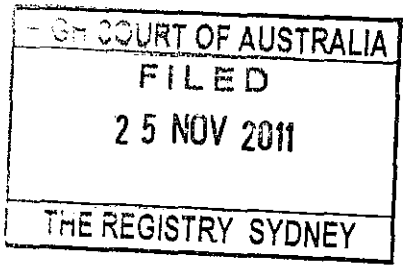
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S344 of 2011

BETWEEN:

THE QUEEN

Appellant



and

BELAL SAADALLAH KHAZAAL

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1.1. This document is in a form suitable for publication on the Internet.

Part II: Statement of issues that this appeal raises

2.1. The appellant's argument raises one principal issue, namely, whether the Court of Criminal Appeal (Hall and McCallum JJ., McClellan CJ at CL dissenting) was correct in finding that the learned trial judge had erred in concluding that the respondent had not discharged the evidential burden necessary to invoke the affirmative defence[1] available under s. 101.5(5) *Criminal Code (C'th)*.

2.2. Additionally, the respondent's notice of contention raises the issue of what meaning is to be ascribed to the phrase "connected with", as employed *inter alia* in s. 101.5(1)(b) *Criminal Code (C'th)*. In particular, the notice of contention raises the specific issues of whether the Court of Criminal Appeal (McClellan CJ at CL and McCallum J., Hall J. dissenting) erred in concluding that:

a. the learned trial judge was not required to afford the jury assistance beyond simply stating that the words "connected with" were words of ordinary meaning;

[1] Although the matter provided for is referred to throughout these submissions as an affirmative defence, for the reasons set out in [6.7], it is submitted that the matter is not a defence in the traditional sense.

Filed by: LawyersCorp Pty. Ltd., Solicitors, Level 2, 150-152 Elizabeth Street
Sydney NSW 2000 Telephone: (02) 8262-6777 Fax: (02) 9264-2784

b. the learned trial judge was not required to direct the jury that there must be more than merely a remote, or tenuous, connection between the document and assistance in a terrorist act;

c. the learned trial judge was not required to direct the jury that it had to be satisfied beyond reasonable doubt *inter alia* that:
   i. The accused was aware that the document would be used, or would in the ordinary course of events be used, for assistance in an action or threat of action; and that
   ii. At the time of the making of the document, the accused was aware that the action, or threat of action, contemplated by some person was one which was a terrorist act, within the meaning of s. 100.1(1) *Criminal Code (C'th)*; and

d. the acts described in the document were themselves terrorist acts, and were "acts contemplated by the [respondent]", even though the learned trial judge did not, at any stage when summing-up to the jury, direct the jury to consider whether the commission of those acts had, in fact, been "in the contemplation" of the respondent, whether by himself or others.

Part III: Notice in accordance with s. 78B *Judiciary Act 1903 (C'th)*

3.1. The respondent considers that notice under s. 78 of the *Judiciary Act 1903* need not be given.

Part IV: Material facts which are contested

4.1. In its submissions, the Crown contends that the "respondent submitted the book... to the administrators of a website connected with al-Qaeda (*'the Almaqdese website'*), which contained a number of other publications composed by leaders of known terrorist groups" (Applicant's submissions at [11]). The nature of the Almaqdese website was, however, a matter of sharp contest between the parties at trial. Far from being a terrorist website, the respondent argued that it was a website, which made available information covering a broad range of Islamic topics.

4.2. As part of the defence case, a Mr. Dandan was called. Mr. Dandan was, at the time, an expert in information technology; and was also knowledgeable in matters of religion, having been appointed to the reference group on Islamic issues convened by the then Prime Minister, John Howard, as well as being the Vice President of the Lebanese Muslim Association, the largest Islamic organisation in Australia.

4.3. Shortly after the respondent's arrest, Mr. Dandan visited the Almaqdese website and undertook an analysis of the information contained therein. As at June 2004, when he inspected the website, he concluded that it was an information portal, which one

could locate, if searching for information on an Islamic topic. It contained a variety of forums in which one could pose questions concerning Islamic issues, and also receive advice (or Islamic rulings) in response. Topics discussed included prayer, marriage and divorce. Although there were documents dealing with the topic of Jihad, Mr. Dandan concluded that the bulk of the material related to the other topics just mentioned.

4.4. Mr. Dandan was also tasked with tracing the sources of the material from which the relevant document had been compiled. He concluded that each of the source documents had, in fact, originated from the Almaqdese website. The document was thus merely a compilation of material already found on that website.

4.5. In relation to the actual contents of the book, the evidence showed that the material included had been authored at various periods in history. Indeed, as the Crown's Arabic language expert, Dr. Gamal, conceded, the first portion of the book was in a form, or style, of Arabic, which would not readily be comprehensible to the bulk of modern day Arabic speakers.

4.6. The final two segments, upon which the Crown chiefly relied in addressing the jury, were taken from works entitled "Knights under the Prophet's Banner" written by Ayman al-Zawahiri and a further document by a Sheikh Al-Azzdy. Each of those works had been available for download from other publicly accessible websites, and there were other references to those in blogs and journalistic articles. Significantly, the last chapter of the book, which was an excerpt from the work "Knights under the Prophet's Banner" had been, as indicated in the book itself, published in the Asharq Alawsat newspaper, an Arabic-language newspaper, was published in the United Kingdom and distributed world-wide.

