The Criminal Law Quarterly

Volume 54, Number 3 February 2009

# Editorial

## The Ottawa Terrorism Conviction: *R. v. Khawaja*

The conviction of Momin Khawaja of various terrorism offences will undoubtedly come as a relief to many. In March 2004, Khawaja became the first person charged with new terrorism offences enacted after 9/11. His trial was delayed by his Charter challenge to the legislation, two separate national security confidentiality applications in the Federal Court, and two unsuccessful attempts to have the Supreme Court of Canada entertain appeals of pre-trial rulings.

Despite the use of a direct indictment, and a non-jury trial that heard just 27 days of evidence, Khawaja was only convicted in late October 2008. In contrast, five of seven of his alleged British accomplices were convicted of conspiring to cause an explosion with 600 kg of fertilizer in April 2007. This conviction came after one of the longest trials (13 months) and jury deliberations (27 days) in British history. Canada's Khawaja case is a cautionary tale about the dangers of bifurcating national security confidentiality between the Federal Court and the trial judge and of allowing pre-trial appeals.

The Khawaja conviction, combined with the earlier Toronto terrorism conviction, confirms the breadth of Canada's new terrorism offences. In both cases, the accused was convicted despite reasonable doubts that they knew about the specific plots of the terrorist group that they knowingly participated in and supported.

Justice Rutherford in his *Khawaja* decision was candid about the breadth of the new terrorism offences and their departure from traditional criminal law. For example, he found that while beliefs in violent Jihad were sufficient to supply the intent required for new terrorism crimes, they were not specific enough to invoke the traditional co-conspirators exception to the hearsay rule: *R. v. Khawaja* (2009), 238 C.C.C. (3d) 114 at para. 78 (Ont. S.C.J.). This approach is in contrast to that used in the recent Toronto terrorism

conviction in *R. v. Y. (N.)* (unreported, September 25, 2008, Ont. S.C.J.), which relied heavily on the co-conspirator exception.

Although they were not specific enough to form a conspiracy, Khawaja's general beliefs in violence to establish Islamic dominance were specific enough to support convictions for providing property to a terrorist group (s. 83.03), participating in a terrorist group (s. 83.18), facilitating a terrorist activity (s. 83.19), and instructing a person to carry out an activity for a terrorist group (s. 83.21). Indeed, it did not seem to matter whether Khawaja was supporting a bombing in London, a suicide bombing in Israel, training in Pakistan or insurgent fighting in Afghanistan.

Justice Rutherford found that the armed conflict exception in s. 83.01 did not apply because Khawaja was not committing his acts during an armed conflict either as part of a military force or in a manner in accordance with international law: *R. v. Khawaja*, *ibid.*, at paras. 128-29. This follows the restrictive reading of the armed conflict exception in *R. v. Y. (N.)*, *ibid.*, at para. 239, which implicitly rejected the idea that supporting insurgent fighting in Afghanistan would fall under the armed conflict exception.

Khawaja would have had to have gone to Afghanistan to have committed his acts during an armed conflict. The armed conflict exception could also be rejected on the basis that Khawaja would not be part of a military force and his activities would likely not be in accordance with international law.

Even if he was wrong about the armed conflict exception, Justice Rutherford stated that Khawaja's general support for violence to spread and defend Islam was sufficient to find that he knowingly participated and supported a terrorist group: *R. v. Khawaja*, *ibid.*, at para. 132. Khawaja participated in a training camp in Northern Pakistan in order to enhance the ability of a terrorist group to facilitate or carry out a terrorist activity under s. 83.18. The precise terrorist activity that would be carried out or facilitated did not need to be established.

Khawaja was also guilty of making property available, intending or knowing that it would be used for the purpose of facilitating or carrying out a terrorist activity, when he made his parent's house in Pakistan available for the use of others who came to Pakistan for training. This conclusion, as well as the conclusion that Khawaja was guilty under s. 83.21 of instructing a person to transfer money for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity, seems to rely on the reference to facilitation of a terrorist activity.

Under s. 83.01(2), references to facilitation include the very broad definition of facilitation under s. 83.19(2). This latter section makes a person guilty of facilitation whether or not "any particular terrorist activity was foreseen or planned at the time it was facilitated". A generic type of terrorist activity would seem to suffice under this section.

