The Criminal Law Quarterly

Volume 57, Number 1 February 2011

Editorial

Sentencing Terrorists

There has been surprisingly little writing about the sentencing of terrorists since 9/11. There is a perhaps natural tendency to think that it is a simple matter and that terrorists should always receive heavy sentences. This may be the main take-away from four sentencing decisions delivered by the Ontario Court of Appeal in late December 2010, but even those decisions raise complex issues.

In *R. v. Khawaja*, 2010 ONCA 862, the Court of Appeal raised Khawaja's sentence of 10.5 years' imprisonment in addition to five years' pre-trial custody to life imprisonment. The life imprisonment sentence was rendered on an explosives offence (the trial judge had imposed a four-year sentence). The trial judge had sentenced Khawaja to a total of 6.5 years on various terrorism offences, but the Court of Appeal raised this sentence to 24 years with 10 years before parole eligibility.

The Court of Appeal found numerous errors with the trial judge's approach. One error was his application of the totality principle in providing 6.5 years for five terrorism offences in the face of the clear instruction in s. 83.26 that sentences for terrorism offences should be served consecutively. Another error was a failure to find that Khawaja's absence of remorse or prospect for rehabilitation was a significant factor indicating his dangerousness: *Khawaja*, *supra*, at para. 200. Both Khawaja and his parents had refused to be interviewed for the purpose of a pre-sentence report.

The Court of Appeal's approach is tough, but it is justified by many cites from Khawaja's violent rhetoric contemplating "10 Sept. 11's" (*supra*, at para. 202) and his lack of remorse including his refusal to plead guilty. Similar life sentences were given to his co-conspirators in England: *R. v. Khyam*, [2009] EWCA Crim 161, though foreign precedents must always be used with care given different parole eligibility rules. The fact that Khawaja was a young adult of 24 years of age with a good job working for the Department of Foreign Affairs is also relevant to his sentence.

The Court of Appeal's approach in the companion Toronto terrorism cases is, however, more problematic. This is not to undermine the seriousness of the relevant Toronto plot to explode three truck bombs in Toronto, which included the controlled delivery of explosives. At the same time, all three men were significantly younger that Khawaja; all pled guilty and all had renounced violence and expressed genuine remorse for their actions.

The Court of Appeal dismissed an appeal by Zakaria Amara from his sentence of life imprisonment as the ringleader of the Toronto plot to explode three truck bombs. It stressed the seriousness of the offence and that Amara "knew full well that hundreds, if not thousands of innocent people would die or be gravely injured if everything went according to his plan": *R. v. Amara*, 2010 ONCA 858 at para. 8. It also stressed the trial judge's findings that though the accused was remorseful, his prospects for rehabilitation were far from certain.

In *R. v. Khalid*, 2010 ONCA 861, the Court of Appeal raised a 14-year sentence to 20 years for a 19-year-old first offender who was proven by the Crown to have been wilfully blind to the danger of death and injury in downtown Toronto while also not being fully aware of the details of the truck bomb plot. The trial judge was satisfied that the he was "truly remorseful", had been "specifically deterred and learned a significant lesson" and was not "a continuing danger to the public": *supra*, at para. 21.

The Court of Appeal suggested that absent the mitigating factor in this case the appropriate sentence given the seriousness of the plot would have been life imprisonment: *supra*, at para. 36. The Court of Appeal held that the sentencing judge had erred by giving too much weight to rehabilitation. It thus seems that while poor prospects for rehabilitation in *Khawaja* is a significant aggravating factor, good prospects for rehabilitation play a much more limited role as a mitigating factor.

The Court of Appeal stressed the need for general deterrence stressing "the sad truth . . . that young home-grown terrorists with no criminal record have become a reality": *supra*, at para. 47. Khalid was "not a deprived youth" but rather "fuelled by fanatical beliefs" and "engaged in a diabolical plot that most 19-year-olds would never even think of, let alone pursue": *supra*, at para. 50. The Court of Appeal indicated that it might have gone as high as 25 years, but the Crown only asked for 20 years: *supra*, at para. 56.