4.7. It should be noted that there was no evidence adduced, which was capable of proving that any person had, in fact, read the document. It was for this reason that the indictment, as originally drafted, was amended in respect of count 2. Rather than pleading an incitement to commit a terrorist act or acts, the Crown instead pleaded an attempt to incite a terrorist act or acts. It should also be noted that the jury was unable to reach a verdict in respect of this count.

4.8. It is conceded that there was no dispute at trial that the respondent had compiled the book. Accordingly, as the Crown states, one issue was whether the book was connected with facilitation of a terrorist act. In this regard, the respondent argued that the book was, intrinsically, incapable of facilitating a terrorist act. The respondent also argued that he did not intend to facilitate a terrorist act. However, he was prohibited from pursuing that line of argument, owing to the learned trial judge's ruling that the evidential burden under s. 101.5(1) *Criminal Code (C'th)* had not been discharged.

Part V: Applicable legislation etc.

5.1. The appellant's statement of applicable constitutional provisions, statutes and regulations is accepted.

Part VI: Respondent's argument in answer to the appellant's argument

6.1. The appellant's first contention (at [21]), that the question of whether the affirmative defence under s. 101.5(5) *Criminal Code (C'th)* had been engaged, fell to be considered upon the assumption that the matters set out in [17(i)-(v)] of the appellant's submissions had been established. Apparently, a failure to appreciate this fact led Hall and McCallum JJ. into error when analysing Latham J.'s reasoning. However, this first contention is unsupported in both law and logic.

6.2. The appellant's reasoning would appear to be similar, if not identical, to that which was advanced, but rejected by the majority, in *Braysich v. The Queen* (2011) 85 ALJR 593 at 607 [48] per French CJ, Crennan and Kiefel J. Such reasoning presupposes that, in order to determine whether the affirmative defence has been engaged, the trial judge must assess whether those matters, which are said to discharge the evidential burden, go beyond a denial of the offence itself. The reasoning is that, if such evidence were rejected by the jury when considering whether the offence had been made out, the evidence would similarly be rejected when considering the affirmative defence. Following this line, the argument would appear to be that only such evidence, which goes beyond the denial of the offence itself, is capable of discharging the evidential burden.

6.3. Significantly, the appellant's first contention ignores the distinction in the legislative language between subsections (1) and (5). Subsection (1) requires knowledge that "the document *is connected* with preparation for, the engagement of a person in, or assistance in a terrorist act" (emphasis added). In contrast, subsection (5) exculpates the accused where "the collection or making of the document *was not intended to facilitate* preparation for, the engagement of a person in, or assistance in a terrorist act" (emphasis added). The statutory language differentiates between the knowledge of a connection between the document and facilitation of assistance in a terrorist act on the one hand, and the intention in the making the document on the other. Hence, a person must be acquitted if (assuming the affirmative defence has been engaged) there was no intention to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act. This is the case, even though the accused knows that the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act. Therefore, even if it were to be accepted that the jury correctly found that there was a connection between the document and

facilitation of a terrorist act,[2] and even if it were proved that the respondent knew of that connection, those facts, by themselves, do not preclude operation of the affirmative defence. As a matter of simple logic they cannot, since the affirmative defence would, otherwise, have no work to do.

6.4. Axiomatically, the Crown's suggestion that the direction given at [28(vi)] of its submission "would not be reconcilable with the directions as to the elements of the offence" must be wrong. This is the direction which is mandated by the statutory language. Even if the all other elements have been proved beyond reasonable doubt, it falls to the Crown to negate the affirmative defence once it has been engaged, see s. 13.1(2) *Criminal Code (C'th)*. The Crown offers no explanation why such a direction is wrong in law; and nor can it.[3]

6.5. Furthermore, as this Court said recently in *Braysich* at 607 [49] per French CJ, Crennan and Kiefel J., a jury may arrive at its conclusion by a variety of paths. Thus, the rejection of certain evidence, adduced to prove that the accused did not have a particular knowledge, does not invariably mean that that evidence may not be used in determining what was the accused's purpose. It is for this reason that caution should be adopted, before shutting out a criminal accused from relying upon an affirmative defence.

6.6. Such caution was particularly relevant in the present case, where the defence sought, in theoretical terms, to argue a number of alternative propositions before the jury. Firstly, it was argued that the book was not connected with facilitation of a terrorist act. Secondly, even if the book were so connected, then the respondent did not know of the connection. However, thirdly, even if he did have the knowledge, he nevertheless did not intend to facilitate a terrorist act. It is submitted that a finding against the respondent on any one element would necessarily carry with it a finding, adverse to the respondent, on any other element.

