

On Murder, Motive & Life Without Parole.

(An essay about mandatory sentencing)

Introduction. In a judge's bench-book you will read that a jury has no need to understand why the person in the dock killed "whoever". The question for the jury is not "motive", but "deed" Did he (or she) do it? That is the law; but this separation of mind and deed is never apparent in the early stage of a police investigation. In the case of John Newman, Task Force GAP's interest in Phuong Ngo began on the night of the murder. John Newman's friend and Fairfield City councillor Ken Chapman told detectives that Phuong Ngo might get some benefit from the shooting. The point here is that the investigation began with motive and at the end sentencing depended on motive. Our focus is motive, law and particularly the legislative basis for sentence, and subsequent process of review.

Whether the jury considered motive or not, Justice John Dunford certainly did. The motive for this murder, Dunford wrote was an insatiable ambition.¹ For that, he sentenced Ngo to a life in prison without parole:

15 I am satisfied to the criminal standard that Phuong Ngo's *motive* for the killing of John Newman was *naked political ambition and impatience*. He wanted to be the Legislative Assembly member for Cabramatta, but had given the Labor Party hierarchy an undertaking that he would not run for pre-selection whilst John Newman was the sitting member. *He [Ngo] could not wait until the next general election due in 1999*; and so he needed to remove John Newman as the sitting member in order that he could run in the pre-selection ballot which, on the numbers, he had a very good chance of winning. The method he chose was to have John Newman killed.²

Notice the phrases: "*satisfied to the criminal standard*" and "*could not wait until the next general election due in 1999*". Justice Dunford had no doubt what lay behind the murder; the purpose of this essay is to persuade you, my reader, that he was not a little wrong but dead wrong. After that I ask you to consider the relationship between motive and sentence.

Justice Dunford's wrote: "Ngo could not wait until *the next general election due in 1999*". This seems unusual; a little context will show why. The NSW electoral system runs on a regular four year cycle. John Newman died in September 1994. An election was held in March 1995; that is public knowledge. Justice Dunford, trained in law, certainly knew that; why then did he refer to "*the next general election due in 1999*"? Judges use language precisely; that is their trade. The word "next" denotes a closeness of items that naturally belong together - either in space or time.³ Thus the election in 1995 was the next election, not '99, according to normal English usage. That was the puzzle. I wanted an answer. I got a satisfying answer, but having got it I was astonished to find a greater and more troubling puzzle. The puzzle? How did this single word - "next" - from the phrase "the next election" earn a sentence of life without parole for the man convicted for John Newman's murder - a Vietnamese immigrant, Phuong Ngo?

The Next Election. The link between "the next election" and the year 1999 began when Phuong Ngo gave evidence in his second trial. (2T/d35). Ngo told the court about some conversation over lunch on the day John Newman died.

¹The word "insatiable" was not used by Justice Dunford. Doubtless some nit-picking, pedant will say that. According to Justice Dunford, Ngo was ambitious and impatient to such a degree that he was driven to murder. Is that not an ambition that cannot be satisfied?

²Justice Dunford, in handing down the sentence, October 2001. Emphasis (and italics) are added.

³Daniel Webster: **next** - nearest in space or position; immediately adjoining **or** immediately following in time or order; e.g. "the following day" **or** at the time or occasion immediately following, e.g. "next the doctor examined his back"

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Q. [Brett Walker, SC, for Ngo] Was anything said [during lunch] about Mr Newman and the seat of Cabramatta?

A. [The accused, Ngo] At that lunch I recall Mr. Della Bosca has told us that either he just come back from a meeting with the then Leader of the Opposition, Mr. Bob Carr, or he just had a conversation with Mr. Bob Carr, that there had been a lot of complaints about Mr. Newman and that Mr. Newman would not be re-endorsed for the following election.⁴

The Police Running Sheet. In 1994 John Della Bosca was the general secretary for the ALP in NSW. He knew who's who and what's what; he was the oil in the ALP's gear-box. So Ngo and Della Bosca met for lunch on the day Newman was shot. Unknown to him, detectives knew about the lunch-time conversation in November '94 - fully five years before Ngo mentioned it in court. Using the mobile system call record detectives tracked Ngo's journey as he drove from Cabramatta to ALP headquarters in Sussex Street, Sydney. They interviewed Della Bosca, noting that:

"Newman was mentioned during lunch. Della Bosca suggested that Ngo run against Newman in next election. Ngo said words to the effect of 'No, I've given my word to Newman that I won't run for the legislative assembly'⁵ as member for Cabramatta, [he] would not oppose Newman in pre-selection."

