**Terrorism (part one) transcript**

**Justice Taylor (court recording)**

I find your offending to be extremely serious. It is an outrage to our democracy.

**Dr Patrick Emerton**

When you look at some of these terrorism offenses the mental elements are so complex and the physical elements are so multilayered, so that charging them and proving all of that beyond reasonable doubt is incredibly complex.

**Justice Tinney (court recording)**

Motivated by hatred, intolerance, malevolence, and misguided piety, the three of you went by cover of night into a place of religious worship in a suburb of Melbourne intent on destroying it by fire.

**Greg Muller**

This episode of Gertie’s Law is about one of the most serious, and high profile offenses which comes before the Victorian Supreme Court. Terrorism.

Terrorism trials are usually long, as are the resulting sentences and they attract a lot of public interest. The day of a sentence there’ll be numerous TV cameras, lights and journos setting up outside the gates to the laneway where the prison vans come in. News cameras have about a second - with a long lens - to get shots of the accused being escorted from the van to the court building. Inside the courtroom, the public galleries and press seats will be full.

**Justice Hollingworth**

Terrorism cases are a type of case that have really only started in the last five or 10 years to come through in any significant numbers.

**Greg Muller**

Principal judge of the Criminal division, Justice Hollingworth.

**Justice Hollingworth**

And whilst they’re not an enormous number of cases, they tend to be very complicated. They often involve multiple parties and they’re often very time consuming because they may be many thousands of hours of telephone intercepts or thousands of pages of internet searches or things of that sort. So, they’re actually a lot more complicated than a typical homicide case.

**Greg Muller**

Terrorism laws are relatively new to Australia but the types of crimes they’re designed to capture are not. There was the 1978 Sydney Hilton Hotel bombing which targeted the Commonwealth Heads of Government Meeting killing three people and injuring 11.

In 1980 the Turkish Consul General was shot and killed in Sydney for political reasons. In 2001 a security guard at a Melbourne abortion clinic was shot by an anti-abortionist. Some of these were not considered terrorism at the time, but were all politically or ideologically motivated, a key ingredient for something to be considered a terrorist offence today.

The attacks in America on September 11, 2001 changed the way we think about terrorism. The stakes were suddenly so much higher. Governments here and around the world reacted with stronger anti-terrorism legislation.

In this episode of Gertie’s Law, we’re going to take a look at some of this legislation, find out how these laws are being handled in the Supreme Court, and what a judge has to consider when sentencing for these offences.

So, firstly, how did these laws come about?

**Dr Nicole McGarrity**

My name’s Dr Nicola McGarrity. I’m a senior lecturer at the University of New South Wales in the faculty of law and I’m also the director of the terrorism law reform project.

**Greg Muller**

Nicola also represented a man charged with terrorism offenses in a landmark case here at the Victorian Supreme Court about a decade ago, more on that case later.

**Dr Nicole McGarrity**

If we go back to the September 11 attacks in the United States. At that point in time Australia didn’t actually have any anti-terrorism laws on its’ statute books at the federal level at all. The only Australian jurisdiction that had any anti-terrorism laws was in fact the Northern Territory. However, immediately after the 9-11 terrorist attacks, the Australian Parliament very quickly came to the realisation that we needed specific anti-terrorism laws.

There was something unique about terrorism, whether be it the gravity of the harm that it causes, whether it be the political motivation that underpins it, or really whether it be simply the need to reassure the public that they were safe.

So, for whatever reason the Australian Parliament decided that we needed to enact specific anti-terrorism laws and what we saw in the six month after the September 11 terrorist attacks was a flurry of national security law making.

In March 2002 we had six pieces of national security legislation introduced into the parliament totalling hundreds of pages and those laws which were introduced in 2002 still remain the basis, the foundation of Australia’s anti-terrorism laws today.

**Greg Muller**

And the authorities across the country weren’t shy in using these new laws.

**Dr Nicola McGarrity**

We’ve got well over 100 people who have been charged with terrorism related offences, and by terrorism related offenses I include not only offenses that include the terminology of terrorism such as preparing for a terrorist act or membership of a terrorist organisation but also offenses to deal with engagement in hostile activities so foreign incursions and recruitment offenses.

**Greg Muller**

Although the conduct underlying a terrorist act was already criminalised - whether it be murder or arson or conspiring to murder etc, these new terrorism laws were unique.

**Jessie Smith**

Jessie Smith, I’m a PhD candidate at the University of Cambridge.

**Greg Muller**

Jessie specialises in comparative counter-terrorism law.

**Jesse Smith**

So, Terrorism offenses in Australia are special criminal offenses in our code.