6.7. Additionally, it should be noted that the appellant's arguments ignore the nature of the affirmative defence provided for by s. 101.5(5). The affirmative defence is phrased in the following terms, "Subsections (1) and (2) *do not apply* if..." This language is to be contrasted with other provisions of the *Criminal Code (C'th)*, which employ rather different language, such as "*It is a defence* to a prosecution for an offence against.." or similar, *see, e.g.*, ss. 268.110(2), 272.9(5), 471.29. This distinction was recognised by Hall J. in *Dowe v. Commissioner of the New South Wales Crime Commission* (2006) 206 FLR 1 at 20 [102], rev'd on other

[2] For the reasons set out below in relation to the notice of contention, it is submitted that Latham J.'s directions were in error, and unduly broad. In practical terms, her Honour's directions permitted the requisite connection to be found if, without more, the jury was satisfied that the acts described in the book were ones which, if carried out, would come within the definition of terrorist act, as defined by s. 100.1 *Criminal Code (C'th)*, and that the respondent knew of the book's contents. Given those directions, it is perhaps unsurprising that the jury found the requisite connection proved.

[3] If any conflict is to be seen in the various directions, then the error is to be found in the manner in which her Honour directed the jury in relation to the element "connected with", as to which see below at [7.10].

grounds *Gedeon v. Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120. In discussing the reasonable excuse defence under s. 233B(1AAB) *Customs Act 1901 (C'th) (repealed)*, which was phrased in terms similar to s. 101.5(5), his Honour stated:

> Whilst s. 233B contains statutory defences as, for example, in s. 233B(1A) and (1C), the provisions of s 233B(1AAB) are not expressed to constitute a defence provision as such. That subsection simply states that subs (1)(a)(i), (ii), (iv), (v) or (vi) "does not apply" if the person proves that the person had a reasonable excuse for doing an act referred to in that subparagraph. Accordingly, wherever a reasonable excuse is established, the provisions of s. 233B have no application whatsoever to the conduct that could otherwise have fallen within the conduct referred to in any of the abovementioned provisions of s 233B(1)(a).

6.8. In the light of this distinction, the appellant's argument is quite simply shown to be based on a false premise. There is no requirement that the affirmative defence provided for by s. 101.5(5) can be considered by the jury only once the Crown has proved beyond reasonable doubt those elements of the offence set out in subsections (1) and (2). On the contrary, the statute specifically provides that the offence provision does not apply, once the affirmative defence has been engaged. That is so whether the other elements of the offence might be capable of being made out, or not. Therefore, once an accused has pointed to evidence, sufficient to discharge the evidential burden, the offence provision does not apply, unless the Crown is able to disprove the affirmative defence beyond reasonable doubt. Accordingly, in determining whether the evidential burden under s. 101.5(5) has been discharged, it would be quite wrong to entertain the presumption that the other elements of the offence had been proved. Hence, the appellant's argument, which is based on a strict sequence of reasoning, commencing with proof of the elements in subsection (1), only then to be followed by consideration of the affirmative defence under subsection (5), cannot stand.

6.9. The appellant next criticises Hall J.'s statement at [432] to the effect that, "The issue was whether... the evidence was sufficient to 'suggest' as a reasonable possibility that [the respondent's] intention... was not that asserted by the Crown." The criticism is based upon the fact that, in proving the elements under subsection (1), the Crown was not required to prove that the respondent held any particular intention (see Appellant's submissions at [23]).

6.10. This criticism, however, evaporates when considered in a practical context. Firstly, it is to be noted that in bringing the charge under s. 101.5 of the *Criminal Code*, the Crown has necessarily to contend that the making of the document was intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act. Rhetorically, one might ask whether it would not be an abuse of the court's process to institute, and thereafter continue with, criminal

proceedings, while admitting of the possibility that an affirmative defence is available. It is axiomatic that, in bringing proceedings against an accused, the Crown asserts that it will seek to negate any affirmative defence, should it be raised by the accused.

6.11. An example far removed from the present is the defence of self-defence. Where the Crown brings an assault charge, it is, unless the issue is raised, not required to negate the defence of self-defence. It only carries a burden once the issue is properly raised by the evidence. That is, however, not to say that the Crown does not assert that the accused acted with "animus", i.e. in a manner not excused by the law. Although not initially required to disprove self-defence, the prosecution of itself carries with it the implication that the accused did not act in self-defence. Otherwise, the prosecution would not be brought in the first place.

6.12. At this respondent's trial, it was true that, until the affirmative defence was engaged, the Crown was not required to prove the respondent's intention in making the book. Hall J.'s comments do not suggest otherwise. They merely set up the contest between the Crown and the respondent. His Honour's words simply acknowledge that the respondent asserted that he did not have the requisite, criminal intention. By contrast, if the defence had been engaged, the Crown would have asserted that the respondent did have the requisite intention. This is the context in which his Honour's comments must be considered.[4]

6.13. In any event, the Crown wholly ignores an earlier statement made by Hall J. at [413], which clearly demonstrates that his Honour was aware of the elements the Crown was required to prove and at what stage intention became of relevance:

> An offence under s. 101.5(1)(b) does not require the Crown to prove as an element of the offence that the person charged intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act. It is only when a person charged with such an offence satisfies the evidential burden under s. 101.5(5) that the accused's intention then becomes an issue in the trial. In the event that the evidential burden is satisfied, the Crown must the prove beyond reasonable doubt that the defendant intended to facilitate preparation for, te engagement of a person in, or assistance in a terrorist act...