Superintendent Kaldas & John Della Bosca. The record remained undisclosed⁶ until the day Ngo gave evidence. That same day, police Superintendent Kaldas retrieved it to show John Della Bosca who gave Kaldas a ten point statement. Paragraph #5 undid (in part) Ngo's evidence:

5. A discussion [at that lunch] took place about Mr. NGO's political ambitions. I recall suggesting to Mr. NGO that at some point in the future he would be free to run in pre-selection against Mr. Newman. However, the opportunity for that to happen in the 1995 election had already passed as Mr. NEWMAN had already been endorsed for the 1995 election as had the majority of candidates for that next election.

That phrase from 2000, that "Ngo would be free to run ..." implies a contest but in the police record (from 1994) Della Bosca's memory was "No, I [Ngo] have given my word ...". There would be no race in 1995, not because Newman was the nominated candidate, but because Ngo said, "I've given my word ...". In Della Bosca's memory in 2000, there *was* a race, but "some time in the future". The effect of that change will be apparent shortly.

Again, the final sentence in para. #5 has two points of interest. It might read: that *Newman had already been endorsed for the 1995 election* - full stop, but Della Bosca continued, ending with "*for **that** next election.*" Surely, in September 1994 there was only one "next election"? Where was another? We will shortly see, from his evidence, that Della Bosca did intend to others to understand there was **another** "next election". The pronoun "**that**" has a demonstrative function. Demonstrative pronouns identify and distinguish. Generally, <this> denotes an item that is immediate. I say "**this** Monday" - the Monday mentioned in the conversation. In contrast, <**that**> denotes an item more remote. I might say, "Isaac Newton was born in 1642. *That same year* Abel Tasman named Maatsuyker Island." I identified a specific year distinct from any other year. I know this, because my English teacher, Mrs Collis demanded from me a precise use of language. She would point to some word and say, "What does *that*

⁴Evidence of Mr. Phuong Ngo, second trial, 35th day.

⁵Here I substitute the word 'assembly' for 'council'. In the court, there was agreement that the police wrote 'council' where 'assembly' was intended.

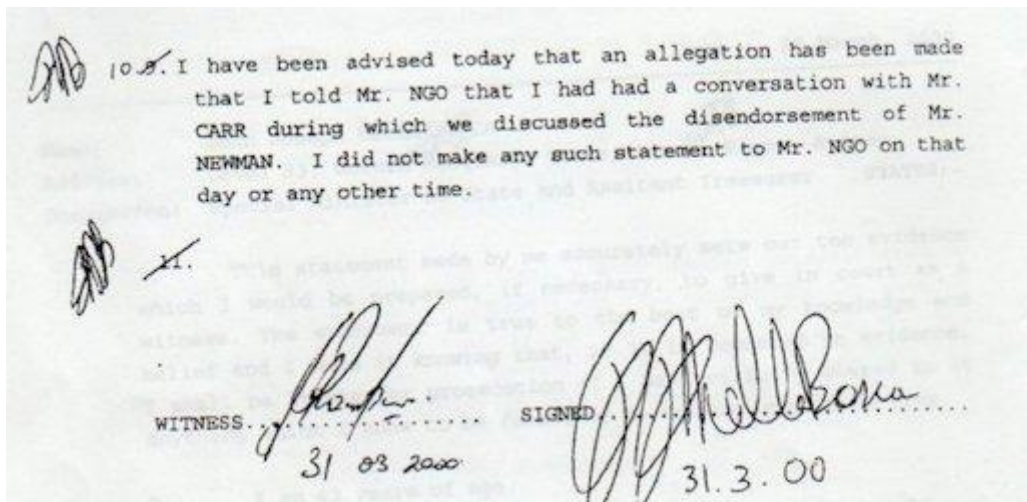
⁶Daniel Webster, on "secret": hidden, concealed, a thing kept from public knowledge. In law, every relevant document found in an investigation must be given to defence at the end of the committal process. This is a formal process, affirmed by a certificate of disclosure. This note - a running sheet - was not given to Ngo's lawyers.

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word add to the meaning of your sentence?" If only ... if only ... if only I had paid more attention to her instruction! At any rate, Mr. Della Bosca's use of the word "that" suggests another 'next election' - out there somewhere.