They’re special because they have additional components of proof that offences such as murder, manslaughter, bomb making don’t have. The two aspects that make it different are the need for the prosecution to prove that an offender intends to advance a political, religious or ideological cause. So that must be both pleaded and proved. The second is that the offender intended to coerce the government or a section of the public. These offenses we incorporated into our law following 9-11. Prior to this date we focussed on very ordinary criminal offenses to deal with political violence.

**Greg Muller**

So what pushes a crime like murder or arson into the terrorist category?

**Dr Patrick Emerton**

In moral theory, normally because it’s targeted at an innocent person, so it’s not a military type operation.

**Greg Muller**

Dr Patrick Emerton is Associate Professor of Law at Monash University.

**Dr Patrick Emerton**

And in law in Australia because it’s motivated by politics or religion and because it’s intended to intimidate the public or a government somewhere in the world.

So it’s that political rather than private interpersonal dimension in Australian law which makes it terrorism.

Some of the offenses, when you look at them are so complex as criminal offenses so when a first year law student studies criminal law they learn that every crime has a *mens rea*, a mental element and **Actus reus** is the physical element and when you look at some of these terrorism offenses the mental elements are so complex and the physical elements are so multilayered and depend on other people having mental states of their own for example, so charging them and proving that beyond reasonable doubt is incredibly complex.

**Greg Muller**

Also, these were Commonwealth laws made by the Federal parliament and according to our constitution, the Commonwealth Legislature doesn’t have the general power to enact criminal laws. That belongs to the states.

It only has the power to enact legislation, including criminal laws on topics that are bestowed on it under the Commonwealth constitution. Terrorism is not one. But it does include matters based on international treaties and also matters that are referred to the Commonwealth by the states. This means for terrorism issues, there was a need for more cooperation.

Dr Nicola McGarrity again.

**Dr Nicola McGarrity**

There certainly has been a requirement for a lot of cooperation between the states and the federal jurisdictions, whether they be the Australian Federal Police and the Australian Security Intelligence Organisation, and then the state and or territory police forces as well, and their respective counter terrorism units.

So, there has been a need because of the border crossing, the cross-jurisdictional nature of terrorism, the fact that it doesn't respect lines between countries, let alone the border between New South Wales and Victoria, there has been a need for a national approach to be taken.

**Dr Nicola McGarrity**

To ensure the commonwealth was able to enact national legislation for what was a national if not global issue of terrorism, what the states did was that they referred their ability to legislate on matters to do with terrorism to the Commonwealth.What this meant was that a national framework could be introduced.

Following on from this, what the states have done to complement the Federal terrorism laws was they tended to enact legislation that mirrors the fundamentals of the Commonwealth legislation.

So all of the states and territories for example have the same definition of terrorism at the heat of their terrorism related legislation.

**Greg Muller**

Broadly speaking, there are two major terrorism offences. A Terrorist Act, which is defined under Commonwealth Criminal Code as:

**Actor**

An act or threat, intended to advance a political, ideological or religious cause by coercing or intimidating an Australian or foreign government or the public.This action must cause serious harm to people or property, create a serious risk to the health and safety to the public, or seriously disrupt trade, critical infrastructure or electronic systems.

**Greg Muller**

And then there’s preparatory offences.This means a person may be prosecuted not only for committing a terrorist act but also for doing preliminary activities with this ultimate goal in mind.

These preparatory offenses even apply if a terrorism act does not occur. We’ll be looking at preparatory terrorism offenses in a lot more detail in the next episode.

To illustrate the difference between a terrorist act and preparatory offences, take this event from 2015 in New South Wales. When 15-year-old Sydneysider Farhad Jabar decided to kill a police officer, he first needed a weapon. He got that from Raban Alou. That transaction was a preparatory offense and Alou was sentenced to 44 years. When Jabar went on to shoot and kill police accountant Curtis Cheng in Parramatta he committed a terrorist act. Jabar was killed by police at the scene.

An important distinction here too. When is an act which terrorises the public not a terrorist act? A recent example occurred in Melbourne.

The attack on Bourke Street where a car was driven down a busy pedestrian mall on 20 January 2017. In Europe, Nice, Stockholm and London there’s been similar incidents where people have driven vehicles into crowds killing many. In Europe these were labelled as terrorist acts. In Melbourne the driver was found guilty of six counts of murder, and 27 counts of recklessly endangering life. The resulting sentence was life with a non-parole period of 46 years, but terrorism charges were never laid.

Jessie Smith.

