Reflective Vignette – Sentencing the Multiple Murderer

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Abstract

In this vignette, a former Supreme Court judge reflects on immediate issues arising in the sentencing of the multiple murderer, in addition to broader issues of policy and principle. The vignette is based upon a real case. Names have been altered for the obvious reason and a significant degree of poetic licence has been exercised to provide colour, content and context. The piece provides insight into the workings of the judicial mind in the courtroom environment as an appeal is heard and the issues are identified and analysed.

The door opened to the cry, 'all stand'. I walked into the dimly lit courtroom and made my way to the chair furthest away. Behind me came the President and behind her, the senior *puisne*. I reached my seat and turned to the Bar table. Out of the corner of my eye, I watched, waiting for some movement from the President triggering a synchronised bow to be reciprocated by the Bar table and all present.

At the same time, I took the opportunity to survey the courtroom. Experienced counsel. I am pleased; we can expect help, but I knew that already from the written submissions. Still, as is so often the case, notwithstanding what has been written, the debate in court tends to illuminate issues previously not thought of, particularly once judicial minds begin to contemplate consequences.

My gaze travels to the public gallery. The usual band of court reporters are present. That is to be expected. This is a heinous case that has attracted much public interest. The odious always does. No-one doubts the wisdom of the open court principle and the importance of the public's right to know, but let's not kid ourselves. This case will only be reported because the shocking sells and what is truly important to the independent, impartial and open administration of justice will likely be overlooked.

Besides the reporters, there are others in the gallery. Not many. These days, few people come to court to witness the administration of justice. It is likely that those present are members of the deceaseds' family and supporters. Perhaps there is also the odd law student, though they do not come to court in the numbers they should, and possibly the stray legal practitioner with a

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little time to kill. I doubt that there is anyone present in support of the respondent. But for his counsel, he will likely have been abandoned. I pause in my mind to think about this a moment longer. If he has been abandoned, as multi-murderers generally are, only his lawyers and the court can protect him from the State and the influence of the mob.

The President flinches. We bow.

As I straighten, I glance at the large flatscreen fixed to the wall. There could be seen the respondent, a triple murderer, dressed in prison garb. By his own admission, he is a woman and child killer. His head sentence, as legislatively prescribed, was life imprisonment. His non-parole period, set by the sentencing judge in the exercise of a discretion, 30 years.

At the Bar table stood the Director of Public Prosecutions and her junior. To her right stood the respondent's silk. They bow and sit. The matter is formally called on—*The Queen v Jones*. Appearances are taken.

This is a Crown appeal against sentence.

Crown appeals against sentence are different to the ordinary appeal against sentence. In the ordinary case, the defendant need only show that a sentencing judge has committed an error to succeed, unless, of course, such error is inconsequential. On a Crown appeal, however, not only must it be established that the sentencing judge has erred, but in addition, that in effect, the public interest in allowing the appeal and resentencing the defendant outweighs the public interest in the defendant not being twice vexed—the State with all its might is not to be permitted multiple opportunities to exact punishment from a person.

Jones had pleaded guilty to committing the three murders at the earliest opportunity. In anger, he had lashed out at his partner, hitting her in the head with a crowbar that, unusually, was readily to hand in the living room of the home they shared. It was early on a Saturday morning. The respondent had been sleeping on a mattress. He and his partner, whom I will call Melanie, had had an argument. She had slapped and punched him, taunted him with her infidelity and derided his inadequacy generally and as a man.

Theirs was a tempestuous relationship. They were drug abusers. She in particular, he, more to be with her. They had been together, off and on, for two years. This was the second time they had been in a relationship. Around seven years ago, they had lived together for just over a year when one night, without warning, she up and left, only to return just as suddenly with two children in tow: one six, the other five.

She had no money, no support and nowhere to go. She and the children were living in her car. The respondent took them in without hesitation. In

a short time, the relationship was rekindled, and in a matter of weeks, the four of them moved into a larger home.

They had not been in the new house long when Melanie first failed to come home one night. Recriminations the following morning led to a heated argument during which, still under the influence, she struck him for the first time. He retreated in more ways than one.

