HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN AND BELL JJ

THE QUEEN APPELLANT

AND

BELAL SAADALLAH KHAZAAL RESPONDENT

The Queen v Khazaal
[2012] HCA 26
10 August 2012
S344/2011

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 9 June 2011 and in place thereof dismiss the appeal against conviction on count 1 of the indictment.*

3. *Remit the matter to the Court of Criminal Appeal of the Supreme Court of New South Wales for consideration and determination of the appeal against sentence in respect of the conviction on count 1 of the indictment.*

On appeal from the Supreme Court of New South Wales

Representation

P W Neil SC with S G Callan for the appellant (instructed by Commonwealth Director of Public Prosecutions)

P D Lange with C C Waterstreet for the respondent (instructed by Lawyers Corp Pty Limited)

CATCHWORDS

The Queen v Khazaal

Criminal law – Terrorism – Collecting or making documents likely to facilitate terrorist acts – Jury misdirection – Respondent convicted of making document "connected with ... assistance in a terrorist act", knowing of that connection, contrary to s 101.5(1) of *Criminal Code* (Cth) ("Code") – Trial judge directed jury that words "connected with ... assistance in a terrorist act" had no special or technical meaning – Whether trial judge misdirected jury.

Criminal law – Terrorism – Collecting or making documents likely to facilitate terrorist acts – Exception to liability – Evidential burden – Section 101.5(5) of Code created exception to liability under s 101.5(1) if making of document "not intended to facilitate ... assistance in a terrorist act" – Respondent bore evidential burden under s 101.5(5), as defined in s 13.3(6) – Whether evidence at trial suggested reasonable possibility that making of document by respondent not intended to facilitate assistance in a terrorist act.

Words and phrases – "connected with", "evidential burden".

Criminal Code (Cth), ss 13.3, 101.5.

FRENCH CJ.

Introduction

1 Belal Saadallah Khazaal ("the respondent") was convicted on 10 September 2008 of an offence against s 101.5(1) of the *Criminal Code* (Cth) ("the Code") namely that he "did make a document connected with assistance in a terrorist act knowing of that connection." He was sentenced to 12 years' imprisonment dating from 31 August 2008 with a nine year non-parole period expiring on 31 August 2017[1]. The Court of Criminal Appeal of New South Wales (McClellan CJ at CL, Hall and McCallum JJ) heard his appeal against conviction and sentence on 6 October 2010 and on 9 June 2011, by majority, allowed the appeal, quashed the conviction and directed a retrial[2].

2 The document the subject of the indictment was an electronic book entitled *Provisions on the Rules of Jihad: Short Judicial Rulings and Organizational Instructions for Fighters and Mujahideen Against Infidels* ("the book"). It was the Crown's case that the respondent selected, compiled and edited downloaded material from the Internet and added his own text to it by way of a dedication and foreword. His conduct in so doing was said to constitute intentionally "making a document" for the purposes of s 101.5(1) of the Code. The book included advice on techniques of assassination and listed categories of targets for assassination, including holders of public office in a number of countries, one of which was Australia. A more detailed account of the content of the book and other evidence relevant to this appeal appears in the joint judgment[3].

3 The appeal was allowed by the Court of Criminal Appeal on the basis that the trial judge erred in declining to leave to the jury the defence, under s 101.5(5) of the Code, that "the document was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act." The point of difference between the trial judge and the majority in the Court of Criminal Appeal was on the question whether the respondent had discharged the evidential burden necessary to invoke the defence.

4 On 7 October 2011, Gummow, Hayne and Bell JJ granted the Crown special leave to appeal to this Court from the decision of the Court of Criminal Appeal.

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1 *R v Khazaal* [2009] NSWSC 1015 at [51].

2 *Khazaal v The Queen* [2011] NSWCCA 129.

3 Reasons of Gummow, Crennan and Bell JJ at [54]-[62].

5 For the reasons that follow the appeal should be allowed.

The issues

6 The two issues for determination in this appeal were:

1. Whether the respondent had discharged the evidential burden necessary to enliven the defence under s 101.5(5) of the Code - this was the question raised by the Crown's notice of appeal.

2. Whether the trial judge's direction to the jury in relation to the requirement that the document be "connected with" assistance in a terrorist act was sufficient - this was the question raised by the respondent's notice of contention.

The evidential burden - general law and the statute

7 The judge in a trial by judge and jury is required to direct the jury on the law which they must apply in determining whether the Crown has established the guilt of the accused. The judge must direct the jury as to each element of the offence which the Crown must prove and each defence lawfully available to the accused.

8 Some defences must be negatived by the prosecution as part of establishing the commission of the offence. In such a case the accused does not have to point to evidence capable of raising the defence. There are other defences which are not lawfully available to the accused unless there is evidence capable of supporting them. In such a case the accused is said to bear the evidential burden[4]. Under the general law, in a case in which the evidential burden is on the accused, that burden is discharged if there is evidence which, taken at its highest in favour of the accused, could lead a reasonable jury, properly instructed, to have a reasonable doubt that the defence had been negatived[5]. The legal burden then shifts to the prosecution to negative the defence beyond reasonable doubt. The question whether the evidential burden has been discharged is a question of law for the trial judge.

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4 Different usages of "evidential burden" in the general law relevant to civil proceedings were discussed by Heydon J in *Strong v Woolworths Ltd* (2012) 86 ALJR 267 at 279-280 [51]-[54]; 285 ALR 420 at 434-435; [2012] HCA 5. The usage adopted here is relevant to criminal prosecutions.

5 *Braysich v The Queen* (2011) 243 CLR 434 at 454 [36] per French CJ, Crennan and Kiefel JJ; [2011] HCA 14.

9 The detailed statutory framework is set out in the joint reasons[6]. Section 101.5(5) provides a defence to a charge of an offence under s 101.5(1). The defence qualifies the scope of the offence which s 101.5(1) creates. Section 101.5(5) provides:

> "Subsections (1) and (2) do not apply if 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."

10 Section 13.3(3) imposes the "evidential burden" upon a defendant wishing to rely upon any "qualification or justification provided by the law creating an offence"[7]. The term "evidential burden" is defined by s 13.3(6):

> "In this Code:
>
> ***evidential burden***, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist."

The relevant Explanatory Memorandum said of s 13.3 that[8]:

> "These provisions accord with basic principles accepted in all jurisdictions. They have been reiterated by the High Court in *He Kaw Teh* (1984-5) 157 CLR 203 [sic]."

There was only glancing reference to the evidential burden in *He Kaw Teh v The Queen*[9]. The case was concerned with whether mens rea was a necessary element of the offence of importing a prohibited drug contrary to s 233B(1) of the *Customs Act* 1901 (Cth). Gibbs CJ referred to "evidence which raises the question"[10] of a defence of honest and reasonable mistake. Wilson J referred to the "evidential burden" as "the burden of adducing evidence"[11]. Brennan J spoke

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6 Reasons of Gummow, Crennan and Bell JJ at [45]-[51].

7 The note to section 101.5(5) states "A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3))."

8 Australia, Senate, Criminal Code Bill 1994, Explanatory Memorandum at 47.

9 (1985) 157 CLR 523; [1985] HCA 43.

10 (1985) 157 CLR 523 at 535, Mason J agreeing at 546.

11 (1985) 157 CLR 523 at 558.

of an evidential burden passing to an accused "to raise a reasonable doubt as to his knowledge"[12]. Dawson J spoke of "the burden of providing the necessary foundation in evidence"[13].

11 The reference to *He Kaw Teh* in the Explanatory Memorandum tends to suggest that the definition of "evidential burden" in s 13.3(6) was not intended to change the general law. The term "reasonable possibility" was used by this Court in *Taiapa v The Queen*[14] in relation to the evidential burden on an accused to raise the defence of compulsion under s 31(1)(d) of the *Criminal Code* (Q). The Court referred to the "evidential burden" as requiring the accused to "identify some basis in the evidence raising as a reasonable possibility the existence of reasonable grounds for his belief"[15]. Nevertheless, it is the text of s 13.3(3), rather than the general law, that must be applied in determining whether an evidential burden imposed by the Code has been discharged.

12 A defendant bears the evidential burden, as defined, in relation to a defence under s 101.5(5). If that burden is discharged, the prosecution bears the legal burden of negativing the defence beyond reasonable doubt[16]. The statutory collocation "evidence that suggests a reasonable possibility" is not readily amenable to translation into other terms. But, applying the ordinary meaning of the words of the definition, it is sufficient for the disposition of the Crown's appeal that s 13.3(3), read with s 13.3(6), requires evidence that is at least capable of supporting the inference that the matter to which the evidential burden applies "exists or does not exist." This approach reflects the general law position with respect to the evidential burden. If no such inference is able to be drawn from the evidence there is no logical basis for saying that the evidence suggests that inference as a reasonable possibility[17]. Evidence which is merely consistent with or not inconsistent with such a possibility does not "suggest" it. The interaction of the "evidence" and the "possibility" in such a case may be like that of ships passing in the night. Importantly, as s 13.3(5) provides, the question

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12 (1985) 157 CLR 523 at 581.

