# *Faheem Khalid Lodhi v Regina [2007] NSWCCA 360*

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## Introduction

Faheem Khalid Lodhi was charged with four discrete terrorism-related offences under three sections of the Commonwealth *Criminal Code*[1] ('the *Code*'): s 101.4, s 101.5 and s 101.6, all of which relate to the procurement and possession of articles in preparation for a 'terrorist act'. Born into a 'well-established family'[2] in the Punjab region of Pakistan, Mr Lodhi graduated from Lahore University with a degree in architecture. In 1998, he emigrated to Australia and enrolled at the University of Sydney, completing additional subjects that allowed him to graduate with a Bachelor of Architecture from that institution in 2000. At the time of his arrest in April 2004, he was in his mid-thirties and working at an architecture firm in Alexandria, Sydney.

After a lengthy trial that was characterised by high security, substantial *in camera* argument, closed court proceedings, and procedural adjournments, the jury deliberated for a period of several days, and eventually found the defendant guilty of three of the four charges. Whealy J, at first instance, sentenced Lodhi to a term of 20 years imprisonment with a non-parole period of 15 years. The Court of Appeal upheld the convictions and the sentence. This case note will consider the legislative framework for the charges, the nature of the offences, and some of the arguments put forward at Lodhi's appeal. The case exposes a number of disquieting legal developments in the field of anti-terror law in Australia, particularly in relation to the presentation of evidence, identification procedures, and the rapid rise of a class of crimes related to 'preparation' for a terrorist act.

## 1. Terror-Related Offences Under the *Code*

Appropriate consideration must be given to the statutory framework underlying the charges against Mr Lodhi. Under s 100.1(b)-(c) of the *Code*, a 'terrorist act' is any action, or threat of action, that is done with the intention of 'advancing a political, religious or ideological cause', in conjunction with the intention of either 'intimidating the public' or 'coercing, or influencing by intimidation' a state, territory, the Commonwealth Government, or the government of a foreign country.

For the purposes of the section, an act must cause death or serious harm to a person, endanger lives, create a serious risk to the health or safety of the public, cause serious

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1 *Criminal Code Act 1995* (Cth), Schedule ('the *Code*').

2 *R v Lodhi* (2006) 199 FLR 364 at 374 (Whealy J) ('*R v Lodhi*').

damage to property, or disrupt electronic systems of information, financial systems, telecommunications, or other essential government services. Certain activities are specifically excluded from s 100, including 'advocacy, protest, dissent or industrial action', provided they are undertaken without an intention to cause death or a risk to the health and safety of the public. Yet as George Williams and Andrew Lynch point out, there are numerous scenarios, which might not ordinarily be associated with terrorism, that ostensibly fall within the scope of a terrorist act under the *Code*.[3]

Section 101 covers offences by individuals in relation to a terrorist act. In addition to the primary offence of engaging in a terrorist act under s 101.1, a number of ancillary offences are contemplated within the section for an act 'that is connected with preparation for, the engagement of a person in, or assistance in a terrorist act'. They include s 101.2, which pertains to an individual who 'provides or receives training' in relation to terrorist acts; s 101.4, which targets an individual who 'possesses a thing' connected with preparation for or assistance in a terrorist act; and s 101.5, which applies to an individual who 'collects or makes a document' likely to facilitate terrorist acts. Offences under each of these sections are punishable by up to 15 years imprisonment. Section 101.6, of somewhat broader scope and attracting a maximum sentence of life imprisonment, makes it an offence to intentionally undertake 'any act in preparation for, or planning, a terrorist act'.

Attempts to undertake any of the above are criminalised under s 11.1 of the *Code*. The offences may be committed regardless of whether an attack actually occurs or whether the action is connected with a *specific* terrorist act. On the issue of specificity, it should be noted that around Christmas 2005, Parliament enacted the *Anti-Terrorism Act 2004* (Cth) (*'ATA'*), which, *inter alia,* repealed ss 101.4(3), 101.5(3) and 101.6(2) of the *Code*, replacing the words 'A person commits an offence … even if *the* terrorist act does not occur' with 'A person commits an offence … even if *a* terrorist act does not occur' (emphasis added). The *Anti-Terrorism Act (No 2) 2005* (Cth) (*'ATA (No 2)'*) rendered this change retrospective as of 16 February 2006, by which time Lodhi's trial had commenced.