Some will immediately declare, "You draw a long bow here, my friend. Do not hang an argument on a single word, and certainly never on a demonstrative pronoun." Be patient, I say. Using the evidence of John Della Bosca I will show he used the word "next" to refer to two elections; one in 1995 and a later "next" election in 1999. This focus on a single word is not an argument about counting angels on the head of a pin. Justice Dunford's sentence of life without parole depends on the meaning linking this word "next" with the election in 1999. That is what he wrote, but where did Justice John Dunford get this aberrant meaning he wrote about so confidently? For the moment we have only the seed. Soon John Della Bosca will show the full-grown tree.

Below you see paragraph #10 from his statement. This refutes Ngo's claim to "know something" about impending dis-endorsement.



In short, the Ngo's about the

we have following: evidence

conversation at lunch and " ... the **following**⁷ election". We have a police running sheet where the detectives wrote "... Della Bosca suggested that Ngo run against Newman **in next election**"⁸, and, after that, (as Della Bosca told the police) Ngo resisted the suggestion, saying, "No, I gave my word ...". Again, please note this was John Della Bosca's memory, not Ngo's.

Now I turn to John Della Bosca's evidence (2T/d42); it is reproduced in Appendix A and also includes legal argument from that day. The key points can be found quickly; they are printed in blue ink. If time permits, please read the legal discussion. Below I summarise key evidence from Appendix A. The phrase 'next election', John Della Bosca told the court, would suggest 'March 1995' to any casual reader. We may think the detective who wrote: "Della Bosca suggested Ngo run against Newman *in next election*" referred to March 1995. That idea was **an error**, Della Bosca said. He used the word "error" as you see here:

- Q. [Mr Walker, SC for Ngo] When you saw the [police] running sheet on 30 March, you say *you identified an error* in that sentence you have read, is that correct?
A. [Mr. Della Bosca] That's correct.

⁷"Following" – the word used by Ngo in evidence.

⁸The bold font and blue ink, of course, was added. It does not appear in the original.

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Q. What is the whole of the error you have identified?

A. The sentence: "Della Bosca suggested that Ngo run against Newman *in the next election*."⁹

The words "*next election*", Della Bosca explained, did not refer to the election in 1995, but the year 1999. His explanation went thus: *He* was General Secretary of the ALP. Unlike the detective who wrote the running sheet, *he* knew that the pre-selection ballot for the '95 election had been finalised by September '94. John Newman was the nominated ALP candidate in the Cabramatta district, and so, Della Bosca said, *he* knew the earliest opportunity for Ngo to challenge Newman would be (in the words used by Justice Dunford) 'the next general election due in 1999'. Walker continued:

Q. What you now say is that the *next available opportunity* for there to be a contest between Ngo and Newman, for Labor Party candidacy would be the pre-selection for the Lower House *election scheduled for March 1999*, is that correct?

A. Yes.¹⁰

That was it! Justice Dunford depended on *that* understanding, carried into the third trial, when he sentenced Ngo. But John Della Bosca's statement brought a second change in understanding the situation. In the police running sheet he suggested Ngo challenge Newman; Ngo turned the suggestion aside, saying "No, I have given my word ...". In Della Bosca's statement, from the year 2000, the emphatic "no" is gone. Della Bosca's suggestion is opportunity. "Opportunity" became ambition, impatience and then motive. The result was a life sentence. In the third trial this subtle change of meaning in "next election" was dead. Rather, the Crown adopted Della Bosca's conclusion - Newman's position for the next election (i.e. 1995) was certain. "Next" came to mean 1999, not 1995, as Justice Dunford's clearly wrote. But eight years thence Reba Meagher gave an account that restored the common meaning of "next". On the same day John Newman was shot John Della Bosca told her John Newman would not contest "the next election". The position was open; she should consider whether she had an interest in standing as a candidate in the electoral district of Cabramatta.

That insight, from 2008, will make the significance of Della Bosca's evidence from the third trial easier to follow. He told the court:

Q. [prosecutor Tedeschi] At that stage was there in your opinion - [...] any prospect of Mr Newman being dis-endorsed as the ALP candidate *in the next election*?¹¹

A. [Mr. Della Bosca] In September '94, no. [The transcript printed '95, but here you see the corrected version.]

and shortly after that:

Q. Did you ever say anything to Mr Ngo on that day [i.e. at lunch] about any possibility or prospect of John Newman losing his endorsement for Cabramatta prior to the next election?

