

THE WAR ON WITCHES

by Christopher Michaelsen*

In June 2004, tabloid front pages and news reports were filled with fury at the Australian judiciary's treatment of two alleged terrorists. What had happened? First, Jack Roche was sentenced to nine years jail by a Perth court after having pleaded guilty midway through his trial on a charge of conspiring to damage the Israeli embassy in Canberra with explosives, and as a consequence harm diplomatic staff. A couple of days later, Bilal Khazal from Lakemba in Sydney's south-west was bailed in Central Local Court after being charged with one count of "collecting or making documents likely to facilitate terrorist acts". The fact that Khazal used to work as a Qantas baggage handler at Sydney Airport added to the media excitement.

Both Courts' decisions were followed by nationwide public outrage. Commentators rushed to condemn the rulings as 'astounding' and 'too soft'. In a poll on Channel Nine's website <http://ninemsn.com.au> over two thirds of voters thought the Roche sentence too lenient. Politicians and police officials quickly joined in the chorus of critics and put forward their own personal suggestions on how the courts – purposely independent of government - should deal with the "terrorists".

According to federal Liberal MP Peter Dutton, for instance, the judiciary should have "put in place proper deterrents for terrorists". Similarly, the NSW Shadow Minister for Police, Peter Debnam, insisted that judges need to "get in step with community expectations and also what Parliament expects". Some of these community expectations were more drastic than others. For John Harrison, who lost his daughter in the Bali bombings, even the 25-year maximum sentence for Roche requested by prosecutor Ron Davis QC would have been too light. Although Roche was not charged for any involvement in the Bali atrocities, Harrison's demand was blunt and simple: "Hang the bastard!"

There is no doubt that both Roche and Khazal were engaged in dubious activities and have been attracting trouble as well as the attention of ASIO for quite some time. Both men have committed offences under criminal law. But are they those dangerous and violent "terrorists" whose presence constitutes a serious threat to Australia's national security and the community at large? Are they the kind of evil criminals that, in the view of many commentators, deserve "special treatment"? Let's get the facts straight.

In 2000 Jack Roche, a British-born Muslim convert, plotted to blow up the Israeli embassy in Canberra, a serious offence indeed. Nevertheless, he soon abandoned these plans and repeatedly tried to contact ASIO to provide information about his trip to Afghanistan and Osama bin Laden. The intelligence agency did not bother to respond. In

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the aftermath of the Bali bombings, however, Roche's Perth home was raided and he was arrested in November 2002. Subsequently, he actively cooperated with ASIO and the AFP. As Justice Healy noted, the information provided by him was instrumental in proving the prosecution's case. Furthermore, his information appears to have contributed to the arrests of alleged Bali mastermind Hambali and senior al-Qaeda operative Khalid Sheikh Mohammed (Mukthar). Because Roche does not have a previous criminal record, he is eligible for parole after half of his nine-year sentence. According to Justice Healy, Western Australia's most experienced judge, his chances of re-offending are virtually non-existent.

Bilal Khazal, has been known to ASIO for his extremist and Islamic fundamentalist views since 1994. In the last ten years Khazal has been interviewed by intelligence officers over a dozen times. Following 9/11 ASIO intensified his surveillance. Last Thursday he was arrested for compiling a pamphlet entitled "Provisions in the Rules of Jihad". The document was posted on the internet last year and espoused radical views on severe violent action against so-called "infidels". It is beyond question that public promotion of violence is totally inexcusable. Such conduct is rightly criminalised under federal law. But it is not as if Khazal was about to blow up the Sydney Harbour Bridge or trying to flee the country (in fact his passport was withdrawn two years ago). As a consequence Magistrate Les Brennan held that while the prosecution's case appeared strong, it had failed to convince him to overturn the current presumption for bail. Interestingly, the Crown did not oppose.

This prompted the NSW Parliament to immediately pass tougher bail laws for terrorism-related offences. The new state laws will reverse the presumption in favour of bail for all charges under the new federal terrorism laws. Meanwhile in Canberra, the Attorney-General yet again announced further changes to the federal terrorism legislation. The proposed laws will set a non-parole period for persons convicted of "terrorist" offences. One wonders why none of these proposals were included in the original terrorism legislation if they are indispensable in order to protect the public. Indeed, it seems that the amendments were rather motivated by politicians wanting to appear resolute and virtuous than by legal principle.

What the latest changes to state and federal law have in common is that they follow a trend to regard every terrorism-related offence as a so-called "crimen exceptum", an exceptional crime that needs to be treated differently from all other offences. While the notion of "crimen exceptum" is unknown to any modern Western legal system, it featured prominently in 15th century Europe to prosecute the crime of witchcraft. As "exceptional offenders" people accused of witchcraft were not subjected to regular legal procedures. The rules of evidence, for instance, were set aside and torture was justified or indeed deemed desirable. A comparable process existed in medieval England and became known as outlawry. Persons designated as outlaws were placed outside the regular protection of the law with their lands and goods forfeited to the crown. Although outlaws were personally liable upon all causes of action, they did not enjoy any civil rights and could not sue in a court of law.

In contemporary Australia persons suspected of or charged with terrorism-related offences obviously have not lost their regular judicial rights and guarantees yet. However, in the light of recent legislative amendments and current political rhetoric it seems that alleged “terrorists” are the witches and outlaws of today. This is a deeply worrisome development which might ultimately pose a greater threat to “our way of life” than international terrorism itself. It is thus especially refreshing and reassuring that the judiciary has not yet been affected by the collective terror paranoia that is currently sweeping the nation.

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