13 (1985) 157 CLR 523 at 592.

14 (2009) 240 CLR 95; [2009] HCA 53.

15 (2009) 240 CLR 95 at 109 [39].

16 Code, s 13.1(2).

17 Whether the word "reasonable" attracts a threshold requirement for the strength of the inference necessary to discharge the evidential burden need not be considered here.

whether an evidential burden has been discharged is one of law. In that respect also the Code and the general law coincide.

The evidential burden - the trial judge's ruling

13 At trial the respondent's counsel asked the judge to direct the jury that:

> "if there is a reasonable possibility that the accused did not make the book with the intention of facilitating assistance in a terrorist act, then they must be satisfied beyond reasonable doubt that the making of the book was intended to facilitate assistance in a terrorist act."

As McClellan CJ at CL correctly observed in the Court of Criminal Appeal, the direction sought conflated the functions of the trial judge and that of the jury[18]. The direction sought would have left to the jury the question whether the evidential burden had been discharged. That was a question of law for the judge. In the event, the judge decided the question of law and decided it adversely to the respondent.

14 In ruling against the respondent, the trial judge, using an example proffered by the Crown, said that the defence for which s 101.5(5) provides would apply to a terrorism consultant or advisor to government and law enforcement agencies who, in the course of his or her employment, collects and collates material advocating the commission of terrorist acts. The expertise and responsibilities of such a person would be inconsistent with an intention to facilitate assistance in a terrorist act. The respondent's asserted status as a journalist and researcher was not of that character.

15 The trial judge also identified what she called a "paradox" inherent in the respondent's application:

> "the accused proposes to submit to the jury that the evidence in the trial would not allow them to draw the conclusion beyond reasonable doubt that the accused knew of the book's connection with assistance in a terrorist act, and, in the event that those submissions fail, rely on the same evidence as suggestive of a reasonable possibility that the accused did not intend facilitating assistance in a terrorist act. The effect is to put the Crown to proof on a fault element that does not form part of the offence."

That aspect of her Honour's reasoning was criticised by Hall J as not reflecting a matter which should have been taken into account in her determination. Hall J

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18 [2011] NSWCCA 129 at [125].

pointed out that whether there was evidence to suggest a "reasonable possibility" within the meaning of s 13.3(6) was a matter that demanded "attention to the evidence in order to determine whether any of the evidence could, as a reasonable possibility, go to supporting the relevant excuse, exemption or justification."[19]

16 In the event, the trial judge, having come to the view that s 105.5(5) had not been engaged, said "but if I am wrong in that regard, I fail to see how the accused has discharged the evidentiary burden placed upon him by the Code." It was the correctness of that latter proposition that was at issue in this appeal.

The evidential burden - the Court of Criminal Appeal's decision

17 McClellan CJ at CL and Hall J both referred to aspects of the evidence relied upon by the respondent to justify a finding that the evidentiary burden in s 13.3(6) was discharged. McClellan CJ at CL referred to four aspects of the evidence, which included the facts that[20]:

- the respondent was an accredited journalist, a researcher and a publisher;
- he had acquired and built up a library which he used in his research;
- he had a significant interest in the Islamic religion; and
- he had written and published articles on benign Islamic issues.

Hall J set out a more extensive list of matters including the following[21]:

- the range of general material published on the website to which the book was uploaded;
- the use of detailed footnotes and references in the book marking it as a reference or research work; and

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19 [2011] NSWCCA 129 at [433].

20 [2011] NSWCCA 129 at [127].

21 [2011] NSWCCA 129 at [388].

- the absence from the text contributed by the respondent of any notion that he was adopting or promoting the views of those whose work had been included in the book.

18 Hall J, with whom McCallum J agreed in respect of the evidential burden, said that[22]:

> "As a matter of law, it could not ... be said that the evidence ... was incapable of suggesting, as a reasonable possibility, that [the respondent] acted as a professional journalist with an intention that was not one to facilitate assistance in a terrorist act as that expression is to be understood under the Code."

19 With respect to their Honours, the question for the trial judge was not whether the evidence relied upon was incapable of suggesting the reasonable possibility necessary to satisfy the evidential burden on the respondent. The question was whether the evidence was capable of supporting that possibility. The fact that the matters relied upon by the respondent were not inconsistent with the absence of an intention to facilitate assistance in a terrorist act did not mean that it was logically open to infer, from those matters, the absence of that intention. The evidence relied upon by the respondent did not suggest a reasonable possibility that the making of the document was not intended to facilitate assistance in a terrorist act.

20 The approach taken by McClellan CJ at CL was, with respect, the approach that should have been taken by the trial judge, albeit it yielded the same result. His Honour said[23]:

> "Whatever be the difficulties with [the trial judge's] approach to the legislative provision I am satisfied that this evidence was insufficient to discharge the evidentiary burden which fell upon [the respondent]. To discharge that burden [the respondent] had to point to evidence that suggested a 'reasonable possibility' that the making of the particular document was not intended to facilitate assistance in a terrorist act. The evidence to which attention was drawn was entirely neutral in relation to that issue. Whether or not [the respondent] was a journalist who had researched and published in relation to Islam it was his intention in making the document which was the issue in the trial. On that issue, apart from the document itself, without [the respondent] giving evidence or there being other evidence from which his intention could be inferred the

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22 [2011] NSWCCA 129 at [441].

23 [2011] NSWCCA 129 at [128].

> evidential burden could not be discharged. There was nothing to support a reasonable possibility that he did not have the relevant intention." (emphasis omitted)

His Honour's conclusion was correct. The respondent failed to discharge the evidential burden, which he had to discharge before the defence under s 101.5(5) could be left to the jury. The Crown's ground of appeal is made out.

Connection - the statutory context

21 Before turning to the question raised by the respondent's notice of contention, it is necessary to refer to the statutory provisions underpinning the allegation in the indictment that the document made by the respondent was "connected with assistance in a terrorist act".

22 The offence created by s 101.5(1) is the collection or making of a document which is "connected with preparation for, the engagement of the person in, or assistance in a terrorist act". To commit the offence under s 101.5(1) the person who makes the document must know of the requisite connection[24]. A lesser offence consisting of exactly the same elements is created by s 101.5(2), save that it requires recklessness as to the existence of the connection rather than knowledge of that existence[25]. At the time of the commission of the offence in September 2003, s 101.5(3) provided:

> "A person commits an offence under subsection (1) or (2) even if the terrorist act does not occur."

That subsection was repealed by the *Anti-Terrorism Act* 2005 (Cth) ("the ATA") and a new subsection 101.5(3) substituted, which reads[26]:

> "A person commits an offence under subsection (1) or (2) even if:
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> (a) a terrorist act does not occur; or
>
> (b) the document is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or

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24 Code, s 101.5(1)(c).

25 Code, s 101.5(2)(c).

26 ATA, Sched 1, Item 3.

(c) the document is connected with preparation for, the engagement of a person in, or assistance in more than one terrorist act."

Similar amendments were made to cognate offences created by Div 101 of the Code. The amendments came into operation on 4 November 2004[27]. Those amendments were subsequently given retrospective effect by the *Anti-Terrorism Act (No 2)* 2005 (Cth) ("the ATA No 2"). The ATA No 2 inserted a new section 106.3 into the Code, applying each amendment to offences committed before and after the commencement of s 106.3, but not before the commencement of the section of the Code which had been amended[28]. Section 106.3 took effect from 16 February 2006.

23 In *Lodhi v The Queen*[29] the Court of Criminal Appeal of New South Wales held that the ATA No 2 did not apply the amendments under the ATA to proceedings that had already been instituted prior to the ATA No 2 receiving Royal Assent. That limitation is not relevant in the present case[30]. The applicable version of s 101.5(3) therefore, is that substituted for the original s 101.5(3) by the combined operation of the ATA and the ATA No 2. The application of the substituted provision was reflected in the trial judge's direction to the jury that it did not matter if the document were not connected with a specific action or threat of action.

24 In the Second Reading Speech for the Anti-Terrorism Bill 2005, the Attorney-General said[31]:

> "When the offences were originally drafted, it was not the intention that the prosecution would be required to identify a 'particular' terrorist act.
>
> The amendments will clarify that it is not necessary for the prosecution to identify a specific terrorist act.

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27 ATA, s 2.

28 ATA No 2, Sched 1, Item 22.

29 (2006) 199 FLR 303.

30 The proceedings in the present case were commenced in 2008.

31 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 November 2005 at 92.

It will be sufficient for the prosecution to prove that the particular conduct was related to 'a' terrorist act."