A. No, I don't believe I did.

Ngo contended that he heard 'something' about Newman during lunch on the day of the murder. If true, then the Crown's claim that he murdered Newman for political advantage would "not make much sense",

⁹Transcript, R v Ngo & others, 2T/d42. Again, the original appears without emphasis or italic font. They appear here to elucidate Mr. Della Bosca intended understanding of "the next election".

¹⁰ibid, but note: This evidence was given on *voire-dire* and thus heard only by Justice Wood, not any jury.

¹¹Evidence in-chief of Mr. Della Bosca, 3T/d35.

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as Justice Wood observed in the second trial. In the third the Crown used Della Bosca's evidence to present Ngo as a finagler. He told the jury:

John Della Bosca refuted the suggestion [...] that he [...] told Phuong Ngo that John Newman was going to lose his endorsement. [...] There was nothing John Della Bosca was aware of that would have cast any sort of doubt on Mr. Newman's continued endorsement as the Labor Party candidate.¹²

Tedeschi continued:

If, on 5 September, Phuong Ngo had been told, "John Newman's going to lose his endorsement", then he wouldn't have needed to kill him. Why would he kill him if he [Newman] was going to lose his endorsement for the 1995 election? That's the point of it [evidence about dis-endorsement] in this trial and that's why it is important that John Della Bosca refuted that. "I wasn't told it by Bob Carr and I didn't tell it to Phuong Ngo."

The reversal of onus of guilt is subtle but apparent. John Newman was dead - clearly murdered. Ngo claimed he knew something. **If** his claim was true, **then** (the Crown said) the murder would *not* deliver the political advantage the Crown claimed he wanted. Newman *was* dead and so Ngo *did not* know "something". The other party to the conversation - a minister of the Crown, no less - denied the conversation took place, either then or at any other time. Della Bosca had credibility. He was a minister of the Crown. Phuong Ngo, in the dock, had none. Inference: Ngo lied. Prosecutor Tedeschi's proof: ***Newman is dead***. The logic of his argument assumes the point to be proven. It is clever but but wickedly incorrect.¹³ Frankly, I expect integrity from the Crown prosecutor's office.

If the evidence ended here the case on motive would be sustainable; nothing more need be said, but the evidence did not end there, and so I write. In 2008, following an ABC/4 Corners investigation a commission of inquiry heard Reba Meagher's account of a conversation with John Della Bosca.

Q. [Counsel assisting, Mr. Colefax.] What time was this conversation that you had with Mr Della Bosca on 5 September?¹⁴

A. It was about 4 o'clock in the afternoon.¹⁵

Q. As best you can recall, could you tell his Honour the substance of the conversation?

A. I received a phone call from John Della Bosca during the course of the day asking me to go into Sussex Street and meet with him. When I arrived, he asked me about whether I would be interested in standing for Parliament and I said I would be. He said that there were problems with two members of Parliament that probably wouldn't be contesting **the next election** and that was in the seat of Cabramatta and the seat of St Marys. He asked me to give consideration to which seat I would like to be a candidate for and to go away and think about that.

Q. And was it at 4pm you had this face to face meeting with Mr Della Bosca?

A. That's right.

Q. Can you remember the time of the telephone call which preceded it in which you were invited to go to his office?

A. It was around midday.

¹²Prosecutor Tedeschi, to the jury in closing on d57 of the third trial.

¹³Affirming the consequent.

¹⁴As the risk of pedantry: This is the day Della Bosca/Ngo ate lunch together, and (later) the day John Newman was shot.

¹⁵Evidence of Reba Meagher before Acting Justice David Patten, d12, 2008. "The afternoon" was the same day Ngo had lunch with John Della Bosca. It was the day John Newman was shot.

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You noticed, I'm sure, the phrase, "the next election".

The lunch in Ngo's evidence sat between the mid-day call and the 4pm meeting. I suggest one may reasonably infer John Della Bosca's intention on that day from the order of events. He scheduled a meeting with Reba Meagher at 4pm. In that meeting he canvassed her interest in standing in the '95 election. The pre-selection ballot was 'done'; Newman won that ballot but Della Bosca told Meagher that Newman "probably wouldn't be contesting the next election". Acting Justice Patten accepted Reba Meagher's evidence; we will see that shortly.

A diary entry by Bob Carr, then leader of opposition in the NSW parliament, mentions the circumstances around the dismissal of the other person Reba Meagher mentioned.

