

Jihad Jack's Trial (by Media)

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Mr Jack Thomas, to whom the popular media have added the epithet 'Jihad', was freed by the Victorian Court of Appeal a week ago. Mr Thomas was the first person to be tried in Australia under the Federal Government's new anti-terror laws.

In the blaze of media coverage that followed the quashing of charges against him, some pretty wild, prejudicial and uninformed things were said not just about Mr Thomas but also about the law and the courts. I will to take a closer look at some of these. But it is instructive first to understand the reasons for the Court's decision.

Mr Thomas was charged with four terrorism related offences. At his initial trial the jury acquitted him of the two most serious charges, those which related to his alleged training for and participation in the planning of terrorism offences. He was convicted of the two lesser charges: one count of receiving funds from a terrorist organization and one of possessing a falsified Australian passport.

The evidence which founded his convictions was comprised entirely of confessions Mr Thomas had made in an interview with Australian Federal Police officers in Pakistan. He had been arrested when leaving Pakistan to fly back to Australia and was detained in custody there for five months. In that time he was held in solitary confinement, was not charged, not tried and was provided with no access to consular or legal advice.

Thomas's convictions were quashed because the Court of Appeal found that his admissions were made under duress. Under Australian common law, as it has stood for many decades, a confessional statement made out of court by an accused person is not admissible unless it is shown to have been made voluntarily.

The Court held that because Thomas had been subjected to intimidation, coercion and ill-treatment, it could not at all be said that his confessions had been freely made. Consequently the record of interview was inadmissible and, because it constituted the entirety of the prosecution evidence, the convictions had to be set aside.

The Court of Appeal summarized its conclusion as follows:

"Put bluntly, there can be little doubt that it was apparent to (Thomas), at the time of the AFP interview, as it would have been to any reasonable person so circumstanced, that, if he was to change his current situation of detention in Pakistan and reduce the risk of indeterminate detention there or in some unidentified location, co-operation was far more important than reliance on his rights under the law. Indeed, it is apparent that he believed – and we would add,

on objectively reasonable grounds – that insistence on his rights might well antagonize those in control of his life.”

For the sake of clarity and fairness, I should add here that there was no suggestion that the AFP officers had subjected Thomas to coercion or ill-treatment. This had occurred in a series of prior interviews by Pakistani and American officers, sometimes with ASIO officials present, that were designed to extract intelligence from him.

The ugly threats made there, however, were critical in persuading Thomas that he had no choice but to answer. These had included that he may be gaoled indefinitely at an unknown location, that agents would be sent to rape his wife, and that his testicles may be crushed.

Chris Merritt, The Australian’s legal editor, was the first into the fray with a box editorial on the front of the paper’s Saturday edition. Merritt, whom I normally respect, penned a ballistic response to the Court’s decision which he characterized as a victory for the enemy. ‘There might be all sorts of nice legal arguments in favour of the decision’, he opined, ‘but try explaining that to the victims of the bombings in Bali.’

As can readily be seen, the legal reasoning behind the decision is hardly ‘nice’. What the Court did was uphold a fundamental common law principle - admissions must not be procured by duress. Let this principle go and the next concession will be the admission of evidence procured by torture. (What the Bali bombings have to do with Thomas, a man acquitted of charges of engaging in terrorist plotting, in an entirely different region of the world, is anyone’s guess).

Merritt poured scorn on the Court, accusing it of being out of touch with reality. ‘Why could (the judges) not find a reason to protect society from this man’, he asked. But is he seriously arguing that we should just have the courts dream up rationales for continuing to incarcerate people charged under anti-terror legislation? In spite of the law? Surely not. Peter Costello got this absolutely right. ‘We live under a system’, he said in commenting on the Court’s decision, ‘in which people charged must have the case against them proven. And sometimes that’s difficult’.

Next came Mirko Bargaric, the controversial Head of Deakin University Law School. He is the one who favours the inclusion of torture as part of the interrogator’s kit bag. In an article headed ‘Jihad Jack should stay in jail’, Professor Bargaric acknowledged that the judges had got the law right, but then attacked the law.

He proposed that in circumstances where a confession is obtained under duress, but where it is nevertheless reliable, it should be admitted into evidence. So, the rule against admitting involuntary evidence should be abolished. The remedy for coercive interrogation should rest, instead, upon the penalization of the errant law enforcement officials involved.

This is a splendid non-sequitur because the rationale for the exclusion of evidence obtained under duress rests in large part upon the plain recognition that coerced confessions are inherently *unreliable*. And what better remedy is there for the

abuse of police power than that convictions that are pursued upon the foundation of that abuse should be quashed.