## 2. The Charges Against Faheem Lodhi

On the first charge of the indictment, under s 101.5 of the *Code*, the prosecution alleged that, on or about 3 October 2003, Lodhi procured a desk map and a wall map of the Australian electricity supply system in connection with preparations to bomb a part of that system. The prosecution presented evidence that in ordering the maps from a Sydney supply company, Lodhi had supplied a false name, 'M Rasul', as well as a bogus post office box address, telephone number and company name, 'Rasul Electrical', of which he had held himself out to be a 'partner'. While Lodhi accepted that it was he who had ordered the desk maps, he submitted that he had procured them for an electrical business he had planned to establish, the name of which was to include 'Rasul'.

3 George Williams & Andrew Lynch, *What Price Security?: Taking Stock of Australia's Anti-Terror Laws* (2006) at 16.

The second charge, under s 101.6, alleged that a week after ordering the maps, in preparation for that same terrorist act, the defendant had sent a facsimile from his architecture firm to a Sydney chemical company. The document contained a request for a price quotation on a number of chemicals, and explained that the sender was planning to start a detergent business. In the facsimile presented into evidence, the defendant had included a false post office box address and the unregistered business name 'Eagle Flyers', signing off as 'Fahim' using an irregular signature.

On the third count, under s 101.5, Lodhi was charged with making a set of aerial photographs, on or around 24 October 2003, of a number of Australian Defence Force establishments, including Victoria Barracks, Holdsworthy Barracks and HMAS *Penguin*, with the intention of committing a terrorist act upon one or more of those sites.

On the fourth and final count, Lodhi was charged under s 101.4 with possessing a notebook which contained information on the manufacture of a number of poisonous substances, explosives, and other incendiary devices. The information, recipes and procedures in the notebook were written in Urdu in the defendant's handwriting.

At trial, Lodhi was found guilty on the first, second and fourth counts, but was acquitted on the third.

## 3. The Terms of the Indictment and its Retrospectivity

Prior to the commencement of the *Lodhi* trial in earnest, counsel for the defendant, Mr Phillip Boulten, SC, and Mr Peter Lange, appealed to the NSW Court of Criminal Appeal (NSWCCA) against a decision of Whealy J at first instance. Whealy J had ruled against the defendant regarding the validity of the retrospectivity provisions in the *ATA (No 2)*. The defence further submitted that the charges were duplicitous and that the indictment lacked particularity, primarily because the Crown had failed to identify a specific terrorist act.

With respect to submissions on the retrospective application of the *ATA (No 2)*, the defence argued that said provisions did not apply to Lodhi's trial because it had already commenced at the time the amendment had entered into force.[4] Spigelman CJ, with whom McClellan CJ at CL and Sully J agreed, held that the retrospective amendments should be read down given that the trial had already commenced. Accordingly, the applicant was successful on the grounds that the indictment in its original form lacked particularity, failing to address all of the elements of the charges under the *Code*. The matter was remitted to Whealy J, with fresh charges from the Director of Public Prosecutions stating the elements of the offences in accordance with the NSWCCA's ruling.[5]

Despite this, the Court apparently circumvented the retrospectivity issue on the grounds of duplicity. It was held that even under the original form of the provisions it was not necessary for the Crown, led by Richard Maidment, SC, to specify to any great extent the details of the terrorist act in any of the charges. As Spigelman CJ noted at page 318:

4 *Lodhi v The Queen* (2006) 199 FLR 303.

5 *Lodhi v The Queen* (2006) 199 FLR 303 at 320–24 (Spigelman CJ).

> 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.[6]

And later, at page 320:

> [T]he selection of a target is not necessary, indeed not usually determined at the time of the 'doing' or 'making' or the 'possessing'. That is the point of making preparatory acts offences … What has been made an offence includes conduct where an offender has not decided precisely what he or she intends to do.[7]

Clearly, the judgment of Spigelman CJ highlighted the willingness of New South Wales courts to view terrorism offences in a different light to other crimes, especially with regard to acts of preparation. It demonstrated a clear judicial intention to act in a preventive capacity; however, it is not clear how this view can be reconciled with the establishment of actual criminal intent on the part of the defendant.[8] Most worryingly, such a proactive approach may have the effect of criminalising otherwise lawful activity when the intentions of the accused may be ultimately impossible to carry out.