In *R. v. Gaya*, 2010 ONCA 860, the Court of Appeal increased a 12-year sentence to 18 years for a 18-year-old first offender who was wilfully blind but not fully aware of the details of the truck bomb plot and who was genuinely remorseful. The trial judge also noted that the accused was immature and had given the authorities information about the plot that they did not previously possess but that he was unwilling to point fingers. As in

Khalid, the Court of Appeal indicated that the appropriate range was 25-20 years, but only raised the sentence to 18 years because that was all the Crown had requested: *supra*, at para. 20.

These cases clearly raise the tariff for terrorist cases. In the next such cases, the Crown may ask for much longer sentences including life sentences in cases involving threats of violence. This approach will place a premium on the offences of commission of indictable offences for a terrorist group in s. 83.2 and the instructing offences in ss. 83.21 and 83.22, which are the only terrorist offences having a maximum of life imprisonment. Indeed most other terrorism offences carry maximum sentences of 10 and 14 years' imprisonment so sentences in the 20-25 year range will require multiple convictions and the use of the mandatory consecutive sentencing provisions of s. 83.26.

The Court of Appeal cited both British and Australian cases in support of its approach indicating an interest in international responses to international terrorism. The 1999 IRA case of *R. v. Martin*, [1999] 1 Cr App. R (S) 477 that the Court of Appeal relied upon has been overtaken by higher post 9/11sentences in *R. v. Barot*, [2007] EWCA Crim 1119 at para. 36 where the Court of Appeal handed down life imprisonment with a minimum 30-year term and indicated that political and religious motivation could, like some unassessed mental condition, justify a life term. The Court of Appeal stressed "IRA terrorists were not prepared to blow themselves up for their cause. It is this fanaticism that makes it appropriate to impose indeterminate sentences on today's terrorists, because it will often be impossible to say when, if ever, such terrorists will cease to pose a danger.": *supra*, at para. 54. The British courts have also indicated that higher sentences for speech associated with terrorism are warranted after 9/11: *R. v. DaCosta*, [2009] EWCA Crim 482 at para. 30.

If the new Canadian approach is still more lenient than the British approach, it is sterner than at least some Australian approaches. The Victorian Court of Appeal has recently reduced sentences in a Melbourne-based conspiracy to 15 years for a ringleader and between 8 and 4.5 years for followers even though none of the accused had renounced violence. The approach to sentencing the Toronto terrorists who had renounced violence seems much tougher even accounting for the fact that the Toronto plot was at a more advanced stage.

The Victorian Court of Appeal wisely stressed the need to factor in the breadth of terrorism offences and broad definitions of terrorist organizations that range from al Qaeda to "a rag-tag collection of malcontents" with non-specific plans: *Benbrika and Ors v. The Queen*, [2010] VSCA 281 at para. 555. It also reduced sentences because of concerns about the overlapping nature of the offences, concerns that cannot be recognized because of s. 83.26 of the Canadian Code.

The Court of Appeal's approach in the Toronto cases has clearly changed the approach to sentencing. Depending on the circumstances and the charges, sentences from 15-25 years and life imprisonment may now be the new norm in terrorism cases. Such sentences may take away the incentive of those accused of terrorism to plead guilty. Although the Khawaja and Toronto cases ended in convictions, many previous Canadian terrorism prosecutions failed and guilty pleas are to be encouraged for a wide variety of reasons relating to efficiency, disclosure of secrets, informers, ongoing investigations and public confidence.

The Court of Appeal recognizes that reductions within or below the 15-20 year range can be justified especially in cases where the accused provides necessary evidence to convict those higher up in the plot: *R. v. Khawaja*, *supra*, at para. 220. In Australia, for example, one of the accused who provided evidence against large conspiracies in Melbourne received five and one-half years: *R. v. Atik*, [2007] VSC 299 at paras. 48-50, though his subsequent testimony was found not to be satisfactory.

Although heavy sentences are appropriate for terrorists, it is also important to pay attention to what terrorists actually did given the breadth and overlapping nature of many terrorist offences. Mandatory consecutive sentencing under s. 83.26 also raises concerns recognized in other jurisdictions about multiple punishment for overlapping factors. Although the Court of Appeal was correct not to dismiss the relevance of rehabilitation, the prospects of rehabilitation, the guilty pleas and the renunciation of violence in the three Toronto cases made little difference. Indeed, the Ontario Court of Appeal seemed inclined to award even higher sentences had the Crown asked for them.

K.R.