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Editorial

The Toronto Terrorism Conviction

The recent conviction of a young offender in the Toronto terrorism case of participating in a terrorist group has raised concerns that his conviction was a form of guilt by association. The Crown's star witness, Mubin Shaikh, was quick to tell reporters that he did not believe the young man was a terrorist. Those who read Justice Sproat's 98-page decision in *R. v. Y. (N.)* (unreported, September 25, 2008, Ont. S.C.J.) will know that the legal issue of guilt under s. 83.18 of the *Criminal Code* is not that simple. Indeed the legal issues are extremely complex and unlikely to be finally resolved by this decision.

To be guilty of the offence under s. 83.18, the Crown must prove that the accused knew he was participating in or contributing to a terrorist group and was doing so for the purpose of enhancing the ability of the group to facilitate or carry out a terrorist activity. One does not have to be a terrorist who is planning a specific terrorist act to be guilty under this offence. One also does not have to be guilty of a conspiracy in the form of an agreement to commit an act of terrorism. The criminal law has been expanded; the critical question is, how far?

The judge found that the young man participated in or contributed to a terrorist group by doing acts such as stealing walkie talkies, removing a surveillance camera and attending two training camps. In reaching this conclusion, Sproat J. relied on s. 83.18(3) of the Code, which deems that receiving training and providing a skill or expertise to benefit a terrorist group are culpable forms of participation in or contributing to a terrorist group.

A critical basis for the trial judge's decision that the accused knowingly participated in or contributed to a terrorist group was that the young man continued to contribute to the group after his attendance at the first training camp in Washago. This finding that the accused knew he was contributing to

a terrorist group should dispel the simplistic idea that the young offender was being convicted simply because he associated with the wrong people.

Section 83.18, however, requires more than knowing participation or contribution to a terrorist group to establish guilt. The Crown must establish that the accused had the purpose of enhancing the ability of any terrorist group either to facilitate or to carry out a terrorist activity. In this case, the judge found that the young man had the purpose of enhancing the group's ability to facilitate a terrorist activity even though he was likely kept in the dark as to any details of the plans that the group may have had to commit actual acts of terrorism in Ottawa and Toronto.

The trial judge cited legislative history evidence that the nature of modern cell-based terrorism means that many terrorists may be kept in the dark about the specifics of a planned terrorist act: *Y. (N.)*, *ibid.*, at paras. 157-58. To this end, s. 83.18(2)(c) of the Code provides that a person may be guilty of participating in or contributing to a terrorist group whether or not "the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group".

Although it is clear that the accused did not know the specific nature of any planned terrorist activity, the troubling question is whether he knew that any terrorist activity at all was being planned.

Here the trial judge's reasoning becomes less clear. He found that the offender ". . . clearly understood that the camps were training for a terrorist purpose. He also understood that contributing materials to be used at the camp enhanced the ability of the group to conduct the training . . . It is difficult to conceive that anyone, armed with that knowledge of a terrorist intent, would participate in or contribute to the terrorist group unless they shared the essential aims and ideals of the group and intended to enhance its ability. As provided in s. 83.01(2) of the *Criminal Code*, a terrorist activity is facilitated regardless of whether any particular terrorist activity was foreseen or planned at the time or whether any terrorist activity was actually carried out." (*Y. (N.)*, *ibid.*, at paras. 278-79).

The reference to facilitation in s. 83.01(2) incorporates a problematic provision, s. 83.19(2), which defines facilitation as occurring regardless of whether "the facilitator knows that a particular terrorist activity is facilitated" or even whether "any particular terrorist activity was foreseen or planned at the time it was facilitated."

It is one thing not to know the details and the specific nature of a terrorist activity; it is another not to know that any terrorist act at all is planned. In the former case, a person knows he is going to commit a terrorist act, but does not know when, where or how. In the latter case, the person may know that he is dealing with terrorists but have no knowledge that they are planning to commit "any particular terrorist activity". Section 83.19(2)(b) is much more sweeping than s. 83.18(2)(c).

Justice Rutherford considered and upheld the constitutionality of s. 83.19(2)(b) in *R. v. Khawaja* (2006), 214 C.C.C. (3d) 399 at paras. 36 and 39-42 (Ont. S.C.J.), leave to appeal to S.C.C. refused 216 C.C.C. (3d) vi, and Justice Sproat relied in part on this decision. But Justice Rutherford did not deal with the differences between the sensible notion that an accused can be guilty of a terrorism offence without knowing the specific nature of a planned terrorist activity and the somewhat Orwellian notion that an accused can be guilty of a terrorism offence even though he does not know that any particular terrorist activity is foreseen or planned.

The Supreme Court may eventually have to grapple with whether the remaining fault once knowledge of any particular terrorist activity is taken away by s. 83.19(2)(b) is sufficient to label and punish a person as guilty of a terrorism offence. To be sure, the young offender was not without fault. He knew he was dealing with a terrorist group. But is this enough to convict him of an offence that requires not only knowing participation but also a purpose to enhance the ability of the terrorist group to facilitate or carry out a terrorist activity?

It is possible that appellate courts could decide that the enhanced punishment and stigma of a terrorism offence requires more fault than is contemplated under the very expansive definition of facilitation in s. 83.19(2)(b). In other words, to be guilty of a terrorism offence you should at least have knowledge that a terrorist activity is being planned even though you do not need to have knowledge about the specific nature and details of the terrorist activity.

Post 9/11 laws and practices raise real concerns about guilt by association. Maher Arar's ordeal started when he was identified as a person of interest in an RCMP terrorism investigation because he was seen at an Ottawa café with one of the RCMP's suspects.

Charges have been stayed by the prosecutors against three youths and four adults who were arrested and charged to worldwide publicity and alarm in June 2006. There is a danger that investigators backed by broad offences can overreach. Although there may be a need to adjust traditional ideas of fault to respond to the nature of cell-based terrorism, the adjustments should not go so far as to undermine the requirement of fault or fair labeling and punishment. Indeed, such notions are important to rebut spurious claims that people planning terrorist acts are being punished for their beliefs and associations.

Justice Sproat has laid out the evidence against the young man in considerable detail. He gave the young man the benefit of the doubt, especially with respect to attendance at the first camp. He also stated that the concerns many Muslims have about the treatment of Muslims worldwide and the work of CSIS in Canada should not be equated with "terrorist rhetoric" or intentions: *R. v. Y. (N.)*, *ibid.*, at para. 205.

This case reveals the breadth of the new terrorism offences, but it rightly stops short of guilt by association. It remains to be seen, however, whether the broad statutory definition of facilitation that Justice Sproat relies upon provides a constitutionally sufficient level of knowledge and connection with an actual terrorist activity.

K.R.