**Jessie Smith**

He’s a great example because he used the violent tropes of the Islamic State in his attack. Query whether he would have killed as many people in that way had ISIS not been promoting the use of vehicles to run over pedestrians. Certainly he had nothing to do with ISIS, he was not in any way consumed or furthering that ideology but he used that violent trope and so in every other way you had this spectacular public act of terrorism in that it instilled terror in the public but it wasn’t the advance of political, religious or ideological cause.

At the moment we have two tiers of offenders and it might not make a great deal of difference in sentencing but I think it does make a great deal of difference in the public apportion of blame, moral culpability etc.

**Greg Muller**

For judges here at the Supreme Court terrorism cases are unique.

**Justice Croucher**

Terrorism trials too have their own special feature in this respect that they are often based on surveillance.

**Greg Muller**

Justice Croucher, criminal judge here at the Supreme Court since 2013.

**Justice Croucher**

Surveillance over not just five minutes or five hours or five days, not just five weeks. It's usually months, even years in some cases. So there are usually reams and reams of pages which reflect transcripts of conversations ranging from, you know, important things to the completely inane. You could imagine listening to someone's life for 12 months? Well, there's going to be a lot of inane stuff there, and people have to trawl, someone has to trawl through all this and work out what's relevant and what's not. And it takes a long time. A lot of police hours, and a lot of prosecution hours from the lawyer's point of view, a lot of defence hours, to work out what is relevant in the end. So, all of that takes a lot of managing.

**Greg Muller**

Criminal Judge, Justice Tinney

**Justice Tinney**

Let's say you've got a case where someone is charged with preparing for a terrorist act, or even a completed terrorist act, the investigating authorities, they will have, they will often have been looking at the people, as possible people of concern in their community because they might have done some things that have shown their leanings in that direction, that they might have become radicalised.

So, the investigators would then take steps to obtain the telephone records, the social media usage records, all of those sorts of things of the person of interest and they might have a lot of information about that before there's any arrest. And at the time of the arrest, the person might be in possession of a mobile phone, and the mobile phone might have on it records of all of the sorts of images and files, and audio files, and documents that have ever been on that phone and every time that that person has made a contribution on social media, on Snapchat or on whatever it is, the prosecution will sort through that, and will be trying to isolate anything that shows the interest this person might have, let's say, in supporting Islamic State or whatever it is.

So, there might be hundreds of thousands of documents and other files on that phone, that need to be looked at and analysed. And then they might go to the person's house and the person might have a computer or two computers, and they need to do the same thing there.

And so, by the time the case ends up being prosecuted, there is this vast bulk of material which the Crown may be relying on, in part, it'll only be part of the case but the Crown will be relying on that to try to prove that this person has carried out this terrorist act or the preparation for the terrorist act, and so there might be thousands and thousands of photographs, and thousands and thousands of poems, and other bits of text, and what have you, that might need to be looked at, and then got into a form, that then they can be placed before the jury.

In my experience, that's one thing that takes a lot of time, and then there's going to need to be refining of that material and then of course, the defence may be arguing, in respect of a particular photograph or particular video file or whatever it is, ‘that's not relevant, it doesn't prove anything’, and ‘it should be excluded’. And so, there can be quite long pre-trial hearings too, first of all, to try to refine what there is and secondly to try to work out, how much of that should actually be able to go before the jury.

**Greg Muller**

This partly explains why the pre-trial for these cases can go on for months.

**Justice Tinney**

And so, that in itself, takes a long time and then putting the stuff before the jury also may take a long time because it may need to be read out, it may need to be played to the jury. In the case of individual photographs, they will need to be shown to the jury, either in a folder or usually, nowadays, on an iPad in the jury box. And so, that can be quite a laborious process as well.

**Nick Robinson QC**

My name is Nick Robinson. I’m a criminal barrister QC who’s done a lot of work for many years for the Commonwealth director of public prosecutions including in prosecuting in terrorism matters.

**Greg Muller**

Not many barristers know as much about prosecuting terrorism cases as Nick Robinson.

**Nicholas Robinson QC**

I’ve been involved in terrorism trials for the Commonwealth since the first trial in Victoria, so that’s 12 or 15 years or whatever.

**Greg Muller**

There’s clearly extra hurdles for prosecution to clear in order to get a terrorism offence over the line.

**Nicholas Robinson QC**

Well you have to prove two things. You have to prove that the person charged did something. And you have to prove that the person who did the act intended to prepare for a terrorist act or intended to carry out a terrorist act. So, you got to both show their state of mind and their state of mind has to reflect in particular that they want to do what they’re doing to advance an ideology, religious or political or just an ideology, usually an extremist ideology, and that in doing it they intend to intimidate the public or a section of the public or a government and it can include a foreign government.