25 The definition of the term "terrorist act" appears in s 100.1 and is set out in the joint judgment. Relevantly, it means "an action or threat of action" which meets a number of criteria set out in the definition. There is no dispute that the assassination of public figures, for the reasons set out in the book compiled by the respondent, would, if carried out, answer the description of a "terrorist act". However, the respondent submitted that:

- the mere fact that a document makes reference to terrorist acts does not create the required connection to a terrorist act;

- the words "connected with" require that the commission of a terrorist act be within the contemplation of a person, whether the accused or another[32]; and

- a document will acquire the requisite connection only where the use of the document in preparation for, the engagement of a person in, or assistance in the terrorist act was actually contemplated.

26 The respondent relied upon the decision of the Victorian Court of Appeal in *Benbrika v The Queen*[33]. That was a case concerned with, among other things, the offence created by s 101.4 of the Code of possession of a "thing" connected with preparation for a terrorist act. The "thing" in question was a compact disc which contained an archive of documents including a section relating to the duty of Muslims to engage in violent jihad and a "Mujahid's Handbook" described in its preamble as originating from United States Army Training and Combat Manuals. The Court of Appeal found that the trial judge in that case had erred when he directed the jury that the phrase "connected with" was "a very wide phrase" which did "not mean connected with in any particular way" and that there just had to be "some connection between the thing and a terrorist act."[34] Their Honours held that the phrase means "that the thing must be shown to have been 'connected with preparation for a terrorist act' by virtue of some person's having had the purpose of using the thing in, or in aid of, preparation for the

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32 The term "contemplation" was derived from *Lodhi v The Queen* (2006) 199 FLR 303, especially at 316-317 [62] per Spigelman CJ, quoting Whealy J at first instance.

33 (2010) 29 VR 593.

34 (2010) 29 VR 593 at 666 [339].

terrorist act."[35] The trial judge's direction had left open "the real possibility that the jury reasoned to guilt without directing any attention to whether the requisite connection had been established."[36]

27 McClellan CJ at CL distinguished *Benbrika* from the present case on the basis that because in *Benbrika* the relevant thing was an inanimate object, Benbrika's possession of it may have been innocuous. The relevant connection could not be determined by reference to the thing itself. Before "Benbrika could be found to have committed an offence against the statute there had to be a terrorist act for which preparatory activity was, at least, in contemplation"[37]. In the present case, as his Honour observed, the respondent was charged with making "a document connected with assistance in a terrorist act." The Crown relied upon the content of the document to establish the requisite connection. The relevant content included that which described methods of assassination, the organisation of effective assassination teams and the identification of prospective targets for assassination. McClellan CJ at CL said[38]:

> "There was more but this is sufficient to identify the fact that the document itself described a variety of terrorist acts from which the jury could conclude that the document was connected with assistance in a terrorist act. They were the acts contemplated by [the respondent]. Proof of a specific terrorist act was not required."

Connection - the trial judge's direction

28 The trial judge directed the jury that the question whether the book was connected with preparation for, the engagement of a person in, or assistance in a terrorist act, was an objective one dependent upon an examination of the contents of the document. Her Honour said:

> "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

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35 (2010) 29 VR 593 at 666-667 [340].

36 (2010) 29 VR 593 at 667 [343].

37 [2011] NSWCCA 129 at [98].

38 [2011] NSWCCA 129 at [101].

> one of the persons that are set out in the particulars, then the Crown has proved that element of the offence.
>
> It does not matter if the document is not connected with a specific action or threat of action, or if it is connected with more than one action or threat of action. As long as the Crown has proved beyond reasonable doubt that the document is connected with an action or threat of action of the kind specified in the charge, that is sufficient to prove this element."

Connection - the Court of Criminal Appeal decision

29 In the Court of Criminal Appeal the respondent submitted that the jury should have at least been told that the Crown had to show more than a remote or tenuous connection between the document the subject of the charge and "assistance in a terrorist act". The respondent did not contend that a positive definition of the words "connected with" was necessary. McClellan CJ at CL concluded that the words "connected with" were ordinary words which the jury were clearly capable of understanding[39]. His Honour accepted that the requisite connection must be more than ephemeral but could see no reason why the jury should have been given a judicial gloss on the words of the legislation. His Honour said[40]:

> "There is nothing in the legislation to suggest that the jury should be required to do other than apply their ordinary understanding of the words 'connected with' to the fact finding required of them."

McCallum J agreed with McClellan CJ at CL on this point[41].

30 Hall J disagreed. His Honour held that the trial judge's direction was erroneous as it "did not provide information or guidance to the jury on the particular meaning attaching to that statutory formulation." His Honour said[42]:

> "The trial judge, in my opinion, was required to direct the jury that, to establish the relevant connection, it was necessary that there be evidence, and that they were satisfied on that evidence, that the book was connected

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39 [2011] NSWCCA 129 at [93].

40 [2011] NSWCCA 129 at [93].

41 [2011] NSWCCA 129 at [451].

42 [2011] NSWCCA 129 at [374].

> with assistance in a terrorist act that, at the time of making the book, was either proposed or contemplated or to an activity that was proposed, contemplated or was under way in relation to a terrorist act."

The connection - general principles

31 Relational terms such as "connected with" appear in a variety of statutory settings. Other examples are: "in relation to"; "in respect of"; "in connection with"; and "in". They may refer to a relationship between two subjects which may be the same or different and may encompass activities, events, persons or things. They may denote relationships which are causal or temporal or relationships of similarity or difference. The task of construing such terms does not involve the resolution of ambiguity. They are ambulatory words and may be designed to cover a variety of subjects and a variety of relationships between those subjects. The nature and breadth of the relationships they cover will depend upon their statutory context and purpose[43]. Generally speaking it is not desirable, in construing relational terms, to go further than is necessary to determine their application in a particular case or class of cases. A more comprehensive approach may be confounded by subsequent cases.

32 The statutory purpose of Pt 5.3 of Ch 5 of the Code, of which Div 101 is part, was described by Spigelman CJ in *Lodhi v The Queen*[44]:

> "Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, eg well before an agreement has been reached for a conspiracy charge. The courts must respect that legislative policy."

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43 *Workers' Compensation Board (Q) v Technical Products Pty Ltd* (1988) 165 CLR 642 at 653-654 per Deane, Dawson and Toohey JJ; [1988] HCA 49; *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 376 per McHugh J; [1990] HCA 16; *Burswood Management Ltd v Attorney-General (Cth)* (1990) 23 FCR 144 at 146; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 288-289; *Australian Competition and Consumer Commission v Maritime Union of Australia* (2001) 114 FCR 472 at 486-487 per Hill J.

44 (2006) 199 FLR 303 at 318 [66]; McClellan CJ at CL and Sully J agreeing at 324 [96] and 327 [111] respectively.

McClellan CJ at CL in this case relied upon that passage[45].

33 It is, of course, necessary to bear in mind that the offences created under s 101.5 and cognate offences in Div 101 of Pt 5.3 of the Code are very serious and punishable by significant terms of imprisonment. The courts, given the task of construction and application of general terms in such cases, must ensure that they are not construed so widely as to exceed the statutory purpose. To say that is not to detract from the proposition that the statutory purpose was, as explained in *Lodhi*, to cast a wide net over preparatory acts.

34 The subjects of the requisite connection under s 101.5(1)(b) are, on the one hand, the document collected or made by the respondent and, on the other hand, the activities of preparation for, engagement in, or assistance in a terrorist act. Section 101.5(1)(b) is capable of covering various kinds of connections between those subjects. By virtue of s 101.5(3) it is not necessary that the document the subject of the offence be connected with a specific terrorist act. It is sufficient, for present purposes, to say that a document which purports to justify terrorist acts and instructs in methods of carrying them out, and identifies potential targets, is capable, as a matter of law, of answering the description "connected with ... assistance in a terrorist act". That was the aspect of the offence under s 101.5(1) with which the respondent was charged.

35 The trial judge's direction required the jury to be "satisfied beyond reasonable doubt that any part of the document [was] connected with helping or facilitating the commission of an action or threat of action against any one of the persons set out in the particulars". Taken in the context of the evidence in this case, that direction fell within the meaning of s 101.5(1)(b) properly construed. It did not authorise the jury to convict on the basis of some ephemeral or remote or tenuous connection.

36 The ground set out in the notice of contention is not made out.

Conclusion

37 The appeal should be allowed. I agree with the orders proposed in the joint judgment.

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45 [2011] NSWCCA 129 at [89].

38 GUMMOW, CRENNAN AND BELL JJ. In September 2003, the respondent, Belal Saadallah Khazaal, compiled and edited an electronic book entitled "Provisions on the Rules of Jihad" and sub-titled "Short Judicial Rulings and Organizational Instructions for Fighters and Mujahideen Against Infidels"[46] ("the e-book"), which comprised material concerning Islam and jihad that the respondent had downloaded from the internet, together with a dedication, foreword and other short passages written by the respondent.