Drug taking was part of their daily lives. Cannabis was his drug of choice, although he would frequently join her in smoking ice. Soon, he could no longer maintain his job. The family became welfare dependent. Less money made it hard to satisfy drug habits; not if the children were to eat. It was around this time that she began to stay away from home more frequently and he became the primary caregiver to her children. Despite his habit, he managed to make sure they were fed and went to school more often than not.

More and more, Melanie came and went as she pleased. Sometimes she came home briefly with company only to leave again after he gave her what money he had, or, if he had none, after she abused him and accused him of not loving her and the children. On other occasions, she came home to him, professing her love and sharing his bed. Still on other occasions she taunted him for not being the man that the father of her children was. At times, she would slap and punch him. She became openly scornful and hostile, seeking to wound him with tales of her infidelity and labouring his inadequacies. Generally, he took it all, but on occasion he gave as good as he received, including slapping her, and from time to time, punching her.

Violence in the relationship became the norm, generally punctuated by periods of drug assisted calm.

As a family, they visited no-one, and no-one visited them. He had no close friends. He was depressed and alone. His life had not been like this before Melanie re-emerged and yet he could not bring himself to leave her and the children.

As mentioned, he killed her early on a Saturday morning. She had been home for three days. For much of the time they had got on relatively well. On the Thursday, she scored, and they spent much of the Friday in a drug induced stupor. The children did not go to school and largely fended for themselves.

On the afternoon of the Friday, there was no more meth to smoke. She became skittish and agitated. They smoked the little cannabis he had and drank the last drop of alcohol in the house. Around 7 pm, she went to bed, refusing him entry to the bedroom. He settled down for the night on a mattress that lay on the lounge room floor. The two children put themselves to bed.

He awoke to the sight of Melanie straddling him, slapping him. He put his hands up to his face for protection, then pushed her, sending her tumbling back. She was yelling something at him, but it was just noise. To his right was a bookshelf and, on the bottom shelf, the crowbar. He took it up as he got to his feet, walked two paces to where she remained sprawled on the floor, and, as she continued to yell at him, he hit her. He hit her to the head. He hit her hard. Twice. All went silent.

He put the crowbar down and went into the kitchen where he took some zip ties out of a drawer. He then returned to the lounge room where she lay silent and motionless, placed a zip tie around her neck and tightened it.

The forensic pathologist determined that the cause of death was asphyxiation, although the blunt force trauma to the skull would, without medical intervention, have also led to death.

The children had not stirred. He moved Melanie's body into the laundry and covered it with clothes that were waiting to be washed. He then returned to the lounge room and cleaned the blood that had poured from her head onto the tiled floor.

In time, the children woke. He fixed breakfast for them and when they were finished, told them to return to their rooms as they were going to play a game. He then visited each child in their room and, telling them that it was part of the game, bound their hands and feet using more zip ties. He then placed a sock in each of their mouths, placed a zip tie around their necks, and, in each case, pulled the zip tie tight.

Both children died from asphyxiation.

I looked at the 31-year-old man on the flatscreen. He was ordinary and relatively non-descript. He did not look evil. Criminals never do. Then again, short of having horns, blood-shot-eyes and a tail with a triangular tip, I do not know what wickedness or evil look like.

I remained starring at the screen a little longer. I do not know what it is like to take another person's life. I cannot imagine doing so intentionally, save in some sort of extreme circumstance justifying such action which, I very much hope, will never eventuate. The premeditated killing of another human being for no reason is beyond my comprehension. And yet, here sits a man, an ordinary looking man, who had taken the lives of three people. Sure, killing Melanie was likely explainable. Not that an explanation made her killing acceptable in the least, just understandable. But the deaths of the two children were of a different order. Whatever one made of Melanie and her treatment of Jones; the children were not to blame. Their murders struck me as acts of evil.