**Greg Muller**

What sorts of things do you use to prove that?

**Nicholas Robinson QC**

Well, one of the very difficult things to prove in terrorism cases is the action was intended to advance an ideology. And, the most common terrorism cases in Australia have been for extreme Islamic ideology like ISIS, but there have also been extreme right wing matters also so, you have to show, so the jury can be satisfied beyond reasonable doubt that the person supports that ideology.

And one way that happens is by showing that was something they spent a lot of time reading, talking about or watching so the sort of thing that juries often hear is there are many thousands of images on a phone. That there were videos, there were posts in chats. That there are social media conversations which extoll for example, ISIS or some other ideology like extreme right wing.

**Greg Muller**

Does that make these trials - they tend to be long and complicated?

**Nicholas Robinson QC**

Yes there are a couple of things about that which make them different from lots of other trials.

The first is, as prosecution and as the defense and as the judge, we’re all concerned that some of the really horrific images and videos are not shown to the jury without being edited. So, we often have to edit out terrible things but let the jury know what it was and it’s common for example that images or videos of beheadings are edited so that the actual beheading is not shown but the jury is told this was a beheading. The last part of the video’s been blacked out so that they can make sense of it. And that makes it pretty wearing on the jury also. One of the things that I think all involved in terrorist trials are very conscious of, that by which I mean the judge and the lawyers, is that the jurors are selected at random as part of their duty to come in and decide these things and ordinarily most people would not go anywhere near reading or watching any of this sort of this material which is a constant in the terrorist trials.

**Greg Muller**

So if someone is murdered - whatever the motivation - wouldn’t it be easier in the case where someone is killed to simply prosecute for a murder? The maximum penalty is the same.

PhD candidate at Cambridge University, Jessie Smith.

**Jessie Smith**

There would always be an option today for the prosecution to charge just ordinary offenses or terrorism offenses. The maximum penalties between murder and terrorism are no different. Although, today I’d say there’s an expectation in the public eye that they would use the label ‘terrorism’.

Of course, that incorporates additional burdens on the prosecution and very much changes the complexion of evidence before the court, so that's always on the prosecutor’s mind in terms of what direction they elect.

Look, for a long time, both in Australia and in the UK they just used the ordinary law. And that’s still the preferred method in many places around the world. I think now, especially post 9/11, terrorism in the public eye means something more serious than simply murder.

There is a public outrage that accompanies these particular acts and that has intensified with the Islamic state activity in Iraq and Syria. So, I think there is, it’s probably fuelled by that public call for this additionally punitive, additionally serious crime to be fixed to that conduct.

**Greg Muller**

Crown Prosecutor, Nick Robinson.

**Nicholas Robinson QC**

The point of terrorism is - at least in my view - that it’s aimed at upsetting, frightening, intimidating the public. It’s not just an intention to murder someone because they’ve failed to pay for their drugs or you want to take their market place or there’s some other personal grudge. It’s aimed at the population and the government generally, and for that reason it’s necessary to show the intent to influence or intimidate the public or the government. That’s the really important part of it and to advance some ideology or cause.

I think one of the things that concerns the laying of the charge for the Director of Public Prosecutions, or anyone who might be advising whether to lay it or not is, if it appears to be terrorism then it should be charged as terrorism.

**Greg Muller**

Because it’s a different crime?

**Nicholas Robinson QC**

Yeah, it’s a different trial, and the reason for the greater penalties and it’s not only in terrorism, federal offenses do have life imprisonment for certain narcotics and so on, but the reason it has the capacity for such a long sentence is because of the, at least in my opinion, the capacity to do great harm.

**Greg Muller**

This issue of whether to charge terrorism or not came up in New Zealand. Using the NZ example, the Christchurch example, there was a reluctance to use terrorism?

J**essie Smith**

So, in New Zealand, following the arrest  and charge of Mr Tarrant, there was a real resistance to use the Suppression of Terrorism Act, I think it’s called  in New Zealand.

**Greg Muller**

Following attacks on two mosques during Friday prayers in Christchurch - on 15 March 2019 - an Australian man was charged with 51 murders, 40 attempted murders and one charge under the Terrorism Suppression Act.

He originally pleaded not guilty to all charges. But changed his plea to guilty on 26th March last year, thereby avoiding a trial. In August, 2020 Tarrant was sentenced to ‘life’ without parole.

**Jessie Smith**

The reason for that is, although since 9/11 the New Zealanders have had  those special laws on their books, it’s been far simpler to use the ordinary criminal law.