The Herald-Sun's acerbic columnist, Andrew Bolt, also weighed in to the debate in his opinion piece headed 'Jihad Jack's story.' Unfortunately, Bolt missed the point of the Court's judgment entirely. 'It came down to this', he said. 'Thomas did not have a lawyer with him when he made his crucial confessions'. That, however, was not the basis on which the Court made its decision. His record of interview was ruled inadmissible because Thomas had been threatened and intimidated to the extent that he could not be regarded as having exercised a free choice to co-operate.

Greg Sheridan in 'The Australian' fell into the same error. 'Thomas's conviction was quashed', he said, 'because in his interview with the AFP in Pakistan he did not have a lawyer present'. It would be helpful if columnists took a little time to read complex and considered Court judgments more carefully. (The Australian's Mike Steketee did, and wrote an informed and thoughtful piece as a result).

Sheridan went further, however. The Court's decision, he argued, indicated that our legal framework is inadequate in dealing with the terrorist threat. Consequently, he appeared to support AFP Commissioner Keelty's suggestion that we should establish some kind of special 'terrorism court'. This suggestion, and indeed every other similar sentiment expressed by the columnists mentioned here, rests upon a dangerous confusion.

It is one thing to say that tough laws should be enacted to prevent, deter and punish terrorist activity. That's fine. But it is quite another to propose that convictions in terrorist cases should then be obtained in trials in which longstanding and accepted principles of criminal law and procedure will not apply.

It is fundamental to the rule of law in this country, and in every other modern democracy, that all people are equal before the law and should be treated equally by it. The creation of special 'terrorist courts' would radically undermine that principle.

It is also fundamental that judges should apply the law impartially and independently. That is what the Court of Appeal did in the Thomas case. It refused to countenance a radical departure from our accepted understanding of the common law principles underpinning a fair trial. So did the US Supreme Court recently when it ruled the Bush administration's military commissions unconstitutional.

This has not been some blow to the fight against terror. It has been an immensely significant example of the rule of law at work.

Footnote:

The day after this article was written, Jack Thomas became the first person to whom a 'control order' under the, *Ant-Terrorism* legislation enacted last year, will be applied. The imposition of the control order was announced by the Attorney-General,

Phillip Ruddock, at a press conference, immediately after it was served on Mr Thomas at a country property where was holidaying with his parents and his children.

At his press conference, Mr Ruddock declared that the order was not imposed for the purposes of punishing Mr Thomas but rather to protect members of the public. It is perfectly clear that Mr Ruddock was responding, at least in part, to the adverse coverage of the Victorian Court of Appeal's decision to quash all charges against Mr Thomas as described in the piece above. Thus, if the court would not find against Mr Thomas, the Attorney-General would.

In this regard it needs, I think, to be remembered that the entire foundation of the Court of Appeal's decision related to the its concern to preserve a common law principle essential to the conduct of a fair trial. Mr Ruddock's endorsement of a control order, in contrast, propels Mr Thomas into a new arena in which the principles of fair trial hardly apply.

So, for example, the control order has been issued in secret, without Mr Thomas or his lawyers having had any opportunity to challenge it. Mr Thomas has been presented with a summary of the grounds on which the order has been made, but is not entitled to assess the evidence upon which that summary is based.

It is unclear whether, when a Federal Court hearing is convened to review the order, Mr Thomas or his legal representatives will be given access to such evidence, whether Mr Thomas will be permitted to remain in court, and whether the hearing will be conducted openly or in secret. In any case, the Court is required to find only that it is reasonably necessary to impose the order in order to prevent Mr Thomas engaging in some potential terrorist related activity, rather than this being demonstrated beyond reasonable doubt.

Of their nature, control orders seek to deprive their subjects of a measure of liberty not for any offence they have committed, but rather because they may commit such an offence at some indeterminate time in the future. The presumption of innocence is reversed.

These dubious provisions provide as clear an indication as any that the fundamentals of fair trial in this country may now be the subject of attack.

I note finally that the Court of Appeal in Britain recently dealt with control orders imposed on a number of terrorist suspects. In that case, the Court found that the control orders imposed constituted a form of indefinite detention without trial and therefore infringed upon the UK's Human Rights Act.

As New Matilda readers will know, we have no such Act in Australia. Nevertheless it is clear that the control order provisions will be subject to constitutional challenge here. Mr Thomas, a man who has had all charges against him either rejected by a jury or quashed upon appeal, is in for a new and protracted legal battle.

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