IN THE SUPREME COURT
OF NEW SOUTH WALES
CRIMINAL DIVISION

BELL J

Wednesday, 8 February 2006

2005/422 Regina v Izhar Ul-Haque

JUDGMENT

1 **BELL J**: The accused was committed for trial on 7 March 2005. On 1 April 2005 he was arraigned before Barr J on an indictment that charged him that, between the 12 January 2003 and the 2 February 2003, in Pakistan, he intentionally received training with respect to combat and the use of arms from a terrorist organisation, Lashkar-e-Taiba (LeT) knowing that LeT was a terrorist organisation. The offence is provided by s 102.5(1) of the **Criminal Code** (Cth) (as it stood in January 2003). The accused entered a plea of not guilty and the proceedings were stood over for trial to 21 November 2005.

2 By notice of motion filed on 4 August 2005 the accused claimed orders, including that the indictment be quashed on the ground that, taken at its highest, the evidence to be adduced by the Crown could not establish a prima facie case against him, or alternatively on the ground that the indictment charged an offence not known to law.

3 The accused's motion came on for hearing on 15 August. On that day he was given leave to amend the motion so as to claim, in the alternative to the relief claimed, an order that the indictment be permanently stayed because a prosecution on it would be an abuse of process. Evidence was tendered by consent comprising the transcripts of three interviews

between the accused and officers of the Australian Federal Police (AFP) and the transcript of two interviews with a person whom I shall refer to as Mr K. On the second day of the hearing Mr Barker QC, who with Mr Lange appeared on behalf of the accused, challenged the indictment upon a ground that involved the interpretation of the **Constitution**. The hearing of the motion was adjourned so that notices under s 78B of the **Judiciary Act 1903** could be served on the Attorneys-General of the States and the Commonwealth, in order that the accused's constitutional challenge could be entertained. The parties were agreed that the convenient course was to stand the motion over to 21 November 2005.

4 On 11 November the matter was re-listed on the joint application of the parties. On this occasion the Crown and the accused submitted that it was desirable that the accused's motion be determined prior to any trial. The Crown Prosecutor pointed to the lack of utility in preparing for a trial that may not proceed. In the circumstances I decided to vacate the trial date and to deal with the issues raised by the relief claimed in paragraph 1 of the accused's amended motion.

5 On 21 November 2005 the accused was given leave to further amend his motion. By his further amended motion he claims the following orders:

> 1(a) The indictment be quashed on the ground that, taken at its highest, the evidence to be adduced by the Crown cannot make a prima facie case against the appellant (sic);
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> (b) Demurring to the indictment on the ground that, having regard to the particulars of the offence alleged in the indictment, the respondent has failed to allege a "terrorist act" over which the Commonwealth has power to legislate, as required by section 100.2(1) **Criminal Code** as in force up to and including the amending Act No. 141 of 2002;
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> (c) In the alternative to the orders sought in paragraphs 1(a) and (b), an order that the prosecution be stayed as an abuse of process for the reasons set out in paragraphs 1(a) and (b).

6 Section 17(1) of the **Criminal Procedure Act 1986** (NSW) provides that an objection to an indictment for a formal defect apparent on its face must be taken, by demurrer or motion to quash the indictment, before the jury is sworn. Clause 10 of the **Criminal Procedure Regulation 2000** requires that any application for an order staying or quashing an indictment or any demurrer to an indictment must not be listed for hearing unless it has been filed in the prescribed time after a copy of the draft indictment was given to the accused person or the accused person's solicitor. The prescribed time for a person who is not in custody is three months. The court may extend the time pursuant to cl 10(2). The accused applied for and was granted an extension of time on 15 August 2005.

7 An accused may apply for the indictment to be quashed after he has been arraigned and entered his plea: **R v Rushton** [1967] VR 842. In **R v Mai** (1992) 26 NSWLR 371 Hunt CJ at CL said at 377:

> But a criminal trial is not conducted upon pleadings in the same way as a civil action is conducted. It is the indictment which must identify the nature of the offence and the manner in which it had been committed. Like an information, the indictment at common law must disclose an offence punishable by law, and it may be quashed if it does not, for it is the indictment which founds the jurisdiction of the court to which it is presented: cf John L Pty Ltd v Attorney-General for the State of New South Wales (1987) 163 CLR 508 at 519 it must identify the essential factual ingredients of the offence charged: Smith v Moody [1903] 1 KB 56 at 60, 61, 63; Johnson v Miller (1937) 59 CLR 467 at 486-487, 501; John L Pty Ltd v AG (NSW) (at 519-520); Saffron v The Queen (1988) 17 NSWLR 395 at 445.