39 In July 2008, the respondent was charged in relation to the e-book under s 101.5 of the *Criminal Code* (Cth) ("the Code") with making a document connected with assistance in a terrorist act, knowing of that connection (count 1). He was also charged under ss 11.1 and 11.4 of the Code with attempting to incite the commission by others of the offence of engaging in a terrorist act contrary to s 101.1(1) of the Code (count 2).

40 The respondent stood trial before Latham J ("the trial judge") in the Supreme Court of New South Wales in August and September 2008. On 10 September 2008, the jury found the respondent guilty of the offence charged in count 1, but was unable to reach a verdict in relation to count 2. On 25 September 2009, the trial judge sentenced the respondent to 12 years' imprisonment, with a non-parole period of 9 years[47].

41 The respondent appealed against his conviction on four grounds. By majority (Hall and McCallum JJ; McClellan CJ at CL dissenting), the Court of Criminal Appeal of the Supreme Court of New South Wales upheld the respondent's fourth ground of appeal, quashed the conviction and ordered a new trial[48]. However, the Court of Criminal Appeal unanimously dismissed the respondent's second ground of appeal, and a majority (McClellan CJ at CL and McCallum J; Hall J dissenting) dismissed the respondent's first and third grounds of appeal. The respondent also appealed against his sentence. Neither Hall J nor McCallum J gave judgment in respect of the respondent's appeal against sentence.

42 On 7 October 2011, a panel constituted by Gummow, Hayne and Bell JJ granted the prosecution special leave to appeal to this Court in relation to the

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46 This was the title in English of a translation from Arabic.

47 *R v Khazaal* [2009] NSWSC 1015.

48 *Khazaal v The Queen* [2011] NSWCCA 129 ("*Khazaal*").

fourth ground argued before the Court of Criminal Appeal[49]. The prosecution contends that the majority of the Court of Criminal Appeal erred in holding that the respondent had discharged the evidential burden imposed on him in relation to the exception to liability in s 101.5(5) of the Code.

43 By notice of contention filed 26 October 2011, referring to the third ground of appeal advanced before the Court of Criminal Appeal[50], the respondent contends that the majority of the Court of Criminal Appeal erred in holding that the trial judge was not required to give specific directions to the jury in relation to the meaning of the words "connected with" in s 101.5(1)(b) of the Code.

44 For the reasons which follow, the appeal should be upheld and the notice of contention should be dismissed. The prosecution has agreed to pay the respondent's costs of the proceeding in this Court.

The statutory framework

45 Part 5.3 of the Code, which was introduced in July 2002[51], deals with terrorism. The context in which Parliament enacted, and later amended[52], Pt 5.3 of the Code included terrorist attacks in the United States of America on 11 September 2001 and subsequent major terrorist attacks in Bali, Madrid, Jakarta and London. This context was acknowledged by several members of this

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49 The fourth ground of appeal stated that the trial judge "erred in holding that the [respondent] had failed to discharge the evidential burden provided for by s 101.5(5) of the Code, and in consequence declining to direct the jury that the Crown was required to prove beyond reasonable doubt that the document was intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act".

50 The third ground of appeal stated that the trial judge "erred in directing the jury in relation to count 1 that the words 'connected with' were simply to be given their ordinary meaning".

51 *Security Legislation Amendment (Terrorism) Act* 2002 (Cth).

52 *Criminal Code Amendment (Terrorism) Act* 2003 (Cth) and *Anti-Terrorism Act* 2005 (Cth).

Court in *Thomas v Mowbray*[53], and in a joint judgment two members of the majority said of those incidents[54]:

> "[M]any of these attacks on major urban targets were carried out by persons with some training and skills in handling explosives and a willingness to die in the course of the attack. Many such attacks have been explained, by those claiming responsibility for them, by reference to jihad, a term encompassing bellicosity, based at least in part on religious considerations, the use of which is not confined to a single nation state[55]."

46 Section 100.1 of the Code defines a "terrorist act", and provides relevantly:

> "(1) In this Part:
>
> …
>
> ***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:
>
> (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

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53 (2007) 233 CLR 307 at 324-325 [7] per Gleeson CJ, 349 [83]-[86] per Gummow and Crennan JJ, 369 [166] per Kirby J, 481 [523] per Callinan J; [2007] HCA 33. See also *Lodhi v The Queen* (2006) 199 FLR 303 at 318 [66] per Spigelman CJ.

54 (2007) 233 CLR 307 at 349 [85] per Gummow and Crennan JJ.

55 Holmes (ed), *The Oxford Companion to Military History* (2001) at 466-467.

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

(2) Action falls within this subsection if it:

(a) causes serious harm that is physical harm to a person; or

(b) causes serious damage to property; or

(c) causes a person's death; or

(d) endangers a person's life, other than the life of the person taking the action; or

(e) creates a serious risk to the health or safety of the public or a section of the public; or

(f) ...

(3) Action falls within this subsection if it:

(a) is advocacy, protest, dissent or industrial action; and

(b) is not intended:

(i) to cause serious harm that is physical harm to a person; or

(ii) to cause a person's death; or

(iii) to endanger the life of a person, other than the person taking the action; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.

..."

47 Section 3.1(1) of the Code stipulates that an offence consists of physical elements and fault elements.

48 Section 101.5 of the Code creates the offence with which the respondent was charged in count 1. Relevantly, s 101.5(1) creates the offence, s 101.5(3) clarifies the scope of the offence, and s 101.5(5) provides for an exception to liability for the offence, upon which the respondent sought to rely:

> "(1) A person commits an offence if:
>
> (a) the person collects or makes a document; and
>
> (b) the document is connected with ... assistance in a terrorist act; and
>
> (c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).
>
> Penalty: Imprisonment for 15 years.
>
> …
>
> (3) A person commits an offence under subsection (1) ... even if:
>
> (a) a terrorist act does not occur; or
>
> (b) the document is not connected with ... assistance in a specific terrorist act; or
>
> (c) the document is connected with ... assistance in more than one terrorist act.
>
> …
>
> (5) [Subsection] (1) ... [does] not apply if the collection or making of the document was not intended to facilitate ... assistance in a terrorist act."

49 It should be noted that ss 101.5(3)(b) and (c) were introduced to the Code in November 2005[56]. However, the other provisions of s 101.5, being those

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56 *Anti-Terrorism Act* 2005 (Cth). The legislative history of s 101.5(3)(a) is set out in the reasons of French CJ at [22]-[24].

immediately relevant to the appeal and notice of contention, are in the form they took at the time of the offence charged in count 1 of the indictment, namely between 20 and 23 September 2003.

50 The offence-creating provision (s 101.5(1)) and the exception-creating provision (s 101.5(5)) depend on the definition of "terrorist act", and the reference to "action" in that definition (s 100.1). Further, the provisions, in particular s 101.5(3), show that the purpose of the legislation is to create an offence under s 101.5 even if a terrorist act does not occur.

51 Section 13.3 of the Code provides relevantly:

> "(1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.
>
> (2) ...
>
> (3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.
>
> (4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.
>
> (5) The question whether an evidential burden has been discharged is one of law.
>
> (6) In this Code:
>
> ***evidential burden***, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist."

52 The indictment dated 3 July 2008 set out count 1 against the respondent as follows:

> "Between about 20 September 2003 and 23 September 2003 at Sydney, New South Wales and elsewhere in the world [the respondent] did make a

document connected with assistance in a terrorist act knowing of that connection."

53 Paragraph 1.1 of the particulars for count 1 identified the document which was the subject of count 1 as the e-book. The terrorist act particularised in par 1.2 of the particulars was "an action or threat of action [done or threatened] against any one or more of a number of persons identified in the document including diplomats, military personnel and holders of public office". The intention particularised in pars 1.2(a) and (b) was framed in terms of pars (b) and (c) of the definition of "terrorist act" in s 100.1 of the Code, and the action, or threat of action, was framed in terms of ss 100.1(2)(a) to (e) of the Code.

The evidence at trial

54 It was not disputed at trial that the respondent had made the e-book, or that he had intended to do so.

55 The respondent made the e-book between 20 and 23 September 2003 by downloading from the internet various articles written in Arabic concerning Islam and jihad, editing and rearranging them, and inserting a dedication, introduction and other brief commentary of his own[57].

56 Shortly after creating the e-book, the respondent submitted it to the administrators of the "Al-Maqdese" website under the pseudonym "Abu Mohamed Attawheedy", and, after some final formatting changes, it was published on that website[58]. There was some dispute at trial about the nature of the "Al-Maqdese" website. An expert witness called by the prosecution gave evidence that the website was linked to the terrorist group Al-Qaeda, and that it contained a number of publications by leaders of known terrorist organisations[59]. An expert witness called by the respondent gave evidence that the website contained benign material on Islamic issues. An English translation of the e-book was tendered during the prosecution case.

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57 *Khazaal* [2011] NSWCCA 129 at [5], [17] per McClellan CJ at CL, [187]-[188] per Hall J.