Khawaja was also convicted of facilitating a terrorist activity under s. 83.19. This offence was referred to as a "basket charge" and included a broad range of activities such as transporting medical kits, SIM cards and invisible ink pens, and making suggestions that others come to Canada for training. These actions might be thought to be evidence of participation in a terrorist group rather than the more serious facilitation offence. Nevertheless, the convictions were possible because s. 83.19(2) relieves the prosecutor of having to prove that any particular terrorist activity was planned or foreseen at the time it was facilitated. As previously suggested, this is the broadest and most problematic part of the new terrorism offences.

Although the definition of terrorist activities is itself very broad and includes counselling, conspiracies, attempts and even threats to carry out terrorist activities, Justice Rutherford's rejection of the co-conspirators exception to the hearsay rule seems to suggest that he did not rely on these more traditional criminal law concepts.

Much of the emphasis, as in the Toronto case, was on the broad notion of facilitation of terrorist activities even though no particular or perhaps any terrorist activity was planned or foreseen at the time that the act of facilitation was committed. This strains fault requirements and the idea that the act and fault must occur at the same time. A general intent to commit violence for terrorist aims combined with a virtually limitless array of facilitative acts seems to be enough.

Khawaja was, however, acquitted of two counts of making an explosive device, namely a detonating device, for a terrorist group. Justice Rutherford's reasoning was more related to the prosecutor's statements that the device was tied to the 600kg of fertilizer in London (*Khawaja*, *ibid.*, at para. 101) than the wording of the offence. Indeed, Khawaja's building of the device seems to satisfy the broadly worded requirements in s. 83.2 of committing an indictable offence "for the benefit of, at the direction of or in association with a terrorist group". As in the Toronto case, the relevant terrorist group was not an officially listed one, but rather an ad hoc one composed of named individuals.

Khawaja was convicted of lesser explosive offences under s. 81 of the *Criminal Code*. There was sufficient intent to cause death, bodily injury or property damage even though it could not be particularized to a London-based plan. Again, it seems that Khawaja could have been convicted under s. 83.2 had the prosecutors chosen not to associate the detonator device with the London fertilizer.

The case reveals much about the nature of terrorism and terrorism prosecutions. Khawaja was born in Canada, was employed by the Canadian government, and comes from a well-educated and well-off family. Nevertheless, he trained in Pakistan for possible fighting in Afghanistan and became committed to violence.

Khawaja's beliefs appear from the judgment to be a toxic combination of shallow religion and gangster culture. Although the trial judge had previously struck out the political or religious motive requirement as an unjustified violation of fundamental freedoms, he found that there was enough evidence of such motives in this case: *R. v. Khawaja*, *ibid.*, at para. 89.

Although extensive electronic and e-mail surveillance was used in Canada and the United Kingdom, the star witness was Mohammed Babar, a person in American custody convicted of multiple material support of terrorism charges and awaiting sentencing and possible extradition to Pakistan. Although electronic surveillance will often be used in terrorism investigations, informers, including those who are active in plots, will often be critical.

The case is also a reminder of the international nature of terrorism. The prosecutions were conducted in three different countries: Canada, the United Kingdom and the United States. Those involved frequently traveled to London, the United States and Pakistan. The plans seemed to have alternated between fighting in Afghanistan, training in Pakistan and committing acts of terrorism in the United Kingdom or Israel.

The case also demonstrates the cell nature of terrorism including the fact that members of the cell may be involved in multiple plots. Not all members may have full knowledge of each plot. The British conspirators had some contact with two of the 7/7 bombers, a matter that has caused controversy in the United Kingdom and drawn an explanation from MI5 (see <http://www.mi5.gov.uk/output/links-between-the-7-july-bombers-and-the-fertiliser-plotters.html>).

The Khawaja case underlines the often murky nature of who is inside and outside a terrorist cell. Khawaja used a woman in Ottawa to transfer money, persuaded his parents to allow him to use their house in Pakistan, and the detonating device was built in his brother Qasim's room. Neither the woman nor Khawaja's brother or parents were charged.

Subject to a finding that the stigma and punishment of a terrorism conviction requires more than generalized terrorist intentions, however, it seems that the criminal law has changed to accommodate the idea that a person with generalized intent to commit violence in any of a variety of places has a specific enough intent to be convicted under Canada's new terrorism offences.

K.R.