8 A demurrer is a plea that admits for the purpose of its determination that all the statements in the count are true and maintains that admitting their truth they are not sufficient in law to make the accused guilty and, therefore, that he is not bound to answer them: **R v Boston** (1923) 33 CLR 386 per Isaacs and Rich J at 396. In the event the demurrer is decided against the accused person he or she is required to "answer over" to the charge: s 18 of the **Criminal Procedure Act**. No point was taken on

the hearing of the motion of the distinction between a demurrer and an application on motion to quash the indictment.

9 The law that applies to the offence is the law as at January 2003. Part 5.3 of the **Criminal Code** was inserted by the **Security Legislation Amendment (Terrorism) Act 2002** (the 2002 Act). The **Criminal Code** has been amended on more than one occasion since that time. The **Criminal Code Amendment (Terrorism) Act 2003** effected the repeal of Pt 5.3 (which deals with terrorism and which includes the offence with which the accused is charged) and substituted a new Pt 5.3. The relevant provisions of the amending Act came into force on 29 May 2003. It is not suggested that the provisions introduced by the amending Act have retrospective operation. Unless otherwise stated I will refer in these reasons to the provisions of the **Criminal Code** as they stood in January 2003.

10 Section 102.5(1) provided, relevantly, that a person commits an offence if:

> (a) the person intentionally receives training from, an organisation; and
>
> (b) the organisation is a terrorist organisation; and
>
> (c) the person knows the organisation is a terrorist organisation.

11 "Terrorist organisation" is defined in s 102.1(1) to mean:

> (a) An organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or
>
> (c) an organisation that is specified by the regulations for the purposes of this paragraph.

12 As at January 2003 LeT was not an organisation specified by the regulations for the purposes of s 102.1(1) of the **Criminal Code**. On 8

November 2003 by the **Criminal Code Amendment Regulations 2003 (No. 10)** LeT was specified as a terrorist organisation for the purposes of s102.1(1) of the **Criminal Code**. The regulation did not have retrospective effect.

13 At any trial of the accused on the present indictment it will be necessary for the Crown to prove that in January 2003 LeT was a terrorist organisation within the meaning of that expression as defined in s102.1(a): that LeT was an organisation that was directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of **a terrorist act** (whether or not the terrorist act occurs) (emphasis added).

14 "Organisation" is defined in s 100.1(1), for the purposes of the terrorism offences in Pt 5.3, to mean:

> (a) a body corporate; or
>
> (b) an unincorporated body;
>
> whether or not the body is based outside Australia, consists of persons who are not Australian citizens, or is part of a larger organisation.

15 "Terrorist act" is defined in s 100.1(1) for the purposes of the terrorism offences in Pt 5.3, to mean:

> an action or threat of action where:
>
> (a) the action falls within subsection (2) and does not fall within subsection (2A); 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 part of a State, Territory or foreign country; or

(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

(ba) causes a person's death; or

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

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

(e) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

(i) an information system; or

(ii) a telecommunications system; or

(iii) a financial system; or

(iv) a system used for the delivery of essential government services; or

(v) a system used for, or by, an essential public utility; or

(vi) a system used for, or by, a transport system.

(2A) 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.

(3) In this Division:

(a) a reference to any person of property is a reference to any person or property wherever situated, within or outside Australia; and

(b) a reference to the public includes a reference to the public of a country other than Australia.

16 At the commencement of the hearing of the motion Mr Barker submitted that the indictment was deficient in that it did not plead the terrorist act relied upon by the Crown in order to establish that LeT was a terrorist organisation. The Crown contended that there was no defect in the pleading of the offence (which was in the terms of the statute) but acknowledged that the accused was entitled to particulars of its case in this respect.