There is simply no basis for contending that his Honour misapprehended the burden placed upon the Crown.

6.14. Finally, the practical realities of the trial demonstrate that the Crown not only implicitly asserted that the respondent held the requisite, criminal intention, but

[4] Interestingly, McClellan CJ at CL made a rather similar comment in a passage relied upon by the Crown at [26] of its written submissions. In considering whether the evidential burden had been discharged, his Honour stated at [128], "[I]t was [the respondent's] intention in making the document which was the issue in the trial." Nevertheless, the Chief Judge's comments escape the Crown's criticism.

did so expressly. It is to be noted that the respondent was not only charged with an offence contrary to s. 101.5(1), but also a second offence contrary to ss. 11.1, 101.1 *Criminal Code (C'th)*, namely attempting to incite a terrorist act. The prosecution case was that, by making the book, the respondent was attempting to incite the commission of terrorist acts. It was, by and large, the same conduct which was said to underlie both charges. Plainly, the prosecution argument, that the respondent was attempting to incite the commission of terrorist acts, carried with it the inference that he must have had the concurrent intention of facilitating preparation for, the engagement of a person in, or assistance in a terrorist act. Although proof of his intention may, theoretically, not have been necessary in relation to count 1, the Crown's submissions on counts 1 and 2 were, as a matter of practicality, inextricably bound to it. Accordingly, the criticism of Hall J.'s reference to an intention "asserted by the Crown" is without foundation.

6.15. The approach of McClellan CJ at CL, supported by the Crown on this appeal is, it is submitted, erroneous. The argument set out at [26] of the Crown's submissions is that the evidence was incapable of discharging the evidential burden, because of the contents of the particular document, which was the subject of the charges. The Crown contends that the matters pointed to by the respondent were intractably neutral and were, therefore, not appropriate to discharge the evidential burden. Indeed at [27] of its submissions, the Crown goes one step further and asserts that the material pointed to by the respondent supported the Crown case, because it demonstrated that the respondent was prepared to use his journalistic endeavours to encourage assassination, and thereby further his religious cause.[5]

6.16. The conclusion expressed by McClellan CJ at CL (at [128]), and now relied upon by the appellant, to the effect that the evidence pointed to by the respondent was neutral on the question of intention is, with respect, erroneous. In the absence of direct evidence of an expression of intention, a person's intention is necessarily a matter of inference to be drawn from the available evidence. The very idea that the respondent pursued a legitimate vocation, and had a particular interest in Islam, is anything other than neutral. It demonstrates

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[5] The Crown's assertion (at fn.6 of its submissions) that McCallum J. accepted as much at [485] of the Court of Criminal Appeal's judgment is fanciful. In that passage, her Honour stated:

> There was ample evidence from which a jury could conclude that the [respondent's] intention was to support his religion by preparing and publishing a properly-sourced collection of writings including religious rulings and other pieces condoning, and indeed encouraging, the ritual of assassination.

This passage plainly demonstrates that her Honour was not stating that the respondent was supporting his religion by "condoning, and indeed encouraging, the ritual of assassination". On the contrary, her Honour was merely describing the document as a collection of writings, which contained religious rulings as well as other pieces that condoned and encouraged the ritual of assassination. This distinction is crucial and entirely passed over by the appellant.

the pursuit of a lawful activity.[6] The fact that a person has acted lawfully in the past is a matter from which it can be inferred that his actions on a particular occasion were likewise part of his lawful activity, compare *R v. Brauer* (1989) 45 A.Crim.R. 109 at 114 per Thomas J. ("All that is needed to surmount the initial evidential burden is a circumstantial case with a sufficient basis for an inference of the continuance of lawful use.").

6.17. Again, reference to the case of *Braysich* is of assistance. There, one issue was whether the accused had acted with a dishonest purpose. Eventually, on appeal, this Court held that the lower court had erred in holding that evidence of good character was not available to discharge the evidential burden. The issue being one of dishonesty, the fact that the accused had acted honestly in the past, as evidenced by his good character, was a matter from which it could be inferred that it was not his purpose to act dishonestly on the particular occasion, see *Braysich* at 606 [44] per French CJ, Crennan and Kiefel JJ.

6.18. On the Crown's argument, such evidence of good character would be "neutral", since a person who has acted honestly in the past may or may not act honestly in future. Therefore, on the Crown's argument, good character could not be relied upon in order to satisfy an evidential burden that the accused had acted honestly on the relevant occasion. The holding of this Court in *Braysich* puts paid to this argument.

