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Editorial

The Air India Trial

A public opinion poll conducted in British Columbia shortly after the acquittals of Ripiduman Singh Malik and Ajaib Singh Bagri suggests that two-thirds of the public disagree with the verdict. The families of the 329 victims have expressed their understandable dismay and anguish at the result of the 16-month trial. What should we make of these reactions to acquittals in one of the most important criminal trials in Canadian history?

Some comments in the media have conveyed the false impression that no one has been held responsible for Canada's most deadly act of terrorism. Inderjit Singh Reyat pled guilty to manslaughter in 2003 in relation to the Air India bombing, after having previously been convicted of manslaughter in the related Narita bombing. Reyat testified that he was approached by Talwinder Singh Parmar (killed in India in 1992 and acknowledged to be the leader of the bombing conspiracy) to construct an explosive device. Unfortunately, Reyat did not identify other accomplices or conspirators. Justice Josephson stated that if Reyat had "harboured even the slightest degree of genuine remorse, he would have been forthcoming": *R v. Malik*, 2005 BCSC 350 at para. 227.

Justice Josephson concluded that the Crown had proven beyond a reasonable doubt that the bomb was loaded onto the Air India plane in Vancouver in the luggage of "M. Singh", a person who never boarded the flight. This issue involved complex and competing expert evidence about the exact location of the bomb on the plane. Although every effort was made in the salvage and reconstruction, there was no forensic evidence of the type that linked Reyat with the Narita bomb. Indeed, there was no forensic evidence linking the two accused men with the Air India bomb.

Justice Josephson ultimately found that the various Crown witnesses who testified that the accused had made incriminating admissions to them were not credible. There were many reasons for these conclusions, including long delays in the witnesses coming forward, motives to lie and the fact that one

had been paid US$300,000 for his testimony. As the Crown recognized in its decision not to appeal the acquittals, questions of credibility are left to the trier of fact in our system.

Other evidence in this trial focused on the accuseds' motives to commit terrorism and their associations. In evaluating this evidence, context is very important. The motive to commit crimes against the Indian Government in the wake of its Army's 1984 attack on the Golden Temple "was shared by countless other Sikhs throughout the world and by an unknown number in British Columbia" (*ibid.*, at para. 1238).

This case demonstrates that political or religious motive evidence of the sort now required under s. 83.01(1)(b)(I)(A) of the *Criminal Code* could be relevant even before these 2001 terrorism amendments. At the same time, however, it also underlines that such motives may be so widely shared in some communities that proof of even strong motive may not substantially advance the Crown's case.

Some forms of association evidence are now made admissible under s. 83.18(4) of the *Criminal Code*, but the result in this case again suggests that association evidence cannot be conclusive proof of guilt. We should not forget that association and political motive evidence have played a role in some miscarriages of justice in terrorism cases, such as that of the Maguire Seven.

The Air India trial reaffirms the demanding and limited nature of the criminal trial even in times of heightened concern about terrorism. Justice Josephson correctly and eloquently stated that the need to prove guilt beyond a reasonable doubt "is the essence of the Rule of Law and cannot be applied any less vigorously in cases of horrific crimes than it is with respect to any other offence under the *Criminal Code*" (*ibid.*, at para. 662). Proof that someone is probably guilty even "of a diabolical act of terrorism unparalleled until recently in aviation history" (*ibid.*, at para. 1254) is not enough.

Justice Josephson's lengthy and careful judgment focused on whether the Crown had proven guilt beyond a reasonable doubt and nothing more. It did not deal extensively with prior findings of "unacceptable negligence" in CSIS's destruction of audiotapes and other evidence (*R. v. Malik*, 2002 BCSC 864; *R. v. Malik*, 2004 BCSC 554) and did not reach the question of the appropriate remedy for these and other Charter violations. It also did not deal with the controversial attempt to use the new investigative hearings in the middle of this trial (*Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 184 C.C.C. (3d) 449 *sub nom. R. v. Bagri*).

There are alternatives to a criminal trial that might have reached different conclusions. Some, such as the immigration and military proceedings used in many current terrorism cases, place less emphasis on giving detainees a fair trial, let alone the benefit of a reasonable doubt. Other alternatives such as civil litigation and public inquiries may be better able to reach conclusions

about what happened and what can be done to prevent a repeat of such a horrific crime. The Air India case raises important issues about the relationship between the RCMP and CSIS that could be examined by a public inquiry.

Prevention should not be forgotten. The fact that the bags on both the Air India and Narita flights were allowed to travel without their passengers and the problems with screening the luggage for explosives are chilling reminders of the continued need for vigilant aviation security.

Although much attention has focused on the acquittals, the fact that the trial was completed is no small accomplishment. Mega-trials of this sort are very difficult and all the participants made special efforts to see that the trial reached a verdict, including the use of a direct indictment and trial by judge alone. Despite the continued need for some publication bans to protect witnesses, efforts were made to afford the public access through a website and a new courtroom. The judgment's length and complexity reflects the nature and length of the trial, but it concludes with an accessible summary and it demonstrates appropriate sympathy for the 329 men, women and children who perished on the plane.

Canada is not alone in producing acquittals in recent high-profile terrorism cases. Convictions of alleged members of the Hamburg al Qaeda cell in Germany in relation to the 9/11 attacks have been overturned because of concerns that fair trials are not possible in the absence of full disclosure. We should rightly be cautious about repeating the mistakes of past wrongful convictions in terrorism cases.

As demanding as the criminal trial is, we should not be ashamed of acquittals of accused terrorists. Such acquittals are an affirmation of the very high price that democracies are willing to pay in their attempts to ensure that only the guilty are punished. This is one of the qualities that distinguishes the legitimate pain imposed by democracies on guilty criminals from the illegitimate, indiscriminate and terrible pain imposed on the innocent by terrorists.

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