Following the jury's verdict, Lodhi again appealed, by leave of the court, against the refusal of Whealy J to quash the indictment for duplicity and lack of particularity. It was conceded that this application was brought primarily for the purpose of a potential High Court appeal.[9] Barr J declined to review that ground of appeal, citing the reasons given by Spigelman CJ in the initial appeal judgment, discussed above.

## 4. The Accused's Connection with Willie Brigitte

### *A. Evidence of Association*

Given the prosecution's need to prove that the defendant possessed the requisite intent to commit a terrorist act, the Crown submitted at trial that Lodhi had engaged in illicit dealings with convicted French terrorist Willie Brigitte prior to and during Brigitte's visit to Australia in 2003. Their association allegedly continued until Brigitte was deported in October of the same year. Evidence of these dealings included records of calls between a mobile telephone registered under the false name of 'Sam Praveen' (who, as Whealy J accepted, was in fact Lodhi) and one 'John Huck' (Brigitte).

Lodhi submitted that the evidence of association between the two men bore no relevance to the charge, since no evidence was offered to suggest that the two were co-conspirators in any criminal activity. Lodhi's counsel submitted a large collection of newspaper articles, reports and other media into evidence,[10] suggesting that 'the spectre

6 *Lodhi v The Queen* (2006) 199 FLR 303 at 318 (Spigelman CJ).

7 *Lodhi v The Queen* (2006) 199 FLR 303 at 320 (Spigelman CJ).

8 Lynch & Williams, above n3 at 18.

9 *Faheem Khalid Lodhi v Regina* [2007] NSWCCA 360 at [118]–[119] ('*Lodhi v R*').

10 *Lodhi v R* [2007] NSWCCA 360 at [143], [147]. Among the documents tendered by the defence was a document collating and summarising 1,571 published references to Willie Brigitte between 23 January 2003 and 14 January 2006.

of Brigitte was omnipresent throughout the trial',[11] that Brigitte was an extremely well-known figure, and that the jury's mind had been unfairly prejudiced by evidence of the connection between Brigitte and the defendant, in breach of s 137 of the *Evidence Act 1995* (Cth).[12] In response, the Crown submitted at first instance to Whealy J that appropriate directions could be given by the trial judge to avoid unnecessary weight being given to evidence concerning Brigitte.

His Honour agreed with this submission and provided such directions to the jury, instructing jurors to 'approach this task dispassionately' and to 'put [any recollection of publicity concerning Brigitte outside trial proceedings] out of your minds for the purposes of this trial'.[13] His Honour further held that while the public might have maintained 'general impressions' of the Brigitte media coverage, it had mostly been forgotten and Lodhi himself had not attracted anywhere near as much publicity as Brigitte.

Whealy J also ruled that all material relating to Brigitte was merely circumstantial evidence, which, 'if it were accepted, could rationally effect [sic] the assessment of the probability of the existence of the fault elements'.[14] The relevant ground of appeal, which asserted that 'his Honour had erred in refusing to exclude the entirety of evidence related to Willie Brigitte', was dealt with by Barr J in the NSWCCA. Barr J agreed with Whealy J at first instance and rejected the appeal. Barr J also held that evidence of a 'contemporary association' could be used as probative evidence 'to explain why the accused acted as he did'.[15]

It appears that Whealy J severely underestimated the attention span of the Australian public in relation to terror-related media coverage. Willie Brigitte's story and mugshot were widely broadcast in the Australian media for a protracted period. Whealy J's reasoning that the specific details of Brigitte's case had largely been 'forgotten' could equally be construed as having a prejudicial effect, since it is just as likely that a jury, possessing only hazy memories of the matter, might automatically equate the name with terrorism, violence and general illegality.