6.19. Furthermore, the Crown's submission (at [27]) that the book "speaks for itself" should not be accepted. Such reasoning, taken to its logical conclusion, would mean that, in relation to this particular book, the affirmative defence could never be engaged. The contents of book, so says the Crown, are such that it *must* have been the respondent's intention to facilitate assistance in a terrorist act. *Quaere*, in those circumstances, what difference it would make if the accused had given evidence concerning his intention (*cf.* Crown's submissions at [26] and judgment of McClellan CJ at CL at [128]). After all then, the book speaks for itself; and there seems to be no evidence which would be capable of demonstrating that the intention was other than the relevant, criminal intention. With respect, the Crown's submission confuses the sufficiency of the evidence to discharge the evidential burden with proof of the relevant intention. The latter is exclusively a matter for the jury to determine.

6.20. When considering whether the defence should be left to the jury, the question for the trial judge is not whether the evidence *will* be accepted as showing that the accused did not act with the requisite intention. All that is required by s. 13.3(3),

[6] The characterisation of the evidence as being "neutral" might have some force, if the evidence had been wholly unrelated to the acts of the respondent on the particular occasion. For example, if the respondent had sought to lead evidence that he had been working as a butcher, such evidence could not rationally affect the jury's assessment of his intention (compare s. 55 *Evidence Act 1995*). Plainly, such evidence could not be relied upon in the discharge of the evidential burden. The evidence, here, though was of a very different nature.

(6) *Criminal Code (C'th),* before a trial judge is required to leave an affirmative defence to the jury, is whether there is a reasonable possibility that the relevant matter exists.

6.21. In this regard, a number of propositions must be borne in mind. Firstly, as this Court recently reiterated in *Braysich* at 607 [47], the evidence is to be taken "at its most favourable to the [accused]." The fact that the Crown might ultimately seek to rely upon that same evidence as part of its proof of the requisite, criminal intention is neither here nor there. If the evidence suggests a reasonable possibility that the matter exists, then the burden has been discharged.

6.22. Secondly, "[a] cautious approach to ruling [evidence] out is indicated." *Braysich* at 607 [49]. Thirdly, the respondent was required to show an absence of a particular intention ("if the making... was not intended to facilitate..."). "Slender evidence may suffice to satisfy an evidential burden in relation to a negative state of affairs." *Jeffrey v. DPP* (1995) 79 A.Crim.R. 514 at 518 per Cole JA; *Fowkes v. DPP* [1997] 2 VR 506 at 512 per Winneke P., Charles JA and Southwell AJA.; *DPP v. Brauer* (1989) 45 A.Crim.R. 109 at 113 per Thomas J. In particular, the last proposition was referred to and accepted by McCallum J., see [479]. With respect, the relevance of these propositions did not attract any mention in the Chief Judge's curtly expressed conclusion.

6.23. Under the heading "Two questions arose", the Crown returns to a theme previously raised. Again, it argues that the evidence was "neutral", and in any event incapable of raising a reasonable possibility that the respondent's intention was not to facilitate assistance in a terrorist act. It is not necessary to repeat why the evidence was not neutral, as asserted by the Crown (simply see above at [6.16]).

6.24. In relation to the assertion that the evidence adduced was incapable of discharging the evidential burden, it appears to be predicated upon one principal assumption, namely, that the book undoubtedly, and without qualification, expresses the respondent's own view that assassination (in the name of Islam) ought to be encouraged. While it may be accepted that the author of "Chapter 10", Sheikh Alazzdy, himself, advocates the so-called ritual of assassination, there is no such unequivocal expression from the respondent. Latham J. summed up the evidence on this point as follows (SU91-92) (emphasis added):

> The accused describes Alazzdy as "our esteemed brother" and he introduces the chapter as "motivating Mujahideen to revive the ritual of assassination". I remind you, of course, that *in that introduction it is clear that the accused is saying that it is Alazzdy, who motivates Mujahideen to revive the ritual of assassination. In other words, the accused is expressing that in the third person. He does not say: I am motivating Mujahideen. He says Alazzdy is doing this.* That is an argument that the accused advances in order to persuade you that this was not the accused's

intention. He was merely reporting someone else's motivation for writing that kind of material. But, as I said, *that is a factual dispute that is one for you to determine.*

Nor is there any other passage in the book, which could be said to be a definitive expression of the respondent's intention in relation to the so-called ritual of assassination.

6.25. The evidence adduced, or pointed to, by the respondent explained what his intention was in compiling the book. Hall J. and McCallum JJ. did not fail to confront the content of the book. Quite simply, there was nothing in the book which was capable of robbing this evidence of its importance in discharging the evidential burden under s. 13.3.

6.26. This conclusion is fortified by the inability of the jury to agree in respect of count 2 on the indictment. If, as the Crown contends (at [34]), the only view to be deduced from the contents of the book is that, in making and publishing the book, the respondent personally endorsed the carrying out of assassinations, then it follows he must, by the publication of the book, have attempted to incite the commission of terrorist acts. Yet, the jury was unable to reach a verdict in relation to count 2, which charged precisely such an offence.

6.27. In summary, Hall J. and McCallum correctly analysed the evidence relied upon by the respondent in the context of the trial, in full knowledge of the contents of the relevant book. Their Honour's conclusion is unassailable and, accordingly, the Crown's appeal should be dismissed.

