



The Skaf Cases: The Rule of Law and “the Most Horrific of Crimes”

Content Warning

The following case note includes a discussion of a case involving teenage girls who were subject to severe acts of sexual assault. This content is disturbing, so teachers and students must be prepared before proceeding. This case note considers sentencing, juries and parole and does not detail any specifics of the offence.

Introduction

According to rule of law principles, trials must be fair and prompt; the accused is afforded the **presumption of innocence**, and the law is applied equally to all – no matter the crime – because no one is above (or beneath) the law.

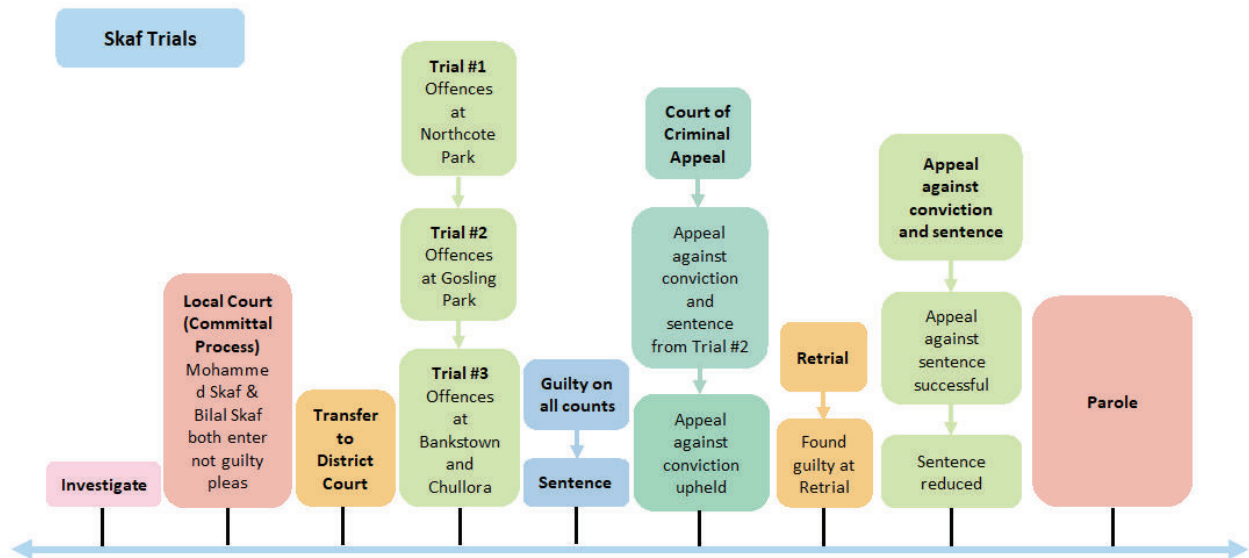
This resource will look at the **Skaf cases**. The Skaf cases are considered by the community as falling into the category of the worst of crimes. This resource demonstrates that even in these types of cases, the rule of law prevails. Regardless of the crime someone is charged with, the rule of law underpins the criminal investigative process, the criminal trial process and sentencing. This resource will focus on **sentencing** and **proportionality**, **parole**, and the impact of **jury misconduct** on **procedural fairness**.

Case Summary

Brothers **Bilal and Mohammed Skaf**, dubbed the ‘Skaf Rapists’, were involved in a number of gang rapes across Sydney in the early 2000s. The Skaf brothers, along with a number of other men involved in the crimes, faced multiple consecutive trials presided over by District Court Judge Michael Finnane QC.

Mohammed Skaf’s recent release on parole on October 6, 2021, after 22 years in prison, has reignited a media debate about the adequacy of his sentence.





Bilal Skaf's offences arose out of three separate incidents:

- Offences at Northcote Park Greenacre on 10 August 2000
- Offences at Gosling Park Greenacre on 12 August 2000
- Offences at Bankstown and Chullora on 30 August 2000

Mohammed Skaf's offences arose out of two separate incidents:

- Offences at Gosling Park Greenacre on 12 August 2000
- Offences at Bankstown and Chullora on 30 August 2000

Bilal Skaf faced three trials for the offences; and his brother Mohammed Skaf was a co-accused for two of the trials. The trials were heard in the **District Court** of New South Wales before Judge Finnane. The **juries** in all three trials found the men **guilty**.

Under the **Crimes (Sentencing Procedure) Act 1999 (NSW)**, Judge Finnane QC sentenced

Mohammed to 32 years in prison for his involvement in the crimes. Bilal Skaf was sentenced to 55 years with a non-parole period of 40 years. At the time, this was **the longest non-life sentence** ever handed down in Australia.