There was no doubt resistance because of the complexity of the laws so if you're using a legislative regime for the first time, that’s always a bit dangerous that there can always be upset in the higher courts, matters can drag on. And there was also no doubt a hesitation to use laws which require the pleading and proof of an ideological position, which means the accused would be very much entitled to take the stand and broadcast the nature of his ideology, the nature of his motivations.

That sort of public platform is something that they experienced in Northern Ireland during the troubles in the 80s and 90s and to avoid that they created special courts which focussed very much on ordinary offences and just drilled down to the overt conduct and acts. They stayed right away from ideology.

**Greg Muller**

And so when you have terrorist acts run to completion - and the offender survives.

**Jessie Smith**

They will be in court defending and speaking to that political project and that can be quite damaging to a society that’s still grieving from what occurred.

**Greg Muller**

Ultimately it’s up to the prosecution to decide which way to go. Dr Nicola McGarrity.

**Dr Nicola McGarrity**

Really a huge amount of discretion lies with prosecutors to decide how particular conduct should be characterised, whether it contains that sufficient level of danger, that sufficient level of threat to the Australian State that justifies it being prosecuted as terrorism. There's a political judgement that goes into the decision whether to prosecute someone as a terrorist or as an ordinary criminal.

The key reason, the key attraction of prosecuting someone for terrorism, I think today is first and foremost that, there are lengthier sentences, considerably lengthier sentences that attach to terrorism offences than those which attached to ordinary criminal offences.Two, there is sufficiently more scope for evidence of association of belief to be introduced for preparatory offences.

And thirdly, because prosecuting someone under the terrorism offences and achieving a conviction can also, after the trial and after even a sentence is served, create an opportunity for seeking continuing detention orders and extended supervision orders if that person is still regarded as posing a threat to the community.

**Greg Muller**

Indeed at the end of each sentence for a terrorism offence you’ll hear something along the lines of:

**Justice Croucher (court recording)**

Thirdly, pursuant to s 105A.23 of the Code, I am also required to warn, that because of the nature of the offence of which he has been convicted, an application may be made to this Court under Division 105A of the Code for a continuing detention order requiring him to be detained in a prison after the end of his sentence.

**Greg Muller**

Justice Croucher.

**Justice Croucher**

Yes, it’s an extraordinary power that the state has, when I say the state, the Commonwealth has to apply to detain you further beyond a sentence, And it's not that uncommon now. We have that in some serious sex offences, some serious violent offences and it's been extended to terrorism which of course is Commonwealth offending although most states have their own terrorism laws as well.

So, it means that if they consider you dangerous still, they can put you on one of these orders which means that you're heavily monitored basically. And obviously, the more risk you're seen to present, then the more likely an order like that will be made beyond your sentence or at least applied for, and then a court would have to decide whether to grant it or not.

**Tipstave (Court recording)**

Silence, all stand please and remain standing. All persons having business before this honourable court are commanded to give their attendance and they shall be heard. Be seated please.

**Justice Taylor (Court recording)**

Call the matter.

**Associate (Court recording)**

Queen against Shoma for sentence.

**Greg Muller**

In June 2019, Justice Taylor sentenced Momena Shoma.

**Justice Taylor (court recording)**

...before I commence I am in accordance with the practice which has been adopted on previous occasions ….(court atmosphere).

**Greg Muller**

The small figure of Momena Shoma, just over five foot high, sat motionless in the dock. She removed her face covering for the purposes of identification and then replaced it.

**Justice Taylor (court recording)**

Will you please stand Ms Shoma and just raise your veil for me.

Are you Momena Shoma?

Thank you. You may resume your covering and sit down.

Momena Shoma, you have pleaded guilty to intentionally engaging in a terrorist act. On nine February 2018, some eight days after you had arrived in Australia on a student visa, you stabbed Roger Singaravelu in the neck with a knife you had brought with you to this country intending to use it in a terrorist act.

Your attack upon Mr Singaravelu was done with the intention of advancing a political, religious or ideological cause, and with the intention of coercing or influencing by intimidation a government of this country or another, or a part of this country or another, and/or intimidating the public or a section of the public.

The maximum penalty for engaging in a terrorist act is life imprisonment. Mr Singaravelu always intended to remember nine February 2018….

**Greg Muller**

This was the first time in Australia that any person had been sentenced for a completed terrorist act.