17 On 16 August 2005 the Crown provided the accused with the following particulars of the offence:

Between 12 January 2003 and 2 February 2003 Lashkar-e-Taiba was a terrorist organisation, in that it was directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, namely:

An action that:

(a) was to be done with the intention of advancing a political, religious or ideological cause, namely the restoration of control of Indian occupied Kashmir to Muslims;

(b) was to be done with the intention of coercing, or influencing by intimidation, the government of India or intimidating the public or a section of the public (including members of the Indian armed services), actually or potentially serving in the region of Indian occupied Kashmir;

(c) was intended to cause serious harm, that is physical harm, to a person or persons, namely members of the Indian armed forces serving in the region of Indian occupied Kashmir;

(d) was intended to endanger the life of such a person; or

(e) was intended to create serious risk to the health or safety of the public or a section of the public, namely members of the Indian armed forces serving in the region of Indian occupied Kashmir, or the health and safety of members of the public who may be put at risk as a result of actions against such members of the Indian armed forces.

The Constitutional challenge

18 Prior to the resumed hearing of the motion the accused gave notice that the cause involved the interpretation of the Constitution within the meaning of s 78B of the **Judiciary Act 1903** (Cth) Mr Bennett QC, the Solicitor-General for the Commonwealth, appeared on behalf of the Commonwealth as an intervenor pursuant to s 78A of the **Judiciary Act**.

19 The accused's Constitutional challenge is not to the validity of s 102.5 of the Criminal Code. In the notice given by the accused under s 78B the issue involving the interpretation of the **Constitution** was identified as:

> The accused shall argue that the "terrorist act" as set out in para 3 [a reference to the particulars set out at para 17 above] is not one in relation to which the Commonwealth Parliament has power to legislate (*cf*) s.100.2(1) **Criminal Code** (Cth).

20 In written submissions Mr Barker identified the issue in this way:

> The Crown has particularised the terrorist act in which, it says, LeT is engaged, as being the killing of Indian soldiers in Kashmir, that is, an act of a foreign organisation in a foreign country against citizens of a foreign country. The question for determination is whether, in theory, the Commonwealth has power to legislate against such activities. Put another way, can the Commonwealth exercise universal jurisdiction *in absentia?* (WS 21 November '05 at [6])

21 Section 100.2 of the **Criminal Code** provides:

> (1) This Part applies to a terrorist act constituted by an action, or threat of action, in relation to which the Parliament has power to legislate.
>
> (2) Without limiting the generality of subsection (1), this Part applies to a terrorist act constituted by an action, or threat of action, if:
>
> > ... (n) the action takes place, or if carried out would take place, outside Australia.

22 Section 102.9 applies s 15.4 of the **Criminal Code** to the offences in Div 102. The offences in Div 102 are the terrorist organisation offences and include the offence with which the accused is charged. Section 15.4 provides:

> If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:
>
> > (a) whether or not the conduct constituting the alleged offence occurs in Australia; and

(b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

23 Sections 100.1(3), 100.2(2)(n) and 102.9 are indicative of the intended extraterritorial nature of the offence provided by s 102.5(1).

24 In **Polyukhovich v The Commonwealth** (1990-1991) 172 CLR 501 the High Court considered the validity of s 9 of the **War Crimes Act 1945** (Cth) which provided that a person who on or after 1 September 1939 and on or before 8 May 1945 committed a "war crime" was guilty of an offence against the Act. Under the Act only an Australian citizen or resident could be charged with an offence but this restriction applied only at the time of charge. The Act created criminal liability in respect of conduct by persons outside Australia who at the time of the conduct had no connection with Australia. One ground of challenge was that the provision was beyond the power conferred on the Commonwealth Parliament by s 51(xxix) of the

25 **Constitution** (the external affairs power).

26 The majority of the Court in **Polyukhovich** held that the provisions of the legislation were supported by the external affairs power: Mason CJ at 530-531, Deane J at 602-603; Toohey J at 655; Dawson J at 641; Gaudron J at 695-696 and McHugh J at 714. Each of their Honours, save Toohey J, considered the externality of the conduct to be sufficient to support them under the external affairs power. Toohey J considered that a matter did not qualify as an external affair simply because it existed outside Australia. In his Honour's opinion it was necessary that it be a matter which the Parliament recognised as touching or concerning Australia in some way (at 654). His Honour considered that, in the context of World War II in which Australia had been directly involved and in which Australian service personnel and civilians had been killed, an Act that purported to render Australian citizens or residents liable for conduct associated with the War was legislation with respect to a matter of concern to Australia and to which the public business of the national government related (at 655).