Mohammed and Bilal Skaf have both had their sentences modified and reduced several times by the NSW Court of Criminal Appeal. The appeal relating to the second set of offences at Gosling Park in Greenacre succeeded, as the NSW Court of Criminal Appeal found that the jury's misconduct led to a mistrial. The brothers also successfully argued that their sentences were manifestly excessive, leading the NSW Court of Criminal Appeal to reduce their sentences further.

Bilal Skaf is now serving a 31-year sentence with a minimum of 28 years. Mohammed Skaf's original sentence was reduced on appeal to 23 years with a non-parole period of 18 years. Mohammed Skaf was released from prison in October 2021.

Legal issues raised in the Skaf cases

Jury Misconduct

At the commencement of any criminal trial, the Judge provides instructions to the jury. **Jury directions** are instructions from the Judge, designed to help jurors understand the law and the issues that arise in the case, so they can use the evidence presented in the trial to reach a **verdict**. In the Skaf trial, Judge Finnane instructed the jury that you are “not to go and do your own research.”

At the second Skaf trial, a key issue was whether the victim had correctly identified Bilal Skaf as the offender. Since the offence occurred at night, much of the evidence led at trial was about the visibility at the park. The adequacy of the lighting in the park became an important factor.

At the conclusion of the second trial, the jury found both men guilty.

However, sometime after the verdict, a solicitor unconnected with the case received information that the night before the verdict, the foreman and another juror had visited the park where the offence occurred. They had inspected the lighting and conducted their own experiments to assess whether a person could be clearly recognised at night from certain distances.

The solicitor was under the impression that the jurors had considered the information obtained when they “went to the park” which was not evidence in the trial. The solicitor reported this to the court.

The foreman said that he only went to the park to “clarify something for my own mind. I felt I had a duty to the court to be right. I wanted to be sure my decision was not in any doubt before the verdict. I did not tell anyone else in the jury about this visit. The only juror who knew about the visit was the one who was with me.”

On appeal, Mohammed Skaf's lawyer, Stephen Odgers SC, said the jurors' experiments concerning the lighting and weather conditions at the park resulted in them gaining additional information that was **not admissible evidence**.

The Court of Appeal found that the ‘park experiment’ could not be considered part of the jury's deliberations.

The Court of Appeal said:

“The Court cannot be satisfied that the visit to the park has not affected the verdict and that the jury would have returned the same verdict if the irregularity had not occurred. The juror treated what was seen and done at the park as information that he took into account in arriving at or confirming his conclusion that guilt had been established beyond reasonable doubt” [paras 274 – 276].

The Court needs to “weigh the possible prejudicial impact” of the information “upon the minds and deliberations of (at least) the two jurors ...

This is because the information obtained by them was not evidence in the trial or properly put to them by the Judge with the knowledge of all the parties. Also, the evidence was obtained in circumstances amounting to procedural unfairness (denial of natural justice) as the accused were unable to test the material in any way."

Application of the Rule of Law

Two key concepts underpinning Australia's rule of law is that **the law should be applied to everyone equally and fairly** and **the principle of open justice** should always be upheld. To ensure trials are equal and fair, there are laws and rules that govern the way a trial operates. For example, the rules of evidence ensure everyone who is charged with an offence, regardless of the offence, is subject to the same restrictions on what evidence can and cannot be used. Both the prosecution and the defence must have a fair opportunity to address all the material considered by the jury when reaching its verdict.

Under the rule of law, the principle of open justice is key. Crucial to this is that the defendant – and the public – is entitled to know the evidence being considered by the jury. Further, the prosecution must prove an accused's guilt beyond a reasonable doubt.

A problem arises when jurors rely on external information that has not been presented to the court, as it is evidence that cannot be scrutinised or explained by the accused's defence team. In this case, the jurors sought their own external information to reaffirm their

view of Bilal Skaf's guilt. This evidence was not able to be cross examined with questions such as 'was the time of year, and the time of day, the same as when the offence occurred?', or 'have the lighting conditions changed at the park in the years since the offence occurred?'

The conduct of the jurors and their reliance on extraneous "evidence" that was not presented at the trial meant the Skaf brothers were not afforded a fair trial and the principle of open justice was infringed. Under the rule of law, everyone is entitled to a fair trial **regardless of the crime**. As a result, the Court of Criminal Appeal ordered a retrial.

Legal Reform

The Skaf case and the jury misconduct led to the introduction of the **Jury Amendment Act 2004** which amended the Jury Act 1977 by prohibiting jurors from making inquiries for the purpose of obtaining information about the accused or issues in the trial, except in the proper exercise of juror functions. This also prohibits jurors from searching the internet or conducting experiments to test evidence. The legislative change provides for harsher penalties for jurors who conduct investigations during the trial. The offence is punishable by a maximum of 2 years imprisonment.