**Justice Taylor (court recording)**

...he now remembers not a cherished milestone of his daughter’s childhood, but being woken by you, kneeling beside him, stabbing him in the neck and yelling Allahu Akbar. The physical force of your attack was such that the knife became embedded in and fractured Mr Singaravelu’s spine.His terror for himself and his young child at that moment is beyond imagining. But you wanted precisely that, and more. At the scene you told police that you had come to Australia to carry out the attack because you were ordered to do so by the caliph of the Islamic State and in response to Muslim people being bombed by westerners. You expressed the hope that Mr Singaravelu would die.

Your deeds and words, and the intentions accompanying them are chilling. They have sent ripples of horror throughout the Australian community. But they do not make you a martyr. They do not make you a beacon of Islam. They do not guarantee you green wings to ascend to Jannah. They make you an undistinguished criminal. You should not mistake your passing notoriety for importance, nor equate it with achievement.

**Greg Muller**

Criminal Judge - Justice Taylor

**Justice Taylor**

It was very difficult. Shoma, Ms Shoma came to Australia with the express and explicit purpose of committing a terrorist offence, and carried that out within a number of days of arriving in Australia. At the same time, she was a very young woman, and it was the first time that an Australian court had to sentence someone for a completed terrorist act.

As it turned out, on the same day that I sentenced Ms Shoma, a New South Wales Supreme Court Judge sentenced someone in New South Wales for a completed terrorist act as well.

**Greg Muller**

That was Ihsas Kahn who was found guilty by a jury and jailed for 36 years, with a non-parole period of 27 years, following a stabbing attack in the Sydney suburb of Minto.Kahn targeted his neighbour after seeing him wearing a t-shirt with a pro-American military logo. The neighbour suffered life threatening injuries but survived.

**Justice Taylor**

And the number of competing considerations that have to be synthesised is very difficult and it is always very difficult sentencing someone to a large number of years in prison, let alone a young woman.

**Greg Muller**

What was it like as a judge deciding on a sentence where there was no precedence?

**Justice Tylor**

It's a difficult task. Sentencing judges say generally, it's one of the most difficult things that they do.

**Greg Muller**

Shoma pleaded guilty, therefore there was no trial.

**Justice Taylor (court recording)**

I give your plea of guilty to this offence its proper weight. You indicated your intention to plead guilty prior to the committal hearing. Your early plea has utilitarian value. It has spared the witnesses, Mr Singaravelu in particular, the trauma of giving evidence at a trial. I also accept that you made full, frank and immediate admissions as to your behaviour and your motivations to police.

But, I do not accept, as was submitted on your behalf, that those admissions allow a finding that you have guarded prospects for rehabilitation. On the contrary, those admissions were made because you were proud of your actions, believing them to be those of a martyr…It was submitted that you are naïve. You are young.

In some cases those matters would be significant sentencing considerations. But, even if you had been much younger than you are, your age and antecedents are of reduced significance due to the seriousness of your offending and the primacy of denunciation, just punishment, protection of the community and deterrence as sentencing factors for terrorism offences.

You have displayed no contrition for your offending. Indeed, the only regret you have uttered is that you did not succeed in taking Mr Singaravelu’s life. That sentiment is despicable.There is no evidence that you have renounced or are close to renouncing the beliefs that led you to commit this offence. On the contrary, you are defiant. It follows that your chances of rehabilitation are poor.

**Greg Muller**

If not for the terrorism charge, this offence would have attracted a much lighter sentence. Indeed, the maximum penalty for attempted murder is 25 years.

**Justice Taylor (court recording)**

Momena Shoma, please stand. I note that you do not.

Balancing, as best I am able, the competing considerations laid down in the Crimes Act, and having regard to the matters I have just discussed, for the offence of intentionally engaging in a terrorist act, I sentence you to 42 years’ imprisonment. I am required by s 19AG of the Crimes Act to set a non-parole period of not less than three quarters of the length of the head sentence. I fix a non-parole period of 31 years and six months.I am required by section 105A.23 of the Criminal Code to warn you that an application may be made under Division 105A of the Code for a continuing detention order requiring you to be detained in a prison after the end of your sentence for this offence.

Please have Miss Shoma removed. Adjourn the court.

**Tipstave (court recording)**

Silence all stand please. This court stands adjourned. Sine Die.

**Greg Muller**

Less than two months later, three men were sentenced for another completed terrorist act.This case involved the burning down of a Shia Mosque.

At the heart of this case was whether or not this was an act of ‘advocacy, protest, or dissent’ resulting in arson or an act of terrorism.They were found guilty of engaging in and attempting to engage in a terrorist act.

**Greg Muller**

Criminal judge, Justice Tinney heard this case.