### B. *Identification Evidence*

At the time of the trial, Brigitte had not been convicted and was being held in a French prison. Accordingly, the Crown called a U.S. citizen, Yong Ki Kwon, who had been convicted in America for terrorism, treason-related and firearms offences, some of which carried terms of life imprisonment. Kwon had accepted a substantially reduced sentence in exchange for testimony and co-operation with the U.S. authorities, and at the time of the *Lodhi* trial was serving a three-year probationary period.[16] Kwon testified that

11 *Lodhi v* R [2007] NSWCCA 360 at [138].

12 *Evidence Act 1995* (Cth), s 137, states 'in a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant'.

13 *Lodhi v* R [2007] NSWCCA 360 at [145].

14 *Lodhi v* R [2007] NSWCCA 360 at [130].

15 *Lodhi v* R [2007] NSWCCA 360 at [129].

16 *Lodhi v* R [2007] NSWCCA 360 at [157].

he had undertaken terrorist training at the Lashkar-e-Taiba training camp in Pakistan, where he had met a man, undertaking similar training, who identified himself as 'Salahudin'. After being shown a photograph of Brigitte by FBI agents at his prison cell in Virginia, Kwon was interviewed by a visiting ASIO officer and shown the same photograph. He identified Brigitte as Salahudin. At Lodhi's trial, Kwon testified that he did not recall the details of the identification procedure.

The defendant submitted that the identification procedure was tainted. Whealy J, analysing the High Court's decision in *Alexander v The Queen*,[17] had rejected this challenge to Kwon's identification of Brigitte and held that the evidence possessed 'a high degree of probative value', especially in light of the relationship between Kwon and Salahudin. Whealy J further held that the issue of Kwon's credibility was one for the jury to decide.[18] Lodhi's appeal to the NSWCCA read as follows:

> [H]is Honour had erred in refusing to exclude evidence of the identification of Willie Brigitte and, as a consequence, the entirety of the evidence relating to Willie Brigitte.[19]

Barr J, agreeing with the reasoning of the trial judge, rejected this submission on appeal. It was Barr J's view that 'his Honour would have usurped the jury's function if he had assessed the credibility of Kwon'.[20]

As Lodhi's counsel have submitted in their application for special leave to appeal to the High Court, filed in early 2008, the core issue with the Brigitte evidence is whether any of it is probative of a fact in issue with respect to the offences laid out in s 101 of the *Code*.[21] A large proportion of trial time in *Lodhi* was devoted to evidence related to the accused's association with Brigitte, despite the fact that the Crown never adduced evidence to suggest that Brigitte and the accused were co-conspirators in the crimes with which Lodhi was charged. Further, no evidence was ever put forward to suggest that Brigitte incited or encouraged Lodhi to commit the terrorist acts of which he was eventually convicted.

### C. *Subsequent Evidence from Yong Ki Kwon*

At an entirely separate trial for a different defendant, Hasan, which occurred in early 2007 following the verdict in *Lodhi*, Yong Ki Kwon gave conflicting evidence suggesting that the FBI agents had briefed Kwon on Salahudin's real name and the importance of the proceedings *prior* to Kwon's interview with the ASIO officer.[22] Mr Lodhi's counsel therefore appealed on a fifth ground, arguing:

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17 *Alexander v The Queen* (1981) 145 CLR 395 at 400. Whealy J's analysis of *Alexander* stated that the rules of identification evidence related only to Brigitte in his capacity as a third party, not as an accused. See discussion in *Lodhi v R* [2007] NSWCCA 360 at [163].

18 *Lodhi v R* [2007] NSWCCA 360 at [178].

19 *Lodhi v R* [2007] NSWCCA 360 at [122].

20 *Lodhi v R* [2007] NSWCCA 360 at [176].