58 *Khazaal* [2011] NSWCCA 129 at [5] per McClellan CJ at CL, [189]-[194] per Hall J.

59 *Khazaal* [2011] NSWCCA 129 at [5] per McClellan CJ at CL, [189] per Hall J.

57 The introduction to the e-book, which (unlike the various chapters) had been written by the respondent, contained the following passage:

> "This is but a short message I hastily prepared in response to a request from brothers working to support this religion. I was requested to prepare it, in this fashion, to serve as a reference to all brothers or small cells desiring to support this religion.
>
> With God's help I set on its compilation and I completed it in few days. I am however convinced that had I sufficient time and had I been settled in my residence I would have produced a better job than this work which has been conceived in haste. However, better 'haste' than never.
>
> I pray to the Almighty that this essay would be of benefit to everyone working to support this religion. I seek the Almighty's reward and I seek martyrdom for his sake. I do so running towards it not away from it.
>
> I beseech my brothers who read this message to pray that I may attain martyrdom."

58 Chapters 1-9 of the e-book contained justifications for jihad emanating from religious sources. Jihad was defined as meaning "fighting the infidels to make God's word supreme." The recurrent themes in this part of the e-book were that jihad is a religious duty, that militant jihad (that is, the killing of "infidels"[60]), is the best form of jihad, and that jihad may involve attaining "martyrdom"[61].

59 Among other things, Ch 10 of the e-book (entitled "Reasons for Assassination") included commentary on: important characteristics for members of an assassination team; training members of an assassination team; stages of the assassination process; various methods of assassination, including wireless detonation, letter bombing, booby trapping or detonating a car, sniping, smothering, hitting with a hammer and booby trapping a room; and targets "that

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60 Used in a received sense of disbelievers in Islam: *The Oxford English Dictionary*, 2nd ed (1989), vol 7 at 927, "infidel", senses 1 and 2b.

61 Used in a received sense of the sufferings and death of a martyr (for the sake of religious belief): *The Oxford English Dictionary*, 2nd ed (1989), vol 9 at 414, "martyrdom", sense 1.

should be assassinated". The targets listed in Ch 10 included persons holding various public offices, including "diplomats, ambassadors and the military", of "enemy nationalities" or of the Jewish, Christian, Hindu and Buddhist religions, a group called "Arab atheists", and "[h]olders of key positions" in "original countries of atheism", the list of which included Australia. Chapter 13 (entitled "The Last Word"), which the respondent attributed to "Dr Shaikh Aymen Al Zawahry", contained a number of passages promoting violent jihad[62] and martyrdom.

60 Expert evidence was given at trial that the term "jihad" had a positive meaning in ordinary Arabic but that the term had acquired a much more sinister meaning in contemporary times.

61 The respondent was an accredited journalist with a journalist's card in New South Wales, and contributed regularly to an Islamic affairs magazine called "Nida ul-Islam" (in English, "The Call of Islam"). This magazine was published by the Islamic Youth Movement, and was freely available to the public. The respondent was largely responsible for its content[63]. The respondent also had a large personal collection of materials relating to Islam, referred to at trial as a library, which included documents, tapes and videos, and which was kept in the respondent's home office, from where he compiled the e-book[64].

62 The respondent did not give evidence at trial.

63 What was essentially in dispute before the trial judge was not the body of evidence described above but rather the inferences to be drawn from it.

64 At issue in this Court are two sets of directions requested by counsel for the respondent which the trial judge declined to give to the jury. These directions became the subject of the fourth[65] and third[66] grounds of appeal argued before the

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62 For example, it included the following:

> "Pursuing Americans and Jews is not an impossible task. Killing them with a single shot, a stab or a pack of a popular mix or with an iron rod is not a difficult deed. Neither is burning their properties with a Molotov bottle. Small groups with small available means can cause horror to American and Jew alike."

63 *Khazaal* [2011] NSWCCA 129 at [17] per McClellan CJ at CL.

64 *Khazaal* [2011] NSWCCA 129 at [127] per McClellan CJ at CL, [439] per Hall J.

65 Set out in note 49 above.

Court of Criminal Appeal, and are now the subject of the prosecution's appeal and the respondent's notice of contention in this Court respectively. These reasons deal first with the appeal, and then turn to the notice of contention.

The appeal: "evidential burden"

65 Counsel for the respondent sought a direction from the trial judge in the following terms:

> "[I]n the event that the jury are satisfied beyond reasonable doubt of the essential ingredients of the offence, the summing up should contain a direction to the jury that if there is a reasonable possibility that the accused did not make the [e-book] with the intention of facilitating assistance in a terrorist act, then they must be satisfied beyond reasonable doubt that the making of the [e-book] was intended to facilitate assistance in a terrorist act."

66 Counsel for the respondent submitted that the direction was necessary because sufficient evidence had been adduced at trial to discharge the evidential burden imposed on the respondent in relation to the exception from liability in s 101.5(5) of the Code. In particular, it was argued that the respondent's status as an accredited journalist and researcher with an academic interest in Islam, and the circumstances in which he made the e-book (at short notice, at the behest of "the brothers"), were sufficient to suggest the "reasonable possibility" required by s 13.3(6) of the Code that, in making the e-book, the respondent did not intend to facilitate assistance in a terrorist act. Counsel for the respondent claimed that the respondent intended, by lawful means, "to support the Islamic religion by compiling a reference book containing the views of authors concerning the role and rules of jihad in the Islamic religion." The prosecution resisted this submission.

67 The trial judge rejected the respondent's argument and determined that the exception from liability in s 101.5(5) did not arise for consideration by the jury. In so concluding, her Honour considered the text of ss 13.3 and 101.5(5), and placed some emphasis on the fact that the words "the matter" in s 13.3 referred to "an exception, exemption, excuse, qualification or justification" and not to a fault element. Having concluded that s 101.5(5) was not engaged, her Honour went on to say: "but if I am wrong in that regard, I fail to see how the accused has discharged the evidentiary burden placed upon him by the Code."

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66 Set out in note 50 above.

68 In the Court of Criminal Appeal, Hall J described the evidence said by the respondent to discharge the evidential burden in relation to the exception from liability in s 101.5(5) as follows: the respondent was "a career journalist, a researcher and a publisher", he had "acquired and built up a library which was used as his research facility", he "had a strong interest in the Islamic religion" and "had written and published articles on a range of issues, in particular, on benign Islamic issues."[67] Hall J concluded that the trial judge erred in determining that the respondent had failed to discharge the evidential burden because the abovementioned evidence suggested (in the sense of placing or bringing forward a proposition for consideration) the "reasonable possibility" that the appellant acted as a professional journalist with an intention that was not one to facilitate assistance in a terrorist act[68]. In substance, McCallum J agreed with Hall J[69].

69 In dissent in relation to this ground, McClellan CJ at CL held that the abovementioned evidence did not discharge the evidential burden and said[70]:

> "To discharge that burden the [respondent] had to point to evidence that suggested a 'reasonable possibility' that the making of the particular document was not intended to facilitate assistance in a terrorist act. The evidence to which attention was drawn was entirely neutral in relation to that issue. Whether or not the [respondent] was a journalist who had researched and published in relation to Islam it was his intention in making the document which was the issue in the trial. On that issue, apart from the document itself, without the [respondent] giving evidence or there being other evidence from which his intention could be inferred the evidential burden could not be discharged. There was nothing to support a reasonable possibility that he did not have the relevant intention." (Emphasis omitted.)

70 The issue raised by the prosecution in this Court is whether the majority of the Court of Criminal Appeal erred in finding that, at the close of evidence at the trial, the evidence suggested a reasonable possibility – sufficient to discharge the

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67 *Khazaal* [2011] NSWCCA 129 at [439].

68 *Khazaal* [2011] NSWCCA 129 at [439]-[441].

69 *Khazaal* [2011] NSWCCA 129 at [477]-[485].

70 *Khazaal* [2011] NSWCCA 129 at [128].

evidential burden imposed on the respondent in relation to s 101.5(5) of the Code – that the making of the e-book by the respondent was not intended to facilitate assistance in a terrorist act.

71 The prosecution relied on the contents of the e-book – especially Ch 10, which contained information and instructions for assassination and other violent acts in the cause of jihad, depicted as a means of advancing the respondent's religion. The prosecution contended that the contents of the e-book were personally endorsed by the respondent. It was further contended that an intention to support one's religion does not engage s 101.5(5) where the acts supported constitute a terrorism offence or where the religion is relied upon as justifying the commission of terrorist acts.