**Justice Tinney (court recording)**

Ahmed Mohamed, Abdullah Chaarani and Hatim Moukhaiber, early in the morning of 11 December 2016, motivated by hatred, intolerance, malevolence, and misguided piety, the three of you went by cover of night into a place of religious worship in a suburb of Melbourne, intent on destroying it by fire…

**Greg Muller**

This is Justice Tinney delivering his sentence on 24th July, 2019.

**Justice Tinney (court recording)**

... You comprehensively achieved your aim, deriving, so it seems, great satisfaction from the outcome.The crime you committed on that morning was motivated by a strong belief in extreme views which have no place in this or in any civilised society.

**Justice Tinney**

That was a case where some men who were Sunni Muslims burnt down a Shia Muslim mosque. So, a lot of the conflict in the world, where Islam is concerned, has been between Sunni and Shia or Shi’ite Muslims. And the teachings of the Islamic State have been that, whilst Western people who are not Muslim, whilst they are an object of criticism and attack, so too are some other Muslims who don't fit in with the views of the Sunni people who follow Islamic State.

In this case, there was a mosque in northern Melbourne which was set alight by these guys and they then scrawled on the wall, Islamic State. And so, they identified that the cause, in support of which they had burnt down the mosque or the prayer centre, was Islamic State and it was an attack, sort of a hate crime, really, against Shia Muslims. So, that's what that one was about.

**Justice Tinney (court recording)**

Your particular purposes were to advance what to most sensible people can only be seen as being a perverse ideology, and more particularly, to strike a blow against, and to intimidate and cause terror to, Shia Muslims. Stated thus, your crime was a heinous one. However, there is more to it than that. What you did reflected an attack upon a fundamental value in our society, namely, religious freedom, an attack upon the conventions and beliefs that all Australians hold dear, and indeed, an attack upon this society itself, a society under whose protection and sharing whose benefits you have lived throughout your lives in Australia. Looked at rationally, your crime is very difficult to understand, and quite impossible to excuse.

You have all been found guilty by a jury of offences connected with terrorist attacks upon the Imam Ali Islamic Centre which I will refer to as the mosque throughout this sentence...

**Greg Muller**

The fire was started in the middle of the night - when the mosque was empty and there was no evidence of an attempt to physically hurt anybody.

So during the trial, the accused tried to have the offence considered as arson.

**Justice Tinney**

Well, in that case, in the case of arson the elements are completely different, from what the elements of this crime were and in fact, one of the accused in that trial was saying, look, I am guilty of burning down this place and I am guilty of arson but I'm not guilty of a terrorist act because you can't prove that, you know, all of the elements of the terrorist crime are made out.

Look, the fact is the elements are completely different and the element is that terrorist crimes are Commonwealth Crimes, and that the law is entirely different, and of course, a lot of terrorist acts would subsume other state offences as well.

For example, if you went, in a terrorist act, went and shot someone in Fed Square or wherever it was, and killed them, well that would be a terrorist act. It would also be murder, and indeed, whether it would be prosecuted as a terrorist act or as murder, would be up to the authorities to sort out, but  it's a completely different scheme, mental elements that are different that have to be proved.

In the case of a terrorist act, it needs to be something that's done to further a particular cause. It could be a religious or a political or ideological cause. A normal state crime, such as a murder, doesn't need to be carried out for any particular cause. It just has to be carried out with particular intention.

**Justice Tinney (court recording)**

… in his defence response on your behalf, told the jury that there was only one issue between you and the prosecution. It was whether or not your admitted involvement in the attempted destruction and then the successful destruction of the mosque were terrorist acts.

**Greg Muller**

Justice Tinney again, delivering his sentence.

**Justice Tinney (court recording)**

He admitted on your behalf that you were present on both occasions, that you were the person who spray-painted the graffiti on the mosque on 11 December 2016, that your acts were done with the intention of advancing the cause of Sunni Islam, and that the acts were done with the intention of intimidating Shia Muslims.

The element in dispute, as it was put by your counsel, was whether or not your actions were carried out as advocacy, protest, or dissent. On your behalf, it was acknowledged that your actions amounted to the serious criminal offences of attempted arson and arson, but it was asserted that they were not terrorist acts.

Later in the trial, in an application eventually joined in by counsel for the other two accused, sought to have the crimes of arson and attempted arson left as alternatives to the terrorism offences. For reasons which I announced briefly in Court, I declined to do so.

**Greg Muller**

Defense counsel did try and lower the offence from terrorism to protest, advocacy and dissent. And also described the arson and attempted arson, which the accused had admitted to as ‘awful’, ‘terrible’, ‘most serious’ and ‘despicable hate crimes and a serious example of arson’. But this argument was unsuccessful...