21 Applicant's Summary of Argument, filed February 2008 in the High Court of Australia, Sydney Registry.

22 See *Lodhi v R* [2007] NSWCCA 360 at [188].

> a miscarriage of justice resulted from the absence at trial of fresh evidence concerning the identification of Brigitte.[23]

In rejecting this ground, Barr J held that the only thing lost was the opportunity to cross-examine Kwon as to his credibility in identifying Brigitte, something which did not ultimately result in a miscarriage of justice. However, Kwon's evidence was the vital link between Brigitte and the accused, especially in light of the requirement of intent to commit a terrorist act under s 101 of the *Code*. Cross-examination on the fresh evidence during the trial itself most likely would have rendered Kwon's testimony incredible, thereby breaking that link. Indeed, in the similar circumstances surrounding *Mickelberg v The Queen*, Toohey and Gaudron JJ held that there would have been a 'practical difference' and 'a significant possibility that the jury, acting reasonably, would have acquitted [the defendant]'.[24]

From the three grounds of appeal highlighted above, a broader issue emerges. The judges themselves have argued that terrorism cases are of a 'particular nature', fundamentally different to ordinary criminal trials.[25] One of these differences is surely that terrorism is an issue of global concern, which is being legislated and prosecuted in numerous jurisdictions. Thus, a conflict will inevitably arise between the justice systems of different nations because, despite seeking to multilaterally combat the problem,[26] each nation must respond to its own distinct political demands, cultural norms and judicial practices in securing a conviction. As Mr Boulten, SC, pointed out in his submissions, there was a clear motivation for Kwon to respond favourably to the American authorities in order to reduce his sentence. Any incentive or coercion that may have led to Kwon's compliance was certainly beyond the control of any Australian court. The reasoning of Whealy J and Barr J on the issue of witness credibility in identification procedures, although correct as a matter of Australian law, fails to acknowledge international political factors that may incite or permit witnesses from overseas to lie in Australian courts.

## 5. The *National Security Information Act*

The trial was carried out in conditions of extremely high security. All persons entering the courtroom, including Mr Lodhi's defence counsel, were required to pass through a metal detector and had the contents of their bags and belongings x-rayed. Lodhi bears the prisoner classification 'AA', the highest security classification available to a prisoner in New South Wales. He maintained this status throughout the trial. Under this classification, Lodhi is segregated from the general prison population and kept in conditions akin to solitary confinement. During the trial, he was transported by helicopter from Lithgow jail to proceedings in Sydney. He had contact with only one other prisoner throughout the trial, an association that ended after a short period. Conversations with his lawyers and other prisoners were recorded.

23 *Lodhi v R* [2007] NSWCCA 360 at [187].

24 *Mickelberg v The Queen* (1988) 167 CLR 259 at 302 (Toohey and Gaudron JJ).

25 *Lodhi v The Queen* (2006) 199 FLR 306 at 318 (Spigelman CJ).

26 See generally UNSC Resolution 1373 (2001).

Not surprisingly, in conjunction with the generally heightened security atmosphere of terrorism trials, certain restrictions have been placed on the presentation of evidence at trial that poses a risk to national security. A substantial amount of evidence was heard *in camera*, with some witnesses concealed from the defendant and providing testimony under pseudonyms.

Under s 26(1) of the *National Security Information Act* ('*NSIA*'),[27] where either the prosecutor or the defendant knows or believes that he, she or another person (such as a witness) will prejudice national security in a proceeding, either through the information they provide or even by their presence, the Attorney-General must be notified. Failure to do so carries a penalty of two years imprisonment. Following notification the court must adjourn, pending the Attorney-General's review of the evidence or person in question. If the information is deemed prejudicial, the Attorney-General may issue a certificate directing that the information should not be disclosed. Alternatively, the Attorney-General may provide a redacted version of the subject document with the prejudicial information deleted, or provide a summary of the document that was to be disclosed. In the case of a witness or other person, the Attorney-General has the discretion to issue a certificate barring the appearance of that person in court. A certificate is conclusive evidence that prejudice to national security exists.[28]

Following issuance of a certificate, the court must hold a closed hearing to determine whether the information should be disclosed.[29] At the trial, hearings of this nature excluded the general public, journalists, and occasionally, as in the case of this author, legal representatives of the accused who had not been issued security clearance. In the hearings, the court must decide whether or not the evidence to be adduced may be disclosed, or, in the case of a witness, whether that witness may be heard. In making that decision, three factors must be considered:

(i) whether, having regard to the certificate, there would be a risk of prejudice to national security if the information were disclosed or if the witness provided testimony;

(ii) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence; and

(iii) any other matter the court considers relevant.[30]

The Act states explicitly in s 31(8) that the 'greatest weight' must be given to the Attorney-General's certificate.[31]

Mr Lodhi's submission to the NSWCCA challenged the constitutionality of s 31(8). He submitted that the superlative 'greatest' constituted an 'impermissible usurpation of judicial power'[32] in violation of Chapter III of the *Constitution* because, in practical terms,

27 *National Security Information Act (Criminal and Civil Proceedings) Act 2004* (Cth) ('*NSIA*'),

28 *National Security Information Act (Criminal and Civil Proceedings) 2004*, s 27.