The Director commenced her submissions. The non-parole period, she contended, was manifestly inadequate. Thirty-years for three lives, two

only children, their lives taken coldly and callously. She is careful not to 'over-egg the pudding'. The good prosecutors generally are. The heinousness of Jones' criminal actions could not go unappreciated by the Bench. But more than that, as professional jurists, we are trained to analyse cases and administer justice objectively and dispassionately. Any concerted attempt to appeal to emotion would be frowned upon. The Director's argument stripped to its essentials is that a non-parole period of thirty years for three lives is not enough. It is an outcome error, she contends. To succeed, she must persuade the Court that the outcome, being the non-parole period imposed by the sentencing judge, is plainly wrong and then, as I have said, the balancing of competing public interests falls in favour of the Court interfering.

The Director does not suggest what an appropriate sentence would be. She cannot. The High Court has made plain that it is no part of the prosecutor's task to suggest what might be an appropriate penalty. She focuses upon the loss of life and all that entails.

My mind travels to the head sentence—life imprisonment. In fact, three sentences of life imprisonment. In this jurisdiction life does not mean life. It can mean that the prisoner is imprisoned for life, but that is not the invariable consequence. Generally for murder, a defendant will serve the non-parole period imposed and then, if he or she is paroled and lasts ten years on parole without offending, or otherwise breaching parole conditions, they will be unconditionally released.

We do not aggregate life sentences. Why, I wondered. I knew that in parts of America they did. We have all heard mention on television of a defendant in America being sentenced to consecutive life sentences or sentences in years outstripping life expectancy. A sentence like that must provide the victim with some comfort, but does it? Clearly the defendant will not serve such sentence. Aggregation like that can only be symbolic.

Symbolism has its place here. The hushed silence, the coat of arms, robes, the procession into court by the judges with all called to stand. This is something very serious. Justice administered in full view of the people, by justices who still enjoy a degree of veneration, for and on behalf of the people. A grave wrong has occurred and in consequence, a man's liberty is at stake. As a community, it is freedom and all its attendant benefits that we prize most. So much so, that the greatest penalty we as a people impose is the denial of liberty, sometimes for life. The sombre atmosphere of the courtroom and the symbolism invoked combine to reinforce our commitment to the rule of law and our acceptance that rights, entitlements, and interests shall only be interfered with in accordance with the law. Here too, the community reinforces its commitment to living together in peace and to bringing those who disturb that peace to justice in order that peace and the opportunity to live a fulfilling life are secured.

In my mind, I dwell a little longer on this notion of symbolism. Whilst the aggregation of life sentences results in an overall sentence that could not possibly be served, the penalty imposed reflects the harm done and the loss sustained. The taking of three lives converted to the units of punishment exceeds one man's life expectancy. At one level this engenders some satisfaction, for it vindicates the value and dignity of the lives taken. At another level it provides little comfort—the price will never be paid; it is symbolic.

Sentencing is not a science. It involves the evaluation of many factors personal to the defendant and particular to his or her offending. The factors rarely, if ever, point in one direction. In sentencing, the law pursues four broad policies. Those four policies are widely known—specific and general deterrence, retribution or punishment, and rehabilitation. Retribution is at the forefront of the Director's submissions, although she does not use the word. That is not because to focus on retribution is to sound harsh and unforgiving; there are occasions when the just approach is harsh. Rather, the Director's approach is to appear objective and dispassionate in contending that many, many years of a man's life be taken from him.

Is a sentence requiring that a man forfeit a minimum of 30 years of his own life for taking three lives plainly inadequate? Does it adequately punish and deter? Does it allow for rehabilitation? Should it? If we do not impose aggregated sentences, each sentence reflecting the value of one life, how do we go about sentencing the multiple murderer? In the respondent's case, should he get parole, and all go well then, with the average life expectancy for Australian males in the low to mid 80s, conceivably he may spend 20 years in the community. Is that too much in view of what he has done? Ordinarily, the principle of proportionality sets the limit of any sentence that may be imposed. That is to say, the punishment imposed must be proportionate to the circumstances of the offending and of the offender. Does that principle operate within the limits of life expectancy?

The questions begin to flow thick and fast from the Bench.