72 The respondent characterised s 105.5(5) as providing an affirmative defence, and relied on *Braysich v The Queen*[71] to support the proposition that caution should be adopted before preventing a person in the position of the respondent from relying on an affirmative defence, and that the evidence must be taken at its most favourable to an accused in determining the availability of a defence. The respondent also relied on the use of the word "suggests" in s 13.3(6), and several authorities[72], to support the proposition that "slender evidence" might suffice to discharge an evidential burden which, like the evidential burden imposed in relation to s 101.5(5), is imposed in relation to a negative state of affairs. The respondent further submitted that the evidence that the respondent had acted lawfully in the past as a professional journalist interested in Islam constituted evidence which was capable of raising an inference that the respondent's action in making the e-book was part of lawful or normal journalistic activity on his part, and that the e-book itself should not be relied on to deny the engagement of s 101.5(5). It was agreed by the respondent that the e-book was crucial evidence, but the respondent put a different complexion on the e-book from that put upon it by the prosecution: the e-book was said to contain "scholarly pieces of work" and to be educational.

73 There was no dispute about well established principles for evaluating a trial judge's directions on so much of the law as the jury must understand to

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71 (2011) 243 CLR 434 ("*Braysich*"); [2011] HCA 14.

72 *Fowkes v Deputy Director of Public Prosecutions* [1997] 2 VR 506 at 512 per Winneke P, Charles JA and Southwell AJA; *Jeffrey v Director of Public Prosecutions (Cth)* (1995) 79 A Crim R 514 at 518 per Cole JA; *Director of Public Prosecutions v Brauer* [1991] 2 Qd R 261 at 267-269 per Thomas J.

decide the case by reference to the real issues plainly arising from the evidence[73]. The dispute was narrowly confined: was the evidential burden (as defined in s 13.3(6)) discharged in respect of the respondent's reliance on s 101.5(5) so as to require a direction from the trial judge in the terms proposed by the respondent?

74 It may be accepted that the respondent was right to contend that the operative words in s 13.3(6), "adducing or pointing to evidence that suggests a reasonable possibility" in relation to the relevant negative state of affairs in s 101.5(5) required no more than slender evidence. The prosecution did not disagree. It may also be accepted that, for the purposes of establishing whether the evidential burden (as defined in s 13.3(6)) has been discharged, the evidence may be taken at its most favourable to the accused.

75 In *Braysich*, evidence of good character upon which an appellant sought to rely in contending that he had discharged an evidential burden in relation to a statutory defence turning on honesty had been excluded from consideration[74]. Here, there had been no exclusion of any evidence relied upon by the respondent to support his contention that his making of the e-book was not intended to facilitate assistance in a terrorist act.

76 In the absence of any evidence of his intention in making the e-book, the evidence that the respondent had acted lawfully in the past as an accredited journalist interested in Islam, and had published material about Islam, was incapable of supporting or raising an inference that the respondent's making of the e-book was a lawful activity not intended to facilitate the terrorist act particularised in the indictment in relation to count 1. Such evidence said nothing about the respondent's situation in making the e-book.

77 As to submissions that the e-book was scholarly or educational, the e-book contained information and instructions to any possessor and others in methods of assassination of identified persons described therein as "targets". For that reason, the e-book was incapable of raising or supporting an inference that the respondent's intention in making the e-book was lawful, scholarly, or educational in the sense of making or compiling an inoffensive reference work.

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73 See *Tully v The Queen* (2006) 230 CLR 234 at 248 [44], 250 [49] per Kirby J, 256-257 [75]-[77] per Hayne J; [2006] HCA 56; *Nicholls v The Queen* (2005) 219 CLR 196 at 321-322 [372] per Hayne and Heydon JJ; [2005] HCA 1; *Alford v Magee* (1952) 85 CLR 437 at 466; [1952] HCA 3. See also *Doggett v The Queen* (2001) 208 CLR 343 at 346 [2] per Gleeson CJ; [2001] HCA 46.

74 *Braysich* (2011) 243 CLR 434 at 456-457 [44]-[47].

78 None of the evidence relied on by the respondent to discharge the evidential burden in respect of s 101.5(5) suggested a possibility that the respondent's making of the e-book was not intended to facilitate assistance in the terrorist act for which the e-book provided information and instructions. This renders it unnecessary to determine whether the phrase "reasonable possibility", as it appears in s 13.3(6), excludes evidence which suggests no more than a "mere possibility" or a "bare possibility". That question is better left until facts before this Court require the question to be determined.

79 In the absence of evidence on the question of the respondent's intention in the making of the e-book, there was no error in the trial judge's refusal to give the direction sought by the respondent.

The notice of contention: "connected with"

80 Counsel for the respondent sought a direction from the trial judge in relation to the words "connected with" in s 101.5(1)(b) of the Code in the following terms[75]:

> "The words 'connected with' mean that the [e-book] must itself have been capable of directly assisting in the commission of a terrorist act. A mere remote connection will not suffice."

The trial judge declined to direct the jury in those terms, and instead directed the jury as follows:

> "So, let me go then to element (c)[76]. You will see that the focus of this element is on the connection between the document, that is 'Provisions on the Rules of Jihad', exhibit G, and assistance in an action or threat of action against certain persons. 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

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75 *Khazaal* [2011] NSWCCA 129 at [64] per McClellan CJ at CL.

76 The reference to "element (c)" is a reference to a written direction on count 1 provided by the trial judge to the jury on the elements of the offence: "(c) The document was connected with assistance in an action or threat of action against any one or more of a number of persons, including diplomats, military personnel and holders of public office".

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.

It does not matter if the document is not connected with a specific action or threat of action, or if it is connected with more than one action or threat of action. As long as the Crown has proved beyond reasonable doubt that the document is connected with an action or threat of action of the kind specified in the charge, that is sufficient to prove this element."

81 The respondent's position on this aspect of the case changed before the Court of Criminal Appeal. The respondent first argued that the jury should have been directed that the e-book must have factually and appreciably furthered the commission of a terrorist act, making it "more likely" to take place, before the necessary connection could exist[77]. Then, in supplementary written submissions, the respondent modified his position, contending only that the jury should have been directed that more than a remote connection was required[78].

82 In advancing the relevant ground of appeal before the Court of Criminal Appeal, the respondent sought to rely on the decision of the Court of Appeal of the Supreme Court of Victoria in *Benbrika v The Queen*[79], in which the Court of Appeal (Maxwell P, Nettle and Weinberg JJA) considered appeals by two men against convictions under s 101.4(1) of the Code for possessing "a thing … connected with preparation for … a terrorist act", which led the Court to consider the words "the thing is connected with preparation for ... a terrorist act" as they occur in s 101.4(1).

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77 *Khazaal* [2011] NSWCCA 129 at [66] per McClellan CJ at CL.

78 *Khazaal* [2011] NSWCCA 129 at [66]-[68] per McClellan CJ at CL.

79 (2010) 29 VR 593 ("*Benbrika*").

83 McClellan CJ at CL dismissed this ground of appeal, holding that the trial judge's direction was appropriate[80]. His Honour distinguished *Benbrika*[81], and was right to do so. In concluding that this ground of appeal should be dismissed, McClellan CJ at CL stated that the relevant connection in relation to the e-book was[82]:

> "said to be found within the document itself which described methods of assassination, being terrorist acts, organisation of effective assassination teams and identified prospective targets for assassination … [T]his is sufficient to identify the fact that the document itself described a variety of terrorist acts from which the jury could conclude that the document was connected with assistance in a terrorist act. They were the acts contemplated by the [respondent] … Proof of a specific terrorist act was not required."

84 McCallum J also dismissed this ground of appeal and held that the trial judge had directed the jury appropriately[83], but adopted a different path of reasoning. Her Honour declined to apply *Benbrika* on the basis that analogous application of the reasoning in *Benbrika* concerning s 101.4(1)(b) of the Code to s 101.5(1)(b) would erroneously import a fault element into the physical element of the s 101.5(1) offence[84].

85 In dissent in relation to this ground of appeal, Hall J held that the ordinary meaning of the phrase "connected with" is inappropriately broad in the context of s 101.5(1)(b)[85], and that reasoning analogous to that which applied in *Benbrika* must apply in determining whether the requisite connection for s 101.5(1)(b) exists[86]. Hall J went on to hold that the trial judge's direction was erroneous[87].

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80 *Khazaal* [2011] NSWCCA 129 at [104]-[105].

81 *Khazaal* [2011] NSWCCA 129 at [95]-[104].

82 *Khazaal* [2011] NSWCCA 129 at [101].

83 *Khazaal* [2011] NSWCCA 129 at [467].

84 *Khazaal* [2011] NSWCCA 129 at [463].

85 *Khazaal* [2011] NSWCCA 129 at [348]-[357], [366]-[369].

86 *Khazaal* [2011] NSWCCA 129 at [366]-[370].

87 *Khazaal* [2011] NSWCCA 129 at [374]-[375].

86 The essential issues raised by the respondent on the notice of contention in this Court were whether the trial judge had erred in refusing to direct in the terms sought by the respondent and whether the direction of the trial judge to the jury in relation to the second element of the offence (namely, the required connection) was adequate. The submissions made in this Court were not substantially different from those made before the Court of Criminal Appeal.