19 SEPTEMBER 1994

Tony Aquilina, member for St Marys, is in trouble. I'll axe him before the allegations get aired... And we'll replace him with Pat Staunton, secretary of the nurses union; thus, by the way, locking out Anderson who's eyeing the seat. Tied this up with Della this afternoon.

From the diary of Bob Carr,
quoted in 'Bob Carr - Reluctant Leader, pg 103

Acting Justice Patten understood the conflict between Meagher's evidence (before him) and Della Bosca's (before Dunford).¹⁶ He wrote:

Given that the conversation with Mr Della Bosca directly affected her personal interests in an important way, it seems unlikely to me that Ms Meagher's evidence was unreliable.¹⁷

Unscrambling A/J Patten's double negative I have: It seems likely to me [*he might have written*] that Ms Meagher's evidence was reliable. He did not call Della Bosca, saying there was nothing to be gained from that. When Mr Hastings & Ms Pepper, (representing Ngo in the inquiry) submitted that the political motive "could no longer be reasonably sustained" Patten dismissed the submission. He was not prepared, he wrote, to accept the unsupported evidence of Ngo.¹⁸

That submission assumes that Mr Della Bosca shared, at lunch with Mr Ngo, the information he subsequently conveyed to Ms Meagher on 5 September 1994. The only material on that subject before the jury at the third trial was Mr Della Bosca's evidence who, in answer to a question by Mr Nicholson, "Did you consider in 1994 that there was a possibility that Mr Newman mightn't be a candidate in the next election?", replied "In September 1994, no I don't believe so".¹⁹

Mr Patten might have considered evidence-in-chief given by Mr. Della Bosca in the third trial.

¹⁶Report to the Chief Justice in the conviction of Phuong Canh Ngo (D.A. Patten) para 482/pg 197.

¹⁷ ibid para 483/pg 198.

¹⁸Report to the Chief Justice in the conviction of Phuong Canh Ngo (D.A. Patten) para 492/pg 204.

¹⁹Report, by D.A. Patten para 493/pg 200.

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Q. [Prosecutor Mark Tedeschi] At some stage during the [lunch-time] conversation did you suggest to Mr Ngo where his future may lie?

A. [John Della Bosca] Yes.

Q. What did you say to him?

A. Well, [...] the discussion went over some hour or so, so I was putting to Mr Ngo that at some point in time he could be considered for the leadership council, or he could be a candidate for the ALP in the future.

Q. A candidate at what level?

A. *I was pushing upon him* the idea [...] that he become a candidate for Cabramatta at some time in the future, but I was also keeping open the idea and *he was pushing upon me the idea* that he wanted to run for the Legislative Council.²⁰

Q. When you say in the future the candidate for Cabramatta, do you mean in the State Lower House seat?

A. Yes I do, yes.

Q. Was there anything said about running in a pre-selection against Mr Newman?

A. I am sorry, I don't understand the point of the question.

If Reba Meagher's evidence be true (as Acting Justice Patten said it was) then Newman was to be dis-endorsed (or perhaps step down, as Aquilina did). That being so, there was no point to the question. And again:

Q. During that discussion [at lunch] about one of the options being to run for the State seat of Cabramatta, was there anything said about [Ngo] running against Mr Newman by you?

A. I don't recollect specifically discussing with him about running against Mr Newman. I do recollect a view about Mr Newman's attitude to him running in any future pre-selection in Cabramatta.

Given Patten's acceptance of Meagher, the answer is as pointless as the question. How could *she* stand unless Newman was dis-endorsed? If he was dis-endorsed a "specific discussion about running against him" (whether that be Ngo or another person) would make Meagher's evidence nonsense. The question depends on a false assumption about the situation at that time.

Given the acceptance of Reba Meagher's evidence, Della Bosca's evidence about "pushing" Ngo to run for the state seat of Cabramatta warrants careful consideration. "Pushing" suggests a contest. The contest was not between Ngo and Newman but Ngo and Della Bosca. He was seeking to find a candidate to run in the soon-to-be-disendorsed Newman. Again, the evidence of Reba Meagher gives a context that makes sense that 'the next election' *is* 1995. If a week in politics is a long time, then five years is an eternity. Why could Della Bosca 'push' Ngo about 1999? Newman might resign in the intervening time. His health may fail but in 1994 Della Bosca 'pushed' Ngo to become a candidate 'at some time in the future'. Justice Dunford believed 'the future' to be 1999; Reba Meagher made it clear that 'the next election' meant 1995, not 1999. The idea that Ngo might contest a 'soon-to-be-disendorsed Newman' makes a nonsense of Meagher's evidence - evidence in which Patten expressed such confidence he declined to call Della Bosca as a witness.