Part VII: Respondent's argument on the notice of contention

7.1. To the extent that the Crown's submissions nevertheless do find favour with the Court, it is submitted that McClellan CJ at CL and McCallum erred, in particular, in rejecting ground 3 raised by the respondent before the Court of Criminal Appeal. Therefore, it is submitted that this Court would, in any event, dismiss the Crown's appeal.

7.2. In connection with ground of appeal 3, the respondent challenged the sufficiency of Latham J.'s direction in relation to second element of the offence, namely, the nature of connection required. It will be remembered that the offence requires that "the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act," s. 101.5(1)(b).

7.3. Before turning to the substance of the argument, the Crown's submission, made in reliance upon comments expressed by McHugh J. in *Papakosmas v. The Queen* (1999) 196 CLR 297 at 319 [72], may be dealt with briefly. Prior to the summing-up, there was a lengthy debate between counsel for the respondent and

Latham J. as to the proper directions, which ought to be given. In particular, there was considerable discussion as to what direction the jury ought to be given in relation to the phrase "connected with". Her Honour refused to direct the jury in the terms sought, and therefore the point was preserved for appeal. No question of the application of r. 4 *Criminal Appeal Rules* arose.

7.4. Just as was so before the learned trial judge, the respondent in the Court of Criminal Appeal relied upon the decision in *R v. Zafar* [2008] Q.B. 810 to provide definition to the expression. During oral argument, counsel for the respondent advanced a back-up position, namely that, even if the Court were not to accept the respondent's primary position, nevertheless the jury ought to have been given more assistance. This move, however, does not detract from the fact that the issue of the appropriateness of the directions was, in its entirety, properly before the Court of Criminal Appeal. The ground of appeal was phrased in the following terms, "Her Honour erred directing the jury in relation to count 1 that the words 'connected with' were simply to be given their ordinary meaning."

7.5. Additional submissions were filed in the light of the Victorian Court of Appeal's decision in *Benbrika v. R* (2010) 204 A.Crim.R. 457. Unless clearly wrong, the reasoning of the Victorian Court ought to have been followed by the New South Wales Court of Criminal Appeal, *Australian Securities Commission v. Marlborough Gold Mines Ltd.* (1993) 177 CLR 485. The respondent had a duty to draw the New South Wales court's attention to that decision, and to describe how it would apply to the issues under consideration. It is specious to claim that the respondent has sought relief, which had not, in fact, been claimed. Section 6 *Criminal Appeal Act 1912 (NSW)* conditions relief, *inter alia,* upon a wrong decision of law. The respondent has consistently and staunchly contended that Latham J. had erred. McHugh J.'s comments simply do not apply, either directly or, as claimed, by analogy.

7.6. In directing the jury on the phrase "connected with", Latham J. stated (SU53-54):

> You will see that the focus of this element is on the connection between the document... and assistance in an action or threat of action... Now, this is an element that depends upon an examination of the contents of the document, nothing more, nothing less. We are only concerned about what the document says objectively. It is a matter for you to determine, because it is simply an objective factor, namely, is the document, more accurately the contents of the document, connected with assistance in a terrorist act?
>
> The phrase "connected with assistance in an action or threat of action" has no special or technical meaning. You should interpret that phrase according to its plain English meaning. If you are satisfied beyond reasonable doubt that any part of the document is connected with helping

or facilitating the commission of an action or threat of action against any one of the persons that are set out in the particulars, then the Crown has proved that element of the offence.

7.7. It is submitted that her Honour was required to give the jury more assistance than simply to draw its attention to the ordinary meaning of the words. The words "connected with" simply mean no more than "joined together; conjoined; esp. joined in sequence coherent [or] related; having relationships or associations with a specified nature", Shorter Oxford English Dictionary (5th ed. 2002). "The phrase 'in connection with' is capable of considerable breadth, however it always takes its colour from its surroundings. *The full scope of the dictionary definition is rarely, if ever, appropriate.*" *R v. Orcher* (1999) 48 NSWLR 273 at 278 [28] per Spigelman CJ (emphasis added). It is particularly relevant that the phrase appears in a "highly penal provision". *R v. Novakovic* (2007) 172 A.Crim.R. 414 at 426 [59] per Ashley JA, *quoting with approval Murdoch v. Simmons* [1971] VR 887 per Adam J. In the criminal context, it is submitted that there must be "in a very real sense" a link, that is, a "substantial connection" between the document and the terrorist act alleged. Compare *Re Drug Misuse Act 1986* [1988] 2 Qd.R. 506 at 510-512 per Carter J.

7.8. McClellan CJ at CL's reasons that any ambiguity inherent in the words "connected with" is dissipated once it is realised that the connection must be with an action or threat of action (at [91]; see also at [465] per McCallum J.). However, this reasoning does not answer the respondent's complaint. On the contrary, it squarely raises the conundrum posed by these words of almost infinite meaning.