87 The issues raised by the respondent's notice of contention are not to be resolved by considering whether the reasoning of the Court of Appeal of the Supreme of Victoria in *Benbrika*, on a different section of the Code, should be applied by analogy to s 101.5(1)(b). Rather, the issues are to be resolved by a close examination of the trial judge's directions.

88 First, the trial judge correctly stated that whether the prosecution had proven the second element of the offence in count 1 depended on the contents of the e-book. Because the e-book contained information and instructions to possessors and others in methods of assassination of identified persons described in the e-book as "targets", on any view the e-book had an obvious and direct connection with assistance in the terrorist act particularised in the indictment. The jury was not directed or encouraged to act on what the respondent described as a "mere remote or tenuous connection" between the e-book and assistance in the terrorist act particularised in par 1.2 of the indictment.

89 Secondly, it is plain from the direction complained about that the trial judge gave that direction in the context that the jury had already been provided with a written direction about the elements of the offence in count 1. That written direction included direction about the respondent's knowledge, expressed as awareness of the required connection, at the time of the making of the e-book. That written direction also referred the jury to another written direction on the meaning of the term "terrorist act" as it is dealt with in the legislation. No complaint was made by the respondent in respect of either of those written directions, without which the direction complained about cannot be considered properly.

90 Thirdly, contrary to the way in which the relevant ground of appeal was framed in the Court of Criminal Appeal and addressed in this Court in the notice of contention, the trial judge did not confine her direction in relation to the second element of the offence in count 1 to the words "connected with", but directed the jury in terms of the whole collocation relevant to the respondent, namely the words "connected with assistance in an action or threat of action", reflecting the particulars in par 1.2 of the indictment, to which reference has already been made.

91 Fourthly, the trial judge explained to the jury that her reference to "an action or threat of action" was a reference to an action or threat of action of "the kind specified in the charge".

92 Fifthly, the trial judge told the members of the jury that if they were satisfied beyond reasonable doubt that any part of the e-book was "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."

93 In respect of the jury's tasks, including the task of deciding whether the prosecution had proved the second element of the offence in count 1, the trial judge's direction was adequate. Moreover, no error has been demonstrated in the trial judge's refusal to direct the jury in the terms sought by the respondent.

Conclusions

94 The appeal must be upheld because the evidential burden in respect of the exception from liability in s 101.5(5) of the Code was not discharged. The notice of contention must be dismissed because the trial judge's direction, of which the respondent complained, was adequate and no error was shown in the trial judge's refusal to direct as suggested by the respondent.

Orders

95 The following orders should be made:

1. Appeal allowed.

2. Set aside the orders of the Court of Criminal Appeal made on 9 June 2011 and in place thereof dismiss the appeal against conviction on count 1 of the indictment.

3. Remit the matter to the Court of Criminal Appeal for consideration and determination of the appeal against sentence in respect of the conviction on count 1 of the indictment.

96 As indicated earlier in these reasons, the Commonwealth Director of Public Prosecutions, who prosecutes the appeal on behalf of the Queen, has agreed to pay the costs of the respondent of the proceeding in this Court. No order, in addition to that agreement, is required.

97 HEYDON J. This appeal raises two issues concerning the *Criminal Code* (Cth) ("the Code").

Evidential burden

98 The facts giving rise to the first issue are as follows. The respondent intentionally made a document by preparing an electronic book. That conduct fell within s 101.5(1)(a) of the Code[88]. The book was entitled "Provisions on the Rules of Jihad". It was sub-titled "Short Judicial Rulings and Organizational Instructions for Fighters and Mujahideen Against Infidels". It advocated the widespread use of assassination. It described numerous methods of carrying out assassinations. The respondent downloaded the material for the book from the internet, reordered it into chapters, edited parts of it, renumbered the footnotes, inserted a dedication and provided a foreword. He published the book on a website connected to al-Qaeda. The website contained other publications written by leaders of known terrorist groups.

99 The first issue is whether the making of the book "was not intended to facilitate … assistance in a terrorist act" within the meaning of s 101.5(5) of the Code. Section 101.5(5) is an "exception" to the offence charged. It therefore placed an evidential burden on the respondent within the meaning of s 13.3(3) of the Code. By reason of s 13.3(6) of the Code, that was a "burden of adducing or pointing to evidence that suggests a reasonable possibility" that the respondent did not intend to facilitate assistance in a terrorist act[89]. The trial judge held that the respondent had failed to discharge that evidential burden. Hence her Honour declined to direct the jury that the prosecution bore a legal burden of proving beyond reasonable doubt that the respondent intended to facilitate assistance in a terrorist act.

100 A standard method of establishing a person's intention, or of suggesting a reasonable possibility about that intention, is testimony by that person[90]. But it is not the only method. For example, a person's intention can be inferred from that person's conduct[91]. Indeed, at common law, the placing of an evidential burden on an accused person does not require that accused to meet it by giving or calling evidence. The accused person can meet it by pointing to evidence called in the

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88 The material parts of s 101.5 are set out above at [48]-[50].

89 See above at [10].

90 *Gauci v Federal Commissioner of Taxation* (1975) 135 CLR 81 at 85-86; [1975] HCA 54.

91 *Vallance v The Queen* (1961) 108 CLR 56 at 82; [1961] HCA 42.

prosecution case. That evidence might be the testimony of prosecution witnesses in chief or in re-examination, the testimony of prosecution witnesses in cross-examination, or some other evidence[92]. Section 13.3(4) of the Code corresponds with the common law position[93]. The respondent did not give evidence. But he was entitled to attempt, as he did, to discharge the evidential burden by pointing to evidence that the prosecution had adduced.

101 The respondent's decision only to rely on evidence that the prosecution had adduced, however, led to a self-inflicted problem. The s 101.5(5) exception demands that an accused point to evidence of a negative. In relation to legal burdens of proof, Gulson said[94]:

> "Negative evidence … is always in some sort circumstantial or indirect, and the difficulty of proving the negative lies in discovering a fact or series of facts inconsistent with the fact which we are seeking to disprove, from which it may be possible to infer its absence with anything like an approach to certainty."

That observation does not hold for a negative fact like not possessing a particular intention. It does not hold because non-circumstantial and direct evidence could be called. Similarly, in discharging the evidential burden, the respondent was not confined to circumstantial or indirect evidence. But once the respondent chose not to give evidence, he was left only with circumstantial and indirect evidence to appeal to. That exposed him to a variant of the Gulson problem.

102 Did the respondent discharge the evidential burden? In answering that question, it is desirable to assume without deciding that two of the respondent's submissions to this Court are correct. One is that evidence which satisfies the s 13.3(3) evidential burden can be slender[95]. The second is that the evidence

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92 *Momcilovic v The Queen* (2011) 85 ALJR 957 at 1106 [665]; 280 ALR 221 at 405; [2011] HCA 34.

93 See above at [51].

94 *The Philosophy of Proof*, 2nd ed (1923) at 153.

95 In passing it may be noted that one authority on which the respondent relied for that proposition in relation to negative states of affairs related to instances where the party not bearing the evidential burden had peculiar means of knowledge: *Director of Public Prosecutions v Brauer* [1991] 2 Qd R 261 at 268. In this appeal, however, it was not the prosecution which had peculiar means of knowledge, but the respondent. Other authorities which quote or cite *Director of Public Prosecutions v Brauer* deal with legal burdens, not evidential burdens: *Jeffrey v*

(Footnote continues on next page)

relied on should be taken at its highest in favour of the respondent[96]. An aspect of this second assumption is that the test stated in relation to a different statutory enactment in *Braysich v The Queen*[97] applies to s 101.5(5). The second assumption would ordinarily require[98] that in this case significant matters be put to one side – the book's content, style and tone. The inferences to be drawn from those matters would have been extremely damaging to the respondent's case had the trial judge left the s 101.5(5) exception to the jury. But as they favour the prosecution, they would ordinarily not count against the respondent in deciding whether he had discharged his evidential burden.

103 The Chief Judge at Common Law reached a conclusion adverse to the respondent[99]. The respondent criticised that conclusion as "curtly expressed". The prosecution called it "pithily" expressed. It was certainly trenchantly expressed. It was also correct. So was the trial judge's conclusion.

104 One member of the majority was McCallum J. Her Honour said that the hypothesis which the respondent wished to advance to the jury was that the book was[100]:

> "not a terrorist manual, but rather a collection of works on the topic of jihad, published over many centuries, some controversial, others not, some by authors of great repute, and some in a form of Arabic which would not today be readily comprehensible to an ordinary Arabic speaker."

105 McCallum J accepted the respondent's submissions. Her Honour concluded[101]:

> "There was ample evidence from which a jury could conclude that the [respondent's] intention was to support his religion by preparing and

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DPP (Cth) (1995) 79 A Crim R 514 at 518; *Fowkes v Deputy Director of Public Prosecutions* [1997] 2 VR 506 at 512.

96 The respondent's submission rests on an analogy with the principles applicable to determining whether a proponent of an issue has established a case to answer.