**Justice Tinney (court recording)**

For what it is worth, your defence, Chaarani, was optimistic, verging on the entirely fanciful. For it to be asserted on your behalf that your admitted conduct could have been no more than advocacy, protest or dissent was wholly unrealistic.

You were party to the intentional destruction by fire of a large building in a suburban area which had the status of a place of worship. In my view, no sensible person would countenance the idea that your conduct could possibly fit within the meaning of the words, ‘advocacy, protest or dissent’. It is hardly surprising your defence, which the circumstances indicate must have been decided upon by you very close to the time it was advanced on your behalf, was rejected by the jury.

**Greg Muller**

This is an important distinction and had major implications for the final sentence.

Justice Tinney.

**Justice Tinney**

Well, the maximum penalty for arson is 15 years, and the maximum penalty for the offence I was considering, is life imprisonment. And the reality is, that when I came to sentence in that case, I was sentencing for the terrorist act, a completed terrorist act. So, when I was looking at other comparable cases or other authorities, sentencing authorities, to look at, the ones I'm looking at are cases where long terms of imprisonment have been imposed for terrorist crimes, completed terrorist crimes, of which, fortunately, there have not been too many in Australia.

But, the sentences in Australia, particularly in New South Wales and Queensland, for preparatory terrorist acts, are very long. Many of the sentences are well into the 20 years. Whereas, if I were sentencing those people for arson, the maximum penalty is 15 years and sentences of seven or eight or nine years would be not at all unusual for that sort of offending. So really, it was a case where the crime of which the accused were found guilty, dictated that the maximum penalty is much higher and that the sentence would necessarily have to be significantly higher than if it was charged as arson.

**Justice Tinney (court recording)**

Will the three accused please stand.

Ahmed Mohamed and Abdullah Chaarani, on Charge one, the offence of attempting to engage in a terrorist act, you are each sentenced to be imprisoned for a period of eight years. On charge two, the offence of engaging in a terrorist act, you are each sentenced to be imprisoned for a period of 18 years.

The sentence on charge two is the base sentence. I order that four years of the sentence of charge one is to be served cumulatively upon the sentence of charge two.The total effective sentence for each of you is therefore a sentence of imprisonment for 22 years. I fix a non-parole period of 17 years.

**Greg Muller**

Leave to appeal conviction for all three was granted but these appeals were dismissed by the Victorian Court of Appeal in April 2020.

Then on 16th October, Abdullah Chaarani and Hatim Moukhaiber attempted to go to the High Court. After a short deliberation,  just four minutes, Justice Edelman and Justice Nettle had their decision. Here’s an actor reading the words of Justice Nettle from the court transcript.

**Justice Nettle (actor)**

The Court is not persuaded that appeals to this Court would enjoy sufficient prospects of success to warrant a grant of special leave. The applications are dismissed.

**Greg Muller**

Links to the full sentences of the cases discussed in this episode can be found on the Gertie’s Law website or in your episode description in your podcast app.

Fortunately, cases here for completed terrorist acts are rare.

Next episode of Gertie’s Law we’ll look at the type of terrorism offenses which are more common and arguably more complex.That is, preparatory offenses.These cases raise a whole range of questions around when’s the best time for the law to intervene?

**Justice Taylor**

I think there are still discussions to be had about at what point we criminalise what might be called preparatory offences. If you’re too soon on the trajectory of behaviour then that idea of thought crime comes into existence.

**Betty King**

Often, there's been no murder but they intended there to be one and something might have fortunately prevented it. So, it's the intent that really gets punished.

**Greg Muller**

And what if those plans had no real chance of being realised.

**Justice Croucher (court recording)**

Further, there is no evidence of any starting point or timeline for the commencement of the encouragement of others to overthrow the government. Thus, the ultimate aim of the plan was extremely remote.

**Greg Muller**

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And like season one we will be doing another episode where judges answer your questions. So if this episode has prompted a question you’d like to ask a judge, then send them in as text or audio to gertie@supcourt.vic.gov.au

**Ends.**

**Transcripts of Sentences used in this episode**

[The Queen v Shoma](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2019/367.html)

https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2019/367.html

[The Queen v Mohamed, Chaarani & Moukhaibe](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2019/498.html)

https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2019/498.html

Court of Appeal

[Chaarani & Ors v The Queen](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2020/88.html)

https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA//2020/88.html

High Court

[Chaarani v The Queen; Moukhaiber v The Queen](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2020/161.html)

https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans//2020/161.html