27 Brennan J dissented in **Polyukhovich**, holding that s 51(xxix) of the Constitution does not arm the Commonwealth Parliament with power to make laws with respect to matters outside Australia with which Australia has no connection (at 552). Mr Barker relied on passages in his Honour's judgment in written submissions in support of the contention that the Parliament does not have power to legislate against the killing of foreign citizens by members of a foreign organisation on foreign territory (WS 18 August 2005 at [5]). Brennan J considered the requirement of some connection between Australia and the field of activity affected by a law would be satisfied if the law purported to control extraterritorial conduct engaged in by Australian citizens or residents (at 552). The accused is an Australian citizen. In Mr Barker's submission this circumstance does not bear on the present challenge, which is to an offence under s 102.5(1) arising in circumstances in which the organisation providing the training has no connection with Australia and the terrorist act particularised as that which makes the organisation a terrorist organisation has no connection with Australia.

28 In Mr Barker's submission **Polyukhovich** is to be understood in the context that the offences introduced into the **War Crimes Act** by the **War Crimes Amendment Act 1988**, while fastening on conduct that occurred during World War II overseas, could only be charged against persons who are Australian citizens or residents. Thus, the subject matter of the Act was within power. In Mr Barker's submission the passages from the judgments of the justices who formed the majority (that I have referred to at paragraph 25 above) were, to the extent that they contained observations about the breadth of the external affairs power, not necessary to the decision.

29 Mr Barker's contention is that the cases in which the High Court has held the external affairs power to extend to any matter external to Australia, including **Polyukhovich**, are cases in which the subject matter involved the construction of legislation in light of Australia's obligations under an

international treaty or which possessed a nexus with Australia. The potential scope of the offence created by s 102.5(1) of the **Criminal Code** was said to be unlike any case with which the High Court has previously been concerned, in that "the Commonwealth law purports to apply to the whole world without restriction" (T 21/11/05 3.16-17). In written submissions Mr Barker extracted passages from the judgments in **R v Burgess; Ex Parte Henry** (1936) 55 CLR 608 per Latham CJ at 643 and per Evatt and McTiernan JJ at 684 and **R v Foster; Ex Parte Eastern and Australian Steam Ship Co Ltd** (1959) 103 CLR 256 per Windeyer J at 306 in support of a submission that statements of the justices in the majority in **Polyukhovich** as to the breadth of the external affairs power "did not reflect all the case law which preceded it" (WS 21/11/05 at [10]). In Mr Barker's submission the judgments of Barwick CJ, Mason and Jacobs JJ in **New South Wales v The Commonwealth** (the Seas and Submerged Lands Case) (1975) 135 CLR 337 did not provide support for the interpretation of the scope of the external affairs power that was said to have been adopted in **Polyukhovich**. Mr Barker's submissions addressed **Koowarta v Bjelke-Peterson** (1982) 153 CLR 168 and **Commonwealth v Tasmania** (1983) 158 CLR 1 (the Tasmanian Dam case), decisions which were also said not to support the statement of the scope of the external affairs power found in the judgments of the justices in the majority in **Polyukhovich**.

30 In Mr Barker's submission the power of the United Kingdom Parliament to exercise universal jurisdiction in absentia may be questioned. In this respect he noted the dissenting judgment of Lord Slynn in **R v Bow Street Magistrate; Ex Parte Pinochet** [2000] 1 AC 61 at 79:

> It does not seem to me that it has been shown that there is any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in national courts on the basis of the universality of jurisdiction.

Whatever may be the restrictions on the power of the United Kingdom Parliament, in Mr Barker's submission the legislative power of the Commonwealth Parliament may only be exercised conformably with the Constitution and this was said to necessitate that legislation supported by the external affairs power have some nexus with Australia. In written submissions it was contended, "if there were no such limitation upon the external affairs power, there could never be a transgression of the Constitution" (WS 21/11/05 at [11]).

31 In **Victoria v The Commonwealth** (the Industrial Relations Act case) (1995-1996) 187 CLR 416, in their joint judgment Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ said at 485:

> Of course the scope of the legislative power is not confined to the implementation of treaties. The modern doctrine as to the scope of the power conferred by s 51(xxix) was adopted in **Polyukhovich v The Commonwealth**. Dawson J expressed the doctrine in these terms (233):
>
> > [T]he power extends to places, persons, matters or things physically external to Australia. The word "affairs" is imprecise, but is wide enough to cover places, persons, matters or things. The word "external" is precise and is unqualified. If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase "external affairs".
>
> Similar statements of the doctrine are to be found in the reasons of judgment of other justices: Mason CJ (234); Deane J (235); Gaudron J (236); and McHugh (237). They must now be taken as representing the view of the Court.