97 (2011) 243 CLR 434 at 454 [36]; [2011] HCA 14.

98 See, eg, *Wentworth v Rogers* [1984] 2 NSWLR 422 at 429.

99 See above at [20].

100 *Khazaal v The Queen* [2011] NSWCCA 129 at [484].

101 *Khazaal v The Queen* [2011] NSWCCA 129 at [485].

> publishing a properly-sourced collection of writings including religious rulings and other pieces condoning, and indeed encouraging, the ritual of assassination. Was the unequivocal purpose of doing so to facilitate assistance in a terrorist act? I think there was a reasonable possibility suggested by the evidence that the book was not intended by the [respondent] for that particular purpose."

The respondent adopted that reasoning in this Court. He referred to the book's "scholarly" characteristics. He relied on its capacity to assist in "education". The respondent identified particular parts of the book as favourable to his case. And he submitted that other parts not favourable to his case ought be ignored.

106 The respondent thus sourced his arguments in the book itself. That made them dangerous. The arguments attempted to meet the prosecution's contention that the respondent had an intention to facilitate assistance in a terrorist act by contending that he had a different intention which could be inferred from the book on its face. The argument involved abandoning the "second assumption" described above[102] that the defence evidence be taken at its highest and aspects of the evidence favourable to the appellant be ignored. The respondent's argument that an intention can be inferred from the book's contents that is different from an intention to facilitate assistance in a terrorist act is to call attention to the entirety of the book's contents. It is to require the Court to examine the book as a whole. The book was not divisible into two parts, one consisting of favourable points to be relied on, the other consisting of unfavourable points to be ignored. The parts which were superficially favourable did not in fact support the respondent, because the book conveyed a single integrated message. It identified numerous people as meriting assassination. It identified many methods of assassination. And it endorsed their execution. The book promoted aims and techniques characteristic of terrorism. Once its contents are examined as a whole, it contains no material suggesting a reasonable possibility that a person who assembled and disseminated the book, as the respondent did, assembled it with some intention other than an intention to facilitate assistance in a terrorist act.

107 The respondent's argument that there was a reasonable possibility that he had an intention to promote scholarship and education must fail. It must fail because the type of "education" and "scholarship" that the book promotes does not indicate a reasonable possibility that making the book was not intended to facilitate assistance in a terrorist act involving assassination. For example, as counsel for the respondent conceded in oral argument, the type of "education" and "scholarship" on jihad that the book supplied was instruction on who should be assassinated and how. Similarly, an intention to support a religion which, in

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102 See above at [102].

the respondent's perception, encourages assassination does not indicate a reasonable possibility that making the book was not intended to facilitate assistance in a terrorist act involving assassination. A reasonable possibility of that type cannot exist where it is a tenet of the religion, in the respondent's perception, that terrorist acts be committed.

108 In short, the tactics of the respondent legitimated the prosecution's extensive reliance on the book's contents. That reliance collided with the "second assumption". It destroyed the advantages which the second assumption gave the respondent. The manner in which the respondent used some parts of the book's contents to attempt to show that the evidential burden was discharged disabled him from claiming the advantages of the "second assumption".

109 Hall J, the other member of the majority in the Court of Criminal Appeal, accepted a different argument of the respondent designed to show that he had met his evidential burden. The respondent relied on evidence which he claimed established the following matters. He was "a career journalist, a researcher and a publisher." He "had acquired and built up a library which was used as his research facility." He "had a strong interest in the Islamic religion." And he "had written and published articles on a range of issues, in particular, on benign Islamic issues."[103] In this Court, the respondent submitted that Hall J had correctly concluded that it could not be said that this evidence "was incapable [sic] of suggesting, as a reasonable possibility, that the [respondent] acted as a professional journalist with an intention that was not one to facilitate assistance in a terrorist act"[104].

110 The evidence relied on suggests a reasonable possibility that the respondent lived a useful and blameless professional life in general. But the evidence relied on was entirely neutral about whether the respondent acted, in this particular instance, with an intention other than facilitating assistance in a terrorist act.

111 The respondent submitted that the evidence of his past pursuit of lawful activities was not merely neutral, but favourable. That, he submitted, was because his past conduct as a journalist was relevant to the conduct charged. That is a difficult submission for a court to assess. It would need to be taken in detail to the respondent's past practices as a journalist with a view to comparing those practices to his conduct on the occasion charged. The argument assumes that the respondent was carrying out conduct as a journalist by publishing the book. His reliance on the book's contents does not reveal any reasonable possibility that he was publishing the book in his capacity as a journalist. Even if

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103 *Khazaal v The Queen* [2011] NSWCCA 129 at [439].

104 *Khazaal v The Queen* [2011] NSWCCA 129 at [441].

the contents are put to one side, the following circumstances negate the respondent's thesis that the publication was born of a journalistic intention. The respondent's case rests on the assumption that he published various articles in a magazine, *The Call of Islam*, which did not contain extremist material. He published them in his own name. The book, in contrast, was published on an overseas website that, whatever other information it made available, contained extremist material. The respondent conceded this much at trial. And the book was published using a pseudonym. The habitual behavior of the respondent as a journalist suggests that he was not acting as a journalist on the occasion charged. It does not suggest a reasonable possibility that making the book was not intended to facilitate assistance in a terrorist act.

112 Before the trial judge, the respondent also additionally relied on the "circumstances under which he made the book (at short notice, at the behest of 'the brothers')". But these circumstances do not point one way or the other as to the respondent's true intention. They do not suggest a reasonable possibility that he lacked the intention of facilitating assistance in a terrorist act.

113 The respondent alleged that the prosecution's argument in this Court was that "the evidential burden can only be satisfied in circumstances where the accused adduces evidence of a purpose and in doing so *necessarily excludes* the proscribed purpose" (emphasis in original). The submission continued:

> "The ultimate effect of this proposition is to impose upon the trial judge a duty which traditionally falls within the province of the jury. The absence of a particular purpose is almost invariably a matter proved circumstantially. Such proof would ordinarily consist of pointing to the existence of a purpose other than the proscribed purpose. In practical terms it will generally be impossible for an accused person to prove conclusively a negative …. The reason is plain: a person may hold two concurrent intentions, and these concurrent intentions might well motivate different purposes. It is properly a matter of inference for the jury to determine which purposes existed or, indeed, whether both existed. The course advocated by the [prosecution] requires the trial judge to engage in a searching analysis of the evidence. That is, however, not the role of the trial judge but rather that of the jury …. Accordingly, in order to discharge the burden, it was incumbent upon the respondent to point to evidence of another purpose. He did so. To impose an additional burden upon him, requiring him to negate the other, proscribed purpose, would present … an insurmountable difficulty for an accused person who seeks to avail himself of the affirmative defence."

114 This submission should be rejected. The prosecution was not requiring the respondent to negate the proscribed purpose, only to point to evidence that there was a non-proscribed purpose. The respondent contended that the evidence he pointed to raised a reasonable possibility that there was a non-proscribed

purpose. So far as that evidence lay outside the book, it was neutral or immaterial. So far as it came from the book, it was nullified by the balance of the book.

"Connected with"

115 The second issue in this appeal is whether the trial judge was required to give specific directions on the meaning of the words "connected with" in s 101.5(1)(b) of the Code. That paragraph creates an ingredient of the s 101.5(1) offence – that the document published be "connected with … assistance in a terrorist act".

116 The respondent submitted to the trial judge that her Honour should distinguish between the type of connection to be found in direct assistance, on the one hand, and a "mere remote connection", on the other. But s 105.5(1)(b) does not use the word "directly". The terms of the provision do not support the view that "connection" implies "direct assistance" only. And the trial judge's direction to the jury did not suggest that a "mere remote connection" would suffice.

117 The respondent submitted to the Court of Criminal Appeal that the trial judge should have told the jury that more than a remote and tenuous connection was needed. But the trial judge's direction did not suggest that a remote and tenuous connection would do.

118 In this Court, the respondent argued that the directions the Court of Appeal of the Supreme Court of Victoria stipulated in *Benbrika v The Queen*[105] should have been given. The Court of Criminal Appeal drew the parties' attention to that case after oral argument in that Court had concluded. *Benbrika v The Queen*[106] is a decision on a different provision of the Code. The circumstances to which that provision, s 101.4(1), is directed concern possession of "a thing … connected with preparation for … a terrorist act". Issues which those words might raise in that context do not necessarily arise in relation to s 105.5(1)(b). They certainly do not arise in relation to the application of s 105.5(1)(b) to the present circumstances.

119 These shifts in position raise considerable doubts about the validity of the respondent's stance. Whatever may be necessary in other cases involving different factual circumstances, it was not necessary for the trial judge to give any directions additional to those which her Honour gave.

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105 (2010) 29 VR 593 at 660 [315].

106 (2010) 29 VR 593.

Orders

120 The appeal should be allowed and the orders proposed in the joint judgment should be made.