The Skaf case also altered the way jury directions were given. Directions now cover outside experiments and direct juries that this type of investigation is illegal. Here is a sample of the written directions given to the jury at the opening of a criminal trial:

<https://tinyurl.com/3ckkm3dp>

Sentencing

The principle of totality

Bilal Skaf appealed the sentences that were imposed by Judge Finnane QC to the Court of Criminal Appeal (CCA). The CCA allowed his appeal and quashed the sentences imposed by Judge Finnane QC. The court deemed the original sentences handed down by Judge Finnane QC infringed **the principle of totality**: a principle of sentencing to assist courts when sentencing an offender for a number of offences.

In effect, the principle ensures the sentence reflects the overall criminality of the offending behaviour whereby the sentence must be just and appropriate to the totality of the behaviour. Therefore, since the Skaf brothers were sentenced for multiple offences, the court must ensure the aggregate or overall sentence is "just and appropriate" to the totality of the offending behaviour.

Whilst the CCA agreed that the offences committed were extremely serious, the court "could not categorise them as being within the worst category" when considering the scale for the severity of that crime. Bilal was resentenced to 28 years in prison for the two sets of offences.

Following the jury misconduct, the Skaf brothers faced a retrial where they were found guilty and resentenced by Acting Justice Matthews. The sentence imposed by Matthews JA extended Bilal's overall sentence to 38 years and extended Mohammed Skaf sentence to 26 years.

The brothers appealed the sentence imposed by Matthews JA. The appeal was heard before McClellan at CL, Hidden J and Howie J in the CCA. The lawyers for the Skaf brothers advanced several reasons for why their sentences should be reduced, including **the amount of publicity** surrounding the first trial, in conjunction with the other trials, as well as the **timing of trials** in combination with a focus on radical elements of the Muslim community following the September 11, 2001 attacks.

The appeal against their conviction was rejected but leave to appeal against their sentence was granted. The court considered Bilal's status as a high-risk inmate remanded in protective custody, and the limits and restrictions this imposes upon his access to education, work, and exercise whilst in prison. The sentences imposed by Matthews AJ were quashed on appeal because the CCA determined Her Honour's sentence had not given adequate weight to the principle of totality.

Bilal's total sentence will therefore expire on 11 February 2037, and he will be eligible for release on parole on 11 February 2031. The effect of this resentencing reduced the overall sentence and the non-parole period each by 2 years.



How is the sentence determined?

In determining the appropriate sentence, the Judge must consider what the law says. The **Crimes Sentencing Procedure Act 1999** outlines what a Judge must consider when determining the sentence for an offender.

Firstly, they must look at the **objective seriousness** of the offence/s. The Judge will also consider whether there are any **aggravating factors**. Aggravating factors refer to things that make the offence more serious such as the offence being committed with other people, if the offence was violent in nature or part of a planned, organised criminal activity, and the substantial emotional harm caused by the offence upon victims.

A Judge must also consider the **mitigating factors**; these are the factors that reduce the seriousness of the offence. This includes if the offender is unlikely to re-offend or the offender has shown remorse. The Judge will also consider subjective factors; these are things specific to the offender.

For Mohammed Skaf, this included taking into account his youth at the time of offending. Another factor the Judge must consider when determining an appropriate sentence is whether the offender **has pleaded guilty or not guilty**. In criminal law, those who enter into a guilty plea at the earliest opportunity are entitled to a reduction of their sentence of up to 25%. The reason behind this is that if a guilty person pleads guilty, they remove the anxiety and stress caused to victims who would otherwise have to give evidence.

In both Mohammed and Bilal Skaf's cases, they pled not guilty to the offences.

Sentencing is a very difficult process because it requires a Judge to **balance** and weigh up competing factors. As Morris Lemma - the Premier of NSW in 2005 when the Court of Criminal Appeal reduced the Skaf brother's sentences - said, "It's always a balance, the court needs to reflect in their sentencing community attitudes, and we have seen in this case and other particular vicious cases a need for that to happen. It's a balance, sometimes they don't get that balance right, other times they do."

Getting this balance right requires a Judge to consider inherently difficult issues. For example, a Judge must consider the likelihood of an offender re-offending. This is very difficult to determine because the Judge has to consider the unknown. Another thing a Judge considers is the prospects of an individual's rehabilitation. This is again difficult because a Judge has to try to predict how a person may or may not change over time.

After a Judge has taken these factors into account, they apply a process called '**instinctive synthesis**' to arrive at what they deem an appropriate sentence. An offender can appeal their sentence if they can establish that it is manifestly excessive, or the Judge applied the law incorrectly.