7.9. To test the proposition that the words do not require further definition, it is useful to draw upon the example discussed by the Victorian Court of Appeal in *Benbrika v. R* (2010) 204 A.Crim.R. 457 at 528 [314], namely the possession of a bomb.[7] The bomb itself, although perhaps the stock in trade of a terrorist, is not inherently connected with assistance in a terrorist act. The definition of terrorist act requires that the action, or threat of action comprising the terrorist act, be done with a variety of cumulative intentions, see s. 100.1(1):

> *terrorist act* means an action or threat of action where:
>
> (a) the action falls within subsection (2) and does not fall within subsection (3); and
>
> (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
>
> (c) the action is done or the threat is made with the intention of:

[7] Although the offence under consideration was one under s. 101.4 rather than 101.5, the statutory language is identical, and therefore the same reasoning must apply to both offences.

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

(ii) intimidating the public or a section of the public.

7.10. Therefore, a disgruntled employee, who intends to use a bomb to seek revenge for his recent dismissal, does not possess an item connected with assistance in a terrorist act. Only by examining the disgruntled employee's intentions can one determine whether the object possesses the requisite connection. It is, therefore, quite wrong to seek to determine on an objective basis, as her Honour directed the jury, whether the item is connected with a terrorist act.

7.11. The reasoning would apply similarly to documents. Take as one example the Anarchist's Cookbook, a publication widely distributed on the Internet, containing instructions about how to construct incendiary devices. There can be no doubt that the book would assist in carrying out a terrorist act. However, it might be used for equally destructive, but non-terrorist purposes. Again, it is only once the document is possessed by a person with a particular action, or threat of action, in mind that the book can acquire its relevant connection, viz., either one which falls within the definition of "terrorist act", or one which does not.

7.12. Take as another example a document created by al-Qaeda, which not only contains material such as that set out in the Anarchist's cookbook, but also an entreaty to kill U.S. politicians and military leaders. However, again, the book is possessed by the proverbial disgruntled employee. Once again, the document is not connected with assistance in a subsequent terrorist act. It may be connected with assistance in a violent pursuit, but that is not sufficient to connect the document with assistance in a terrorist act as defined by the *Criminal Code (C'th)*.

7.13. The mere fact that the document makes reference to terrorist acts does not create the required connection to a terrorist act. It is only the subjective state of mind of the individual, which lends the object, or document, the relevant connection.

7.14. So much can be inferred also from the very purpose of the introduction of Part 5.3 of the *Criminal Code (C'th)*. The second reading speech, reproduced by McClellan CJ at CL (at [88]), evinces an intention on the part of parliament to prevent the commission of terrorist acts. In balancing the need to intervene at an early stage, and the restraints ordinarily placed on the application of the criminal law, the legislature has made a deliberate decision not to criminalise the creation and/or the possession of articles, which might be used in terrorist acts. As the

Victorian court correctly pointed out (*Benbrika* at 529 [316]) (emphasis in original):

> As to the requirement that some preparatory activity be under way or in contemplation, we think this follows from the key words 'connected with preparation'. Had Parliament had in mind to criminalise the possession of articles which might be suitable for use should such a preparatory activity be undertaken, then quite different statutory language would have been appropriate. Parliament could, for example, have adopted the language of s. 58(1) of the *Terrorism Act 2006* [sic.] *(UK)*, which makes it an offence to collect or record 'information *of a kind* likely to be useful to a person committing or preparing an act of terrorism.'

7.15. This conclusion must be correct since the Commonwealth parliament was fully cognizant of the British legislation when devising its response to the perceived terrorist threat. Moreover, the language employed in s. 58(1) *Terrorism Act 2000 (UK)* was well known in this country. For example, prior to the introduction of the anti-terrorism legislation, s. 78(1) *Crimes Act 1914 (C'th)* (since amended) had already provided (emphasis added):

> If a person with the intention of prejudicing the safety or defence of the Commonwealth or a part of the Queen's dominions:
>
> (a) makes a sketch, plan, photograph, model, cipher, note, document or article that is *likely to be, might be* or is intended to be *directly or indirectly useful* to an enemy or a foreign power;
>
> (b) obtains, collects, records, uses, has in his possession or communicates to another person a sketch, plan, photograph, model, cipher, note, document, article or information that is *likely to be, might be* or is intended to be *directly or indirectly useful* to an enemy or a foreign power;...
>
> he shall be guilty of an indictable offence.

7.16. This provision demonstrates that, in a different context, there was already in place legislation, which criminalised the possession of information that had the mere potential to cause harm. The deliberate choice to use different language supports the conclusion that the Commonwealth legislature did not intend to prevent the possession of merely potentially dangerous items and documents. Instead, it adopted a more constrained approach, which was to criminalise acts, which were connected specifically with terrorist acts.

7.17. Therefore, the words "connected with" require, firstly, that the commission of a terrorist act be within the contemplation of a person, whether the accused or

another. Use of the concept of "contemplation" is derived from the reasoning of *R v. Lodhi* (2005) 199 FLR 236 at 245-46 [52] per Whealy J., *quoted with approval in Lodhi v. R* (2006) 199 FLR 303 at 316-17 [62] per Spigelman CJ, which legitimately requires that the offences bite sufficiently early, to permit preparatory acts to be criminalised.

