**

Following the closing arguments from the barristers comes, arguably, the biggest moment for the judge in the trial.

The final address to the jury before they deliberate.

### **Chief Judge Kidd**

## **SUPREME COURT OF VICTORIA**

We often call that “the charge”, but it’s referred to in different ways – the judge’s directions, the judge’s charge. And many of the fundamental legal principles are reiterated throughout that charge, such as the burden and standard of proof. How are they to rely upon admissions? The judge will give them directions about things like that. What are they to make of lies, if lies have been found to have been told by an accused person? How can they use various evidence if they accept that that evidence is proven? So, these are the kinds of directions they will give and then once they conclude that charge, the jury, ultimately, goes out to their jury room and they deliberate.

### **Justice Hollingworth**

So when I started as a judge about 15 years ago, Victoria had the dubious distinction of giving the longest judges’ charges anywhere in the common law world, and that would mean for a typical murder trial that might have gone, say, for three to four weeks, it wouldn’t be uncommon for the judge to spend a day and a half to two days giving their charge to the jury.

The government brought in legislation not all that long ago which basically liberated us from what we were previously required to do, and it allowed us to be much shorter and much simpler, and to focus on the things that were really in dispute.

In a typical three-to four-week murder trial, I would now give a charge for no more than the morning, send the jury out and it’s not uncommon for them to be out for two, three, four, even-longer days deliberating.

Whilst it might seem strange to members of the public, and I’m sure it’s sometimes worrying for the parties or family members of the parties or the barristers that they’re out for so long, as a judge, I actually feel comforted by the fact that I think they’re now undertaking a task that we’ve asked them to do and they’re doing it diligently and carefully. So, I’m overall happy when they’re out for a little while, because it means that they’ve actually given serious thought to the task.

### **Evan Martin**

Once the jury has left the court to deliberate, for Fred Smith, there’s nothing left to do but wait and hope.

When the jury informs the court that they have unanimously reached their verdict, all parties are brought to the court as soon as possible - often within 15 minutes or so.

A mad scramble ensues. Fred Smith will be brought down from his cell. The defence and prosecution will hurry to the courts from their nearby chambers. Media will be notified and they’ll also rush to the courtroom.

## **SUPREME COURT OF VICTORIA**

Once we're ready to go, the jury will re-enter the court for what this entire process has been building towards.

### **Associate**

Madam foreperson and members of the jury, have you agreed upon your verdict?

### **Jury foreperson**

Yes.

### **Associate**

Do you find the accused, Fred Smith, guilty or not guilty of the charge of murder?

### **Jury foreperson**

Guilty.

### **Evan Martin**

Fred Smith has been found guilty of murder. Exactly as we discussed earlier in the episode, he'll soon attend a plea hearing and will be sentenced to a long stint in prison.

Because he maintained his innocence and went to trial, he won't receive the potential sentence discount he would have had he pleaded guilty.

### **Evan Martin**

It's been a long, drawn-out process for Fred Smith, but it might not be over.

There's always the Court of Appeal.

### **Justice Whelan**

Well, Mr Smith can appeal his conviction or his sentence.

### **Evan Martin**

Justice Whelan spent eight years as a trial judge before being appointed to the Court of Appeal in 2012.

### **Justice Whelan**

On conviction, he can argue that the jury verdict is unreasonable. In other words, that the jury, if properly instructed and if acting properly, ought to have had a reasonable doubt, must have had a reasonable doubt.

They can argue that there's been some error or irregularity in the trial. Typically it's a ruling by the judge on evidence, or a direction given by the judge to the jury.

And there's a kind of catch-all thing which he can rely on, which is for any other reason there's been a substantial miscarriage of justice. So, that's on conviction.

On sentence, the accused - or the offender in the case of a sentence appeal - will either allege that there's been some error made by the judge, some mistake - they got the maximum sentence wrong, they didn't take this into consideration or that consideration into account.

But more typically, the ground of appeal is what's called manifest excess - that whilst there's no specific error, when you look at the whole thing, it's clearly too much. And it is a discretionary decision of the sentencing judge, so we should not interfere unless we think the judge has made a mistake or unless we think that the sentence is so clearly outside the range of what was open, that although we can't say exactly what the mistake was, there must have been a mistake somewhere.

So, manifest excess is probably the most common ground that offenders rely on on sentence.

As far as the prosecution's concerned, the Director of Public Prosecutions can appeal the sentence if she thinks that there's been an error and that a different sentence should have been imposed, and she is satisfied that the appeal is in the public interest.

So, typically, the DPP appeals when she thinks the sentence is manifestly inadequate.

### **Evan Martin**

The prosecution can appeal certain rulings by the judge throughout the trial, but if the jury ultimately come back with a verdict of 'not guilty,' the prosecution are just about out of moves.

Under very limited circumstances, it is possible to set aside an acquittal and proceed with a new trial.

Though, as of 2019, that has never happened.

Just quickly, let's rewind again.

### **Associate**

Do you find the accused, Fred Smith, guilty or not guilty of the charge of murder?

### **Jury foreperson**

Not guilty.

**Evan Martin**

So, Fred Smith has been found innocent. Is he released immediately?

**Justice Taylor**

Assuming that they're not in custody or been denied bail on another matter, yes.

**Evan Martin**

Justice Taylor.

**Justice Taylor**

They are at that point... well, at that point, the protective presumption of innocence has not been displaced, so they remain innocent. They've not been found innocent, they remain innocent.

So, yes. They're released.

**Justice Hollingworth**

Usually leaping out of the dock, even before the jury have left the court.

**Evan Martin**

At this point, Fred has been in custody for 18 months, maybe more, for a crime he's not been convicted of. Is he entitled to compensation?

**Justice Taylor**

Ah, no. They haven't been wrongfully imprisoned. They've been imprisoned awaiting trial, so unless it's later shown to be a malicious prosecution, it's one of the costs of our system.

**Evan Martin**

Having been found not guilty, for the first time since his arrest, Fred leaves court like everyone else - through the front doors.

**[End theme]**

**Evan Martin**

Gertie's Law is brought to you by the Supreme Court of Victoria.

If you have a question you'd like to ask a judge, about the criminal trial process or something else entirely, send us an email at [gertie@supcourt.vic.gov.au](mailto:gertie@supcourt.vic.gov.au)

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