Justice Patten wrote that he was "not prepared to accept the unsupported evidence of Mr Ngo"²¹ That, surely, was an exaggerated black-letter reading of law.

²⁰Evidence in chief, John Della Bosca, 3T/d35.

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Q. [Prosecutor Tedeschi to Ngo] I want to suggest to you that you were never told anything by Mr John Della Bosca about John Newman being deselected or dropped as the endorsed Australian Labor Party candidate for the State seat of Cabramatta in the 1995 election?

A. [...] I clearly remember that Mr Della Bosca either said he just come back from a meeting or he just had a conversation with Mr Bob Carr at the time, and there had been a lot of complaints about Mr Newman, so he would not be the candidate at the 1995 election.²²

Reba Meagher's evidence tells what **she** knew; we have one version of conversation over lunch from Ngo. That conversation, according to Della Bosca focused was on the "next" election in 1999. Ngo did not give evidence in the third trial. Prosecutor Tedeschi projected the conflict in evidence as a contest of truth. Ngo was on trial for murder. Della Bosca was a minister of the Crown in Bob Carr's cabinet with (apparently) no skin in the game. Doubtless any jury would prefer the evidence of Della Bosca. Ngo would be judged a liar. Who would risk that inference in a murder trial? According to standard legal folk-lore when a jury thinks the person in the dock is lying a guilty verdict will follow. Seven years later, Reba Meagher's evidence made Ngo's account not simply believable, but persuasive.

Returning to the evidence of Reba Meagher, she told Patten:

He [John Della Bosca] rang me at about 11 o'clock that night [the night Newman died] and told me that I would have to make up my mind about whether I was willing to be the candidate for Cabramatta and that I would be required to attend Sussex Street at 9 o'clock the next morning which I did.

The fact of that call would be available from the system call log. It confirms only that a call was made; it says nothing about what was said and therefore weak evidence, but useful by placing her other evidence in context.

In the third trial the question, so far as motive went, was "did Ngo know **something**". After Reba Meagher gave evidence we have a new question. **When** did Ngo learn "something". The idea that Della Bosca would 'push' Ngo about an election once-removed from the *next* election leaves an unanswered question. Why did John Della Bosca tell the court that John Newman's place on "the ticket" was certain?

If Ngo was to run against Newman *at any time*, then Patten must accept "evidence" from a witness he did not call - John Della Bosca. After that he must discount the evidence he accepted without reservation. We are left with a *reductio ad absurdum*, namely this: That Della Bosca suggested Ngo challenge Newman in an election still four years in the future when Newman was to be disendorsed. Patten himself must invoke some form of speculation contrary to Ngo's evidence to explain how Ngo "knew something".

Conclusion. This essay has no interest in verdict - as I wrote at the beginning. Ngo's matter merely illustrates the argument made by Nicholas Cowdery from the Office of Public Prosecutor. Mandatory sentencing is bad law:

"Facing an election in 1999 Premier Carr announced a new policy that would force judges to impose minimum sentences set by the government."

²¹D.A. Patten, Report to Spigelman, para #493

²²Evidence of Phuong Ngo, second trial.

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And after that:

“The NSW Bar Association and I publicly criticised the [...] sentencing policy as being created for 'naked political ends'. To put it bluntly, the new policy *didn't help the justice system at all*. It was just intended to attract votes in the upcoming election campaign.” (NC -Frank & Fearless, pg 11. Italics added.)

This was the legislation that Justice Dunford referred to when he wrote that he would impose a lesser sentence if his hands were not been bound by legislation.

43 Where a life sentence is imposed, the Court has no power to set a non-parole period: [...] nevertheless this is not a case where I believe he [Ngo] necessarily needs to be kept in custody for the whole of that time ...”

Then

“ ... **if I had the power to do so, I would fix a non-parole period**, [...] I echo the remarks of Wood CJ at CL in Harris at [123] *that Parliament might usefully give consideration to whether the Court should have power to fix a non-parole period in cases to which s 61(1) applies.*

A closing comment. In the disturbing matter of Lindy Chamberlain (The Dingo Baby case) prosecutor Ian Barker told the jury the Crown did not submit a motive for the murder. Only, he said, the Crown had proven murder. Less that three years later that proof was dismissed in the Morling Commission. Murder without motive is a rare thing.

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