32 I accept the Commonwealth's submission that there is binding authority that a law that operates on conduct that is geographically external to Australia is necessarily a law with respect to external affairs within s 51(xxix) of the **Constitution**. It follows that the accused's challenge to the Commonwealth Parliament's power to create an offence that may be committed by a foreigner against a foreigner in a foreign country remote

geographically from, and of no particular interest to, Australia must be rejected. It is thus not necessary for me to turn to the Commonwealth's submissions that s 102.5(1) is a valid law with respect to external affairs, it being reasonably capable of being considered appropriate and adapted to giving effect to an international obligation, nor to the Commonwealth's further submission that s 102.5(1) is a law with respect to external affairs because proscribing actions constituting terrorist acts is a matter of sufficient international concern.

The statutory construction challenge

33 Mr Barker acknowledged that the description of the offence in the indictment is in the words of s102.5(1). The Crown has furnished particulars identifying the basis upon which it will contend that LeT was at the material time a terrorist organisation. Mr Barker did not maintain the submission that the indictment was defective for failure to contain an averment of the terrorist act. He submitted that the particulars are not particulars of a "terrorist act" within the meaning of that expression in s 100.1 and thus are not capable of proving that LeT was a terrorist organisation at the time. The offences created in Pt 5.3 were said to require an action or threat of action as distinct from preliminary acts. The argument is that the Crown must particularise a discrete act as the terrorist act relied upon to establish LeT's character as a terrorist organisation in January 2003.

34 In the course of submissions neither party addressed close attention to the written particulars that were supplied by the Crown on 16 August 2005. I have set these out at paragraph 17 above. Argument proceeded on the basis that the Crown had particularised the killing of Indian soldiers in Kashmir as the terrorist act. This was consistent with the way the Crown particularised its case in the course of oral submissions on 15 August 2005:

> The organisation was primarily engaged in killing Indians and Indian soldiers, in particular, in the Kashmir region of India. ... The terrorist act or acts were the object of the organisation, being essentially the killing of Indians in Kashmir with a view to putting pressure on the Indian Government to concede territory which the organisation took a view belonged properly to Kashmiri Muslims rather than to the Indian Government. (T 15/08/05 17.56-58-18.13.17)

35 In written submissions prepared on behalf of the accused, following the receipt of the written particulars, it was said:

> The Crown states that the relevant "terrorist act" is, in a nutshell, the killing of Indian soldiers in Kashmir (WS 18/08/05 at [3]).

36 The written particulars do not contain an assertion in terms that the action (or threat of action) relied on was the killing of Indian soldiers in Kashmir. Particular (a) is directed to the requirements of s 100.1(1)(b), that the action is done or the threat is made with the intention of advancing a political, religious or ideological cause. Particular (b) is directed to the requirements of s 100.1(1)(c), that the action is done or the threat is made with the intention of coercing, or influencing by intimidation, the government of, inter alia, a foreign country or intimidating the public or a section of the public (which includes a reference to the public of a country other than Australia). Particulars (c), (d), and (e) are each particulars of LeT's intention at the time it is said to have been directly or indirectly engaged in, preparing, planning, assisting in or fostering the action or threat of action. A terrorist act means an action or threat of action where the action falls within subsection (2) and does not fall within subsection (2A). Particulars (c), (d) and (e) do not identify the action. If anything they are particulars of how it is proposed to establish that the action does not fall within subsection (2A)(b)(i) to (iv). In this respect the written particulars are flawed in that they do not identify the terrorist act on which the Crown relies.

37 As I have noted, the motion was argued on the basis that the Crown case is that LeT was a terrorist organisation at the material time because it was directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act namely killing Indian soldiers in Kashmir, this being an action that falls within s 100.1(2)(a), (c) and (d)) and which was done with the intention of advancing a political, religious or ideological cause, namely the restoration of control of Indian occupied Kashmir to Muslims and with the intention of coercing, or influencing by intimidation, the government of India or intimidating the public or a section of the public (including members of the Indian armed services), actually or potentially serving in the region of Indian occupied Kashmir. I propose to deal with the challenge to the indictment on this footing and not by reference to the written particulars which do not reflect the way the matter was argued.