29 *National Security Information (Criminal and Civil Proceedings) Act 2004*, ss 31(1)–(6).

30 *National Security Information (Criminal and Civil Proceedings) Act 2004*, s 7.

31 *National Security Information (Criminal and Civil Proceedings) Act 2004*, s 8.

the certificate would ultimately determine whether the disclosure of allegedly sensitive evidence could be made.[33] As Mr Boulten, SC, argued, judges would find themselves bound to adhere to the certificate in all but the most fanciful of claims of threats to national security. In response, the Crown echoed the reasoning of Whealy J at first instance that the use of the term 'greatest' was purely grammatical, reflecting a balancing test between the three factors outlined above, the third consideration of 'any other matter' being a catch-all clause. By way of example, Mr Burmester, QC, for the prosecution suggested that where there is a low risk to national security, placing 'greatest weight' on the certificate would not prevent disclosure. He also argued that the object of the *NSIA* was only to protect national security to a limited extent, and that the Court had the right to stay proceedings under s 19 to prevent abuses of process. On appeal, Spigelman CJ expressed some doubt that staying proceedings for every minor infringement offered a practical solution; however, the NSWCCA did not rule any further on this observation.

The Court accepted the remaining submissions of Mr Burmester, QC. While acknowledging the 'difficult task' of 'balancing incommensurable interests',[34] Spigelman CJ, on the issue of the word 'greatest', went so far as to say that 'even if the superlative was given a substantive, rather than a grammatical application, the subsection would still be valid'.[35]

His Honour analyzed the High Court's approach in *Nicholas v The Queen*.[36] In drawing the comparison, Spigelman CJ cited the opinions of Gummow and Hayne JJ in determining that it was appropriate to:

> 'put to one side' the public and private interest in obtaining all potentially relevant information, 'in favour' of the public interest in national security.[37]

It is true that the reasoning of Spigelman CJ in *Lodhi* paralleled the reasoning of the majority in *Nicholas*. However, *Nicholas* applied only to police conduct in apprehending narcotics offenders, and only to *prevent the exclusion* of evidence relevant to a police officer's criminal act or preparation for a crime in the course of controlled operations. The practical effect of the *NSIA*, in legislating in favour of a concept as broad (and vague) as 'national security',[38] means that the restrictions on judicial power reverberate with far more serious implications, going so far as to limit the ability of lawyers to communicate openly with their clients about the case against them. Unlike in *Nicholas*, the *NSIA* restricts the admission of otherwise relevant evidence about any number of

32 *Lodhi v* R [2007] NSWCCA 360 at [21].

33 See generally the *Commonwealth Constitution*, Chapter III.

34 *Lodhi v* R [2007] NSWCCA 360 at [31].

35 *Lodhi v* R [2007] NSWCCA 360 at [39].

36 (1998) 193 CLR 173 ('*Nicholas*'). In *Nicholas*, the High Court upheld the constitutional validity of legislation that rendered evidence obtained through entrapment as admissible. The court's discretion to exclude the evidence was limited by the legislation in question.

37 *Lodhi v* R [2007] NSWCCA 360 at [66].

38 Under s 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* 'national security' means 'Australia's defence, security, international relations or law enforcement interests'.

matters related to the broad concept of national security, which could ultimately prevent a jury from accessing the full facts of a case. Further, stays of proceedings for abuses of process are hardly an efficient means of checking the power of the *NSIA* in light of overstretched court resources and the need for an expedient trial process. There is serious potential for a miscarriage of justice as a result of incremental infringements upon a defendant's due process rights.