In Australia, a country governed by the rule of law, the sentence imposed must be just and appropriate in the light of the overall offending behaviour: **the principle of totality**. A just and fair sentence does not mean everyone will agree with it. A just and fair sentence is a sentence imposed according to the law and in line with the purposes of sentencing. As demonstrated in the Skaf case, there must be **parity** in the sentences imposed. This means that similar sentences are imposed for similar offences when they are committed under similar circumstances. This creates **predictability** in sentencing and helps the law to be known and accessible as the community becomes aware of the punishment that will be imposed if they commit a certain crime.

The Skaf cases also demonstrate **the principle of proportionality**. That is, the overall punishment is proportionate to the gravity of the offence. In the Skaf cases, Bilal Skaf's sentence was greater than his brother Mohammed's because it reflected that his offences were objectively more serious and had greater gravity.

Post Sentencing Considerations: Parole

Mohammed Skaf's release on parole in October 2021 reignited the debate surrounding parole. Mohammed first became eligible for parole in 2018 but was unsuccessful three times before being granted parole in 2021.

The **State Parole Authority** rejected Mohammed's previous applications. In 2017 and 2019 the State Parole Authority expressed concerns that, "it appears that he blames the victim for his offence,

has no victim empathy and refuses to take responsibility for his actions. This lack of remorse is one of the reasons he has been assessed as a medium to high risk of reoffending again in the next five years".

The reasons Skaf was granted parole in October 2021 were outlined by the State Parole Authority chairman David Frearson SC, "Parole for the final two years of his sentence was the safest pathway for his reintegration into society. This is the only opportunity to supervise a safe transition into the community in the small window of time that we have left". The SPA has no function to alter or increase a sentence imposed by the Courts. This is because the SPA is an executive body, and under the rule of law there is a **clear separation between the roles of the executive, legislature and judiciary**. The SPA does not have the power to imprison Skaf indefinitely once his 23-year sentence has expired.

Before offenders are released on parole, the SPA must determine an offender's eligibility for release. This involves a number of robust processes the SPA goes through to protect the community and ensure that the reintegration of an offender back into society is supervised. The SPA considers several factors such as the advice of expert bodies, having regard for community safety, and the offender's change in behaviour, attitudes, and completion of adequate programs in remand.

Before making its decision, the SPA must, under the legislation, consider recommendations made by the Serious Offenders Review Council.

A serious offender is someone:

- (a) serving a sentence for murder and/or serving a life sentence.
- (b) serving a sentence with a non-parole period of more than 12 years, or;
- (c) is deemed to require to be managed as a serious offender by the sentencing court.

The Serious Offender Review Council recommended Mohammed Skaf be released on parole. Mohammed was released on parole subject to various strict parole conditions. These include:

- (1) Mandatory 24-hour electronic monitoring with daily reporting schedules
- (2) Compliance with ongoing psychological intervention
- (3) A ban on any form of contact with his victims
- (4) A ban on contact with any co-offenders
- (5) Exclusion zone orders for the local government areas of Liverpool, Fairfield, Blacktown and Parramatta

Does the parole of Skaf achieve justice?

The release of Mohammed Skaf on parole has caused considerable backlash from the community. However, when considering the release of Skaf, we must consider whether his parole achieves justice. The offences committed by Mohammed are undoubtedly horrific offences, yet even when 'the worst of the worst' crimes are committed, it is important

that we uphold the criminal processes that, in turn, uphold the rule of law. "The cases that society has found most heinous have always been those in which the rules of fair and just procedure have come under attack", and this is applicable to this case.

Regardless of how society may view the seriousness of a crime and the appropriate punishment, our criminal justice system **must be balanced**. Fair and proper procedure and laws must be followed to achieve a balance and, subsequently, a **just** outcome.

Margaret Cunneen SC, the former Deputy Crown Prosecutor who prosecuted the Skaf cases in the early 2000s, considers the parole of Mohammed indeed achieves justice, for: "He is now 38...he has arguably learnt his lesson" and "done his time." As the SPA said, "Skaf cannot be kept in prison beyond his sentence and his inevitable release must be supervised. Every determinate sentence imposed by a court comes to an end. Freeing Skaf at the end of his full 23-year sentence without extensive monitoring and conditions would pose an unacceptable risk. Usually, release is inevitable. It is important to provide structure to facilitate re-integration in the interests of community safety." Parole balances the rights of an individual and the concerns of the community, ultimately upholding the rule of law.

Read Also...

Michael Finnane, *'The rape trials Australia can't forget'*

Kieth Pennington, *'Innocent Until Proven Guilty: The Origins of a Legal Maxim'*