38 In Mr Barker's submission, the particulars (understood in the way summarised in his submission which I have set out at paragraph 34 above) do no more than identify as an aim of LeT the doing of physical harm to members of the Indian armed forces serving in the region of Indian occupied Kashmir. The concepts of preparing, planning, assisting in or fostering were said to be separate from the act that is their object. All the offences in Pt 5.3 were submitted to require a discrete terrorist action. The repeated use of the definite article was said to make this much obvious.

39 In Mr Barker's submission amending legislation serves to demonstrate that conduct not involving specific terrorist acts was not caught by Pt 5.3 of the **Criminal Code** as it stood in January 2003. In this respect Mr Barker firstly relied on the introduction of the **Criminal Code Amendment (Terrorism) Act 2003** (the 2003 Act) which effected the repeal of Pt 5.3 of the **Criminal Code** and substituted a new Pt 5.3 dealing with terrorism. Section 100.4 of Criminal Code as amended by the 2003 Act is in these terms:

100.4 Application of provisions

Part generally applies to all terrorist acts and preliminary acts.

(1) Subject to subsection (4), this Part applies to the following conduct:

(a) All actions or threats of action that constitute terrorist acts (no matter where the action occurs, the threat is made or the action, if carried out, would occur);

(b) all actions (***preliminary acts***) that relate to terrorist acts but do not themselves constitute terrorist acts (no matter where the preliminary acts occur and no matter where the terrorist acts to which they relate occur or would occur).

40 Mr Barker also relied on the provisions of the **Anti-Terrorism Act 2005**, No 127 of 2005 (The 2005 Act), which amends a number of the terrorist act offences contained in Div 101 and the financing terrorism offences contained in Div 103 of the **Criminal Code**. The 2005 Act did not amend the terrorist organisation offences contained in Div 102.

41 Section 101.2, as it stood prior to the amendment introduced by the 2005 Act, relevantly provided as follows:

(1) A person commits an offence if;

(a) the person provides or receives training; and

(b) the training is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and

(c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

...

(3) A person commits an offence under this section even if the terrorist act does not occur.

42 The 2005 Act effected the repeal of subs (3) above and substituted the following:

(3) A person commits an offence under this section even if:

(a) a terrorist act does not occur; or

(b) the training is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act; or

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

43 Other amendments introduced by the 2005 Act effected like changes.

44 The Crown submitted that care needed to be exercised in approaching the construction of Pt 5.3 of the **Criminal Code** as it stood at the material time by reference to amending legislation. In written submissions the Crown referred to the judgment of French J in **Sun World Inc v Registrar, Plant Variety Rights & Anor** (1997) 148 ALR 447 at 459:

> The role of amending legislation in the construction of the earlier provisions of the legislation it amends is debatable. It can be said that although the **Plant Breeder's Rights Act 1994** repealed the **Plant Variety Rights Act 1987** and substituted a new statutory regime, there is an analogy to the case of amending legislation at least in respect of the operation of the NPC Rules. Amending legislation which expressly introduces an exemption from some condition or liability imposed by the legislation to be amended may support a construction of that earlier statute that does not incorporate the exemption: **Grain Elevators Board (Vic) v Dunmunkle Corp** (1946) 73 CLR 70. But as has been pointed out in a number of cases, care must be taken to determine whether the amending legislation merely makes clear what was implicit in the previous law or resolves doubts about its construction: **Allina Pty Ltd v FCT** (1991) 99 ALR

295 at 303 and see generally Pearce and Geddes, Statutory Interpretation in Australia 4th ed at [3.18] [now 5th ed at [3.30]].

45 In the Crown's submission, the 2003 Act served merely to clarify the offences created by the 2002 Act and not to expand their ambit. The Crown submitted that the 2003 Act identified the constitutional basis for the operation of the terrorist offences in Pt 5.3 in a context that includes both referring States and non-referring States; s 100.2 and in s 100.3. Section 100.4 in subs (2) – (6) deals with the operation of the Pt 5.3 in relation to terrorist acts and preliminary acts occurring in a State that is not a referring State.