In this jurisdiction, there is a minimum non-parole period for murder—20 years. A non-parole period of 20 years is legislatively prescribed as representing a murder at the lower end of the range of objective seriousness. Accepting this, the murderer who intended that his act only result in grievous bodily harm would receive a non-parole period closer to twenty years, than the non-parole period fixed for the murderer who intended to kill. If the murderer who intends to kill gets more than 20 years for one murder, does it follow that the murderer who kills three people intending to kill them, gets a non-parole period upward of 60 years? Such approach would attribute the same value to each life taken.

I have always understood the purpose of a non-parole period to be the minimum period that the sentencing judge considers must be served if the purposes of the head sentence are to be achieved. The sentencing judge is not concerned with the question of whether the defendant should be paroled upon the expiration of his or her non-parole period. That is a question for the future and, ordinarily, for the executive government.

But if a non-parole period is the minimum period that must necessarily be served to achieve the purposes of the head sentence, then it follows that the non-parole period must bear a proportionate relationship to the head sentence. How does this work in the case of the multiple murderer sentenced to life imprisonment for each murder and in relation to who the number of years of liberty we as a community can take is finite?

For the purposes of sentencing a killer, do we attribute some sort of notional value to the life taken? Does that value depend upon such things as age, who the victim is, the contribution they have or might make to the community, whether they were a burden on the community, and how loved they were? If you kill a renowned heart surgeon, is your non-parole period longer than if you kill a drug dealer?

I recall once reading the submissions of a prosecutor in the US addressing a jury on the question of sentence. I do not recall precisely the power that the jury had. It might only have been to recommend a penalty. Still, it was a murder, and the death penalty was in play. My recollection is that the defendant had killed the parents of a young girl. The prosecutor's speech focused on the child and significant milestones in her life that she could expect to reach and yet not enjoy with her parents. 'Who will be there to celebrate with Monica when she attends her first prom or when she graduates from college? Who will walk her down the aisle?' And so on. The rhetoric was impressive. The chord it must have struck, deep and profound. But it troubled me deeply. It was a man's life that was at stake, not his liberty. Emotion is no necessary friend of justice. An emotive plea for the death penalty struck me as risking a distortion of justice.

But perhaps this betrays nothing more than my own values.

As a judge, I was conscious to constrain the projection of my own values into the act of judging and, in particular, in sentencing. It is impossible to do so absolutely. Almost invariably, judges search for objective validation of the decisions they make, but try as judges might to suppress infiltration of their own values, those values will inform conclusions reached. Sentencing is an area of the law where there is scope for a judge's personal views to influence the outcome. Because sentencing is a truly discretionary judgment, weight afforded to certain factors will differ between judges. The result is that some judges are harsher sentencers than others. Some have particular views about certain types of offences, which translate into harsher or more lenient outcomes. All that said, sentencing is not a free for

all. Consistency in the application of principle and approach is insisted upon by authority, maximum penalties and other sentences provide yardsticks and sentences are subject to appellate review.

Still, I am conscious that my views may not coincide with the majority of the community and it is on behalf of the community that we sentence. Where do we find validation in this matter? Multiple murderers and child killers are, thankfully, rare.

From the community's viewpoint, life is sacred. All lives. The value we place on life does not change from one victim to another. But while we do not value individuals in sentencing, we do value the loss to them of their life and all its potential.

Three lives. Two children. The cruel circumstance of the murders swirl around in my head. What is it that shocks us when a young child is murdered more so than when an adult is murdered? A young child is vulnerable and almost always defenceless. Rarely does a child act in a manner that can be said to be causative of their death at the hands of an adult. And if they do, it is the product of circumstances over which they have no control and no ability to escape. Children should be able to trust adults and look to them for care and protection. A child murdered has not had the opportunity to live. They are denied life and all its opportunities and potentialities at a time when their journey has only just begun. The killing of a child is more grave because the child is innocent and could not protect themselves, but also because of what is taken—the loss of the experience of a long life. That is, we take into account the loss of a long life and all its potential pleasures and pains which, in combination, is immeasurably valuable to us as human beings. It is something like this that is meant when people speak of the life of a child being cruelly taken.