## 6. Sentencing

At sentencing, Whealy J referred to the dangers of populist but unconstructive media hysteria on issues of terrorism and stated that 'no matter how much we may deplore … a particular offender … we sacrifice our essential decency if we fail to treat him or her as a human being'.[39] He also had regard to the defendant's marked lack of sophistication in his preparation and the difficulty of actually putting his criminal intent into action. Regardless, his Honour held that 'a stand must be taken … [T]he principles of denunciation and deterrence are to play a substantial role'.[40] His Honour sentenced the defendant to 20 years on the count of seeking information on the availability of chemicals, to 10 years imprisonment on the count related to the defendant's collection of electricity supply system maps, and 10 years imprisonment for the count related to Lodhi's possession of the notebook containing information about poisons and explosives. The sentences were to be served concurrently. His Honour fixed a non-parole period of 15 years.

The NSWCCA agreed with Whealy J, adding that Lodhi's acts 'did not give rise to any imminent, let alone actual, threat of personal injury or damage to property'.[41] Yet the court held that '[i]t does not follow that as long as the preparatory acts relied upon to constitute the offences are in their infancy criminal culpability must necessarily be low. The main focus … must be the offender's conduct and the offender's intention at the time the crime was committed'.[42] In affirming Lodhi's sentence, the Court made it clear that crimes of preparation were viewed in a fundamentally different, and in fact more serious, light to crimes of attempt, a view that is intuitively difficult to comprehend, especially when considering the *actus reus* of an attempt.[43] Moreover, while the 'culpability' for a preparatory act may be high, it does not follow that its sentencing consequences should be commensurate with an act that in and of itself causes loss of life. While deterrence and incapacitation are certainly factors for courts to consider in sentencing offenders, it is vital that courts also take into account the offender's proximity to the damage to which the crime relates. As Lodhi's special leave application submits, it is difficult to assess proximity when no evidence is adduced to prove that it would have been the offender who actually committed the act of terrorism.[44]

39 *R v Lodhi* (2006) 199 FLR 364 at 380.

40 *R v Lodhi* (2006) 199 FLR 364 at 381.

41 *Lodhi v* R [2007] NSWCCA 360 at [83] (Spigelman CJ).

42 *Lodhi v* R [2007] NSWCCA 360 at [229] (Price J).

43 *Davey v Lee* [1968] 1 QB 366; *Robinson* [1915] 2 KB 342. An attempt must be unequivocal and must go beyond mere preparation.

## Conclusion

The *Lodhi* case presented an interesting challenge for the NSW Supreme Court and the NSWCCA. Under the burden of new, largely retroactive legislation that criminalises acts of preparation, affords the Crown unprecedented control over evidence and procedure, and expands powers of investigation and arrest, it is necessary to strike a balance between, on the one hand, the rights of the defendant to due process, a speedy trial and proportional sentencing procedures, and national security on the other. If Lodhi's special leave application is successful, the High Court will certainly be in a position to assess that balance in Australia. Finding a middle ground in this difficult process is certainly not aided by the intense media scrutiny and public abhorrence devoted to terror-related crimes. Nevertheless, the quashing of the convictions of five youths in the United Kingdom charged with offences related to preparation for a terrorist act suggests that courts elsewhere in the world may be offering more moderate views on some of the issues considered directly in *Lodhi*.[45] Although the spectre of religious and ideologically motivated terrorism commands headlines in the world media, the High Court should carefully consider whether, as a matter of law, terror-related offences need to be given such wide judicial berth. As Lynch and Williams postulate, it is impossible to completely eliminate the risk of a terrorist attack in Australia. Thus, abrogation of fundamental legal or human rights at the expense of a more stringent legislative scheme bears diminishing returns.[46]

44 Applicant's Summary of Argument, above n19 at [19].

45 See *R v Zafar* [2008] 2 WLR 1013 at [28]. In that case, the applicants were convicted of possessing items 'for a purpose in connection with' an act of terrorism. The Court of Appeal analyzed s 57 of the *Terrorism Act 2000* (UK), quashing the convictions of the applicants because, *inter alia*, 'the reality is that the phrase "for a purpose in connection with" is so imprecise as to give rise to uncertainty unless defined in a manner that constrains it'.

46 Williams and Lynch, above n3 at 86–91.