46 The Crown referred to the Explanatory Memorandum of the 2003 Act and to the Attorney-General's Second Reading Speech in support of the submission that the 2003 Act was not intended to remedy any perceived deficiency in the ambit of the offences that had been introduced by the 2002 Act. I note that in **Downey v Trans Waste Pty Ltd** (1990-1991) 99 ALR 402 Dawson J, at 409, took into account the reasons for amending legislation by reference to the Minister's second reading speech. In moving the bill that became the 2003 Act be read a second time, the Attorney-General said:

> The Federal legislation enacted earlier this year creates a number of offences in relation to terrorist acts, terrorist organisations and terrorist financing. Those offences were based on existing Commonwealth constitutional powers. As the Commonwealth Constitution does not give the Commonwealth Parliament power to make laws with respect to terrorism as such, the offences rely on a patchwork of existing constitutional powers.
>
> The patchwork of existing Commonwealth constitutional powers is extensive, but it is also complex. It is impossible to rule out unforeseen gaps in the coverage offered by offences based on existing powers. Arguments about possible gaps could be exploited by people trying to avoid prosecution. The reference of powers by the States and the enactment of this Bill will rule out these kinds of arguments. It will ensure

comprehensive national application of the Federal counter-terrorism offences.

The Bill will re-enact Part 5.3 of the **Criminal Code**, which contains the terrorism offences enacted in June and amended in October this year, so that it attracts the support of the State references of power. The Bill will, in effect, re-enact the **Terrorist Act** offences in Division 101, the terrorist organisations offences in Division 102, and the financing of terrorism offences in Division 103. Once re-enacted, terrorism offences will be capable of operating throughout Australia, without any potential limitations arising from existing limits on Commonwealth constitutional powers.

...

The Bill does not effect the substance of the current offences. The re-enacted offences will be in the same terms as the current offences, but for the constitutional "reading down" provisions. The Government has already taken action under the current provisions. Regulations have been made specifying organisations as "terrorist organisations" for the purpose of the terrorist organisation offences (Mr Williams, Hansard, House of Representatives, 12 December 2002, at 10263/4).

47 I do not infer that the introduction of the new Pt 5.3 into the **Criminal Code** demonstrates that conduct not involving specific terrorist acts was not caught by the legislation as it stood in January 2003 (WS 10 August 2005, [12]).

48 In the Crown's submission the amendments introduced by the 2005 Act have no bearing on the provisions of s 102.5 of the **Criminal Code**, which deals with terrorist organisations. The Crown also submitted that reference to the Second Reading Speech in the Legislative Assembly lends no support to a contention that the amendments to Divisions 101 and 103 were effected in order to create criminal liability where it had not previously existed. In his speech moving that the bill which became the 2005 Act be read a second time the Attorney-General said this:

> The amendments before the House today ensure that the Terrorist Act offences in Part 5.3 of the Criminal Code are interpreted as they were originally intended to be interpreted.
>
> They clarify that in a prosecution for a terrorist offence it is not necessary to identify a particular terrorist act.
>
> The existing offences contain a subsection that provides that a person commits the offence even if "the" terrorist act does not occur.
>
> 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. (Mr Ruddock, Hansard, House of Representatives, 2 November 2005 at 62).

49 In **Interlego AG v Croner Trading Pty Ltd** (1992) 111 ALR 577 Gummow J (as he then was) said at 612:

> There is a line of authority that an amendment may be taken into account in determining the scope of the prior legislation, at least to avoid a result which would render the amendment unnecessary, or futile or deficient; see especially **Grain Elevators Board (Vic) v Dunmunkle Corp** (1946) 73 CLR 70 at 85-6; **Hunter Resources Ltd v Melville** (1988) 164 CLR 234 at 254-5. But in doing so, caution should be exercised: see Pearce and Geddes, Statutory Interpretation in Australia (3rd ed, 1988), ¶ 3.26. It is, after all, a curious way of revealing a parliamentary intention at the time of passing the earlier provision. As was observed by Viscount Haldane LC in Re Samuel [1913] AC 514 at 526:
>
> > It is not a conclusive argument as to the construction of an earlier Act to say that unless it be construed in a particular way a later enactment would be surplusage. The later Act may have been designed, ex abundante cautela, to remove possible doubts.

50 I do not consider that an inference should be drawn that the offences created by the 2002 Act did not embrace conduct not involving specific terrorist acts (WS 10 August 2005, [12]) from the fact of the enactment of the 2005 Act. I approach the accused's challenge to the capacity of the case as particularised to constitute an offence under s 102.5 by reference to the meaning of the expressions "a terrorist act" in s 102(1)(a) and "terrorist act" in s 100.1(1) as these definitions stood in January 2003.