The Director has completed her submissions. They were brief and to the point.

I look up at the flat screen. Jones has remained sitting still, starring into space, showing no interest or emotion. His counsel stands, 'I am under instructions to make no submissions'. He moves to sit.

'Just a minute'. It is the President. While I am caught by surprise, her experience kicks in instantly.

Jones' counsel gets back to his feet. 'Yes, Your Honour?'

'Are his instructions the product of a free choice?' The question brings me round. I admire the President's acuity. In the prison system, someone like Jones is at great risk. Prisoners have their own sense of justice and prisoners who have preyed on or killed children are singled out for retribution. Throughout his time in prison, Jones will be at risk of being assaulted or worse.

'Yes', counsel answers. A hint of frustration is detectable in counsel's body language, as if he has tried all he can to persuade his client to let him speak.

Satisfied, the President announces that the court will reserve its judgment. We then adjourn.

Moments later, we meet in an anteroom to the courtroom to discuss our preliminary views, having heard the argument. One of our number has already been allocated the task of producing the first draft of the Court's judgment. The balance of the coram are not, of course, bound to join in that first judgment, but where we can, and likely after further discussion and amendment, we will. A court of three always speaks loudest if there is just one voice being heard.

In our discussion, we focus on the finite life expectancy of the respondent. His attitude to the appeal may reflect contrition or may be no more than resignation to the fact that his life is, so far as he can foresee, gone. We debate the loss of three lives, two children, translated into the units of punishment. It was not suggested that we refrain from imposing a non-parole period. That is an option open to us. An option that reflects the realisation that in some cases, the prospect of rehabilitation is nil. Some murderers should never be released. Thankfully, such cohort is small.

Ours is a system that has, at its heart, the notion of repentance, rehabilitation and reform. Save in exceptional cases, we do not write off a fellow human being as unsalvageable. We continue to adhere to the notion that once a person has served their time, their debt is paid, and the slate is wiped clean. The ordinary member of the public who relies upon the media for information about the administration of justice could be forgiven for thinking that ours is a system that administers punishment exclusively to denounce and in retribution. That expectation is all too frequently reinforced by headlines that record the victim's anguish (he only got fifteen years, but for me it is life) or an opportunistic law maker wishing to be seen to be tough on crime. But notwithstanding the comings and goings of governments of different political persuasions, our system of justice and the power to punish adheres to a rationale that holds that all who perpetrate crimes against their fellow citizens can be reclaimed. This applies equally to Jones. Need justice take away the entirety of the balance of his life? We are satisfied that the 30-year non-parole period is manifestly inadequate having regard to the 20-year minimum and what it represents. We reject the idea that, in this case, we should triple the 20 years, though precision in the articulation of principle evades us. The closest we get is the acknowledgement of the finite period we can take and yet still impose a sentence that vindicates the lives taken whilst allowing for hope. We agree that once a non-parole period exceeds 40 years, there is little point in setting one. The time to be served should be left to future generations to determine with the benefit of knowing how Jones responds in custody. We are agreed that in this case a non-parole period should be set and settle on increasing

the 30 years to 39. We are greatly influenced by the murders of the children and regard the absence of psychiatric or psychological reports as telling.

No-one suggested Jones was a man that could not be salvaged. We are conscious that to refuse to set a non-parole period or to set a non-parole period of excessive length would leave him with no hope of returning to the community. We understand the heinousness of what he has done, but we refuse to write him off and take away everything. Giving him hope and reason to change ennobles us as a community.

The Court reconvenes some three weeks later to announce its judgment. The same counsel appears at the Bar table. I notice Jones neither appears on the flat screen nor in the dock. The President inquires of his counsel as to his whereabouts. He is in hospital. He has been severely beaten in prison and will likely have an irreversible brain injury requiring that he be cared for in institutions for the remainder of his life.

Judgment is delivered.

The Court rises.

The mood is sombre. Justice done or justice defeated?