7.18. At the same time, the definition also has the virtue of excluding from liability such people as the so-called terrorism expert, who downloads material, which might assist in a terrorist act. Since he does not contemplate the commission of an action, or threat of action, the document he makes is not connected with assistance in a terrorist act. Rhetorically, one might ask why such an expert should be required to discharge the evidential burden provided for by s. 101.5(5), when the purpose of the legislation was never intended to capture such conduct in the first place.

7.19. The second aspect of the phrase "connected with" is that the document will acquire the requisite connection, only where it is contemplated by the person envisaging the terrorist act, as being a document which is to be used in preparation for, the engagement of a person in, or assistance in the terrorist act, the commission of which is actually contemplated. The requirement of knowledge, as set out in s. 101.5(1)(c), therefore means that a person will be guilty of an offence contrary to s. 101.5(1) if he is aware of those two aspects at the time of the collecting, or making, of the document, see s. 5.3 *Criminal Code (C'th)*.

7.20. This conclusion broadly accords with the conclusion arrived at by the Court in *Benbrika* at 528-29 [315] and Hall J. in the Court of Criminal Appeal (at [370]). The slight difference is in the Victorian court's reference to "preparatory activity". The respondent concedes that the offence would be made out, if, for example, a person, who contemplates a terrorist act, downloads from the Internet bomb recipes, and contemplates using those. Even though the plan is at such an early stage, that the individual has not yet contemplated the first step of his preparatory activity, there is a legitimate policy interest in criminalising such behaviour.[8]

7.21. Of course, the elements of the offence may be satisfied where a relevant action, or threat of action, is contemplated by the person making the document, and that person is aware that the document will be used, for example, in assistance in such terrorist act. Indeed, McClellan CJ at CL concluded that Latham J.'s directions were proper and adequate, since the acts described in the book were acts contemplated by the respondent (at [101]).

[8] It may, however, be that this is a distinction without a difference, since the downloading of the information may well be seen as an act in preparation; and therefore an offence under s. 101.5 may necessarily involve some form of preparatory activity.

7.22. However, the directions given by the learned trial judge do not support the conclusion that the respondent must have contemplated the acts described. For example, her Honour instructed the jury (SU63) (emphasis added):

> [T]he Crown must prove that he was aware that there was the action or threat of action contained within the document and that its purpose, that is *the purpose if the action, not his purpose*, but the purpose of the action was of the specified nature in (ii) and (iii) and that it would cause the type of harm outlined in (iv).

A perhaps more striking example is found at SU65, SU66 (emphasis added):

> I want to remind you again that it is no part of the Crown case on count 1 that the accused made the document intending that other carry out terrorist acts. That is something which arises on count 2, but not on count 1. The offence in count 1 is wholly concerned with the making of the document, whether the document itself contained information that assisted in the commission of terrorist acts, regardless of whether a terrorist act was actually committed, and whether the accused knew about that aspect of the book. So it is all about his knowledge, ladies and gentlemen, his knowledge about the book.
>
> ...
>
> *It does not matter for these purposes whether the accused's own words in the document can be interpreted in some benign way.* You must look at the whole of the document in order to determine whether it contains material that is connected with terrorist actions.

7.23. In the light of these directions, it cannot be assumed that the jury concluded that the respondent had contemplated the commission of the terrorist acts described. Accordingly, McClellan CJ at CL erred in concluding that the respondent had contemplated the particular acts, and therefore that the document was connected with assistance in a terrorist act.

7.24. In closing, the reasoning of McCallum J. can be disposed of quite briefly. Her Honour concluded (at [463]) that the reasoning of Hall J. and the Victorian Court of Appeal in *Benbrika* was flawed because it "erroneously imports a fault element into a physical element of the offence", that "fault element" being the contemplation of the terrorist act. With the greatest of respect, however, this reasoning misapprehends the meaning of physical element versus fault element under the *Criminal Code (C'th)*. A physical element does not cease to be a physical element merely because it refers to a person's state of mind. In accordance with s. 4.1(1)(c) *Criminal Code (C'th)*, "A physical element of an offence may be... a circumstance in which conduct, or a result of conduct, occurs." The presence of a particular state of mind can be just such a

circumstance. This was recognised in *Lodhi v. R* (2006) 199 FLR 303 at 323 [90] per Spigelman CJ:

> The references to "intention" in each of pars (b) and (c) of the definition of "terrorist act" are not fault elements of the offence. Rather they identify the character of the action that falls within (2) of the definition. This is a physical element, being a "circumstance" within s. 4.1(1)(c) of the *Criminal Code*.

7.25. Similarly, the contemplation of the commission of a terrorist act is also a circumstance, and thus a physical element. No additional fault element is introduced. Therefore, McCallum's reasoning, too, does not undermine the construction advanced in these submissions.

7.26. It is submitted that the directions given by Latham J. were inadequate and, therefore, the Court of Criminal Appeal erred in dismissing the third ground of appeal.

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PETER D. LANGE
Telephone: (02) 8262-6760
Facsimile: (02) 9475-0495
Email: PDL@Langelaw.com

CHARLES C. WATERSTREET
Telephone: (02) 9390-7777
Facsimile: (02) 9261-4600
Email: cwaterstreet@gmail.com