51 In written submissions the Crown contended that the accused's submission that it was necessary to identify a discrete and specific terrorist act was one that may have validity in relation to the offences created under Div 101 of the **Criminal Code** dealing with terrorist acts, but that it had no force with respect to Div 102, which provides for offences relating to terrorist organisations. It pointed to the broad definition of organisation in s 100.1(1) in support of a submission that:

> In considering the meaning of "terrorist organisation", it is first to be noted that the legislation is referring to an organisation, that is, a standing body of people with a particular purpose; not a transient group of conspirators who may come together for a single discrete criminal purpose. The requirement for an "organisation" is consistent with the provision for an entity with an ongoing purpose of committing a number of terrorist acts with the intention of advancing the same political, religious or ideological cause (WS 18/11/05 at [10]).

In the Crown's submission, the definition in s 102.1(1)(a) of a terrorist organisation as one directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act is inconsistent with the requirement for the involvement of the organisation in an immediate and specific terrorist act (WS 18/11/05 at [11]).

52 To the extent that the Crown's submission carries with it that the requirements of proof of a terrorist act in the context of the offences created in Div 101 may be distinguished from the requirements of proof of

a terrorist act for the purpose of the Div 102 terrorist organisation offences, I reject it. The definition of terrorist act contained in Div 100 applies both to the terrorist act offences in Div 101 and the terrorist organisation offences in Div 102.

53 In **R v Lohdi**, (unreported) 23 December 2005, Whealy J considered the definition of "terrorist act", observing that the definition postulates an action of threat of action of the widest possible kind (at paragraph 52). His Honour was dealing with the provisions of Pt 5.3 introduced by the 2003 Act however nothing turns on this since the definition of "terrorist act" was not subject to material alteration. I respectfully agree with his Honour's observations concerning the breadth of the action that may found a terrorist act. A terrorist act is an action that is done (or a threat of action that is made) with each of the intentions specified in subparas (b) and (c). The action must possess one or more of the features specified in subsection (2) provided that it does not have the features specified in subsection (2A). The latter excludes advocacy, protest, dissent or industrial action that is not intended to cause serious harm (that is physical harm) to a person, or to cause death or to endanger life from founding a terrorist act. The breadth of the definition is such that advocacy, protest, dissent or industrial action may be action that falls within subs(2), and be capable of founding a terrorist act, if it is not unaccompanied by the intentions specified in subs(2A)(i)-(iii). In my opinion the words of the definition admit of the killing of Indian soldiers in Kashmir being "action" within the meaning of subsection (2), which provided it is done (or the threat of it is made) with the intentions set out subparagraphs (b) and (c), may constitute a terrorist act.

54 A second basis of challenge identified by Mr Barker was that there is no suggestion that the accused knew of or contemplated the possibility of a discrete, specific terrorist act or that he intended to prepare to participate in any such act. If the accused is to be caught by the provisions of s 102.5(1) in Mr Barker's submission it is necessary that the training

received by him be itself a terrorist act. This was said to flow from the provisions of s 100.2(1):

> This Part applies to a terrorist act constituted by an action, or threat of action, in relation to which the Parliament has power to legislate.

In the course of oral submissions Mr Barker put it this way:

> If he is not charged with a terrorist act constituted by an action or threat of action, there cannot be any case. In other words, if what the Crown sets out to prove in proving a case under 102.5, if that does not involve evidence of a terrorist act on the part of the accused, it can't come within Part 5.3 because it applies specifically to acts constituted by action or threat of action. (T 21/11/05 37.42-49)

55 The **Criminal Code** codifies the law with respect to offences against the laws of the Commonwealth and s 100.2 sets out the constitutional basis for the offences created by Pt 5.3. The provisions of subsection (1) in my opinion do not operate to confine the offence created by s 102.5(1) in the way for which Mr Barker contends. The offence is the intentional receipt of training from (or provision of training to) an organisation that is a terrorist organisation and is known by the accused to be such. The offence is complete on proof of these elements and does not require proof of the commission of a terrorist act constituted by an action, or threat of action by the accused.

56 I note that the Crown accepts that in order to prove the fault element of knowledge it must establish that the accused knew LeT to be a terrorist organisation because he knew that it was directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act being the action or threat of action that the Crown relies on to prove the fact that LeT was a terrorist organisation at the material time.

57 For these reasons I reject the challenge to the indictment as particularised as not disclosing an offence that is known to law.

Abuse of process

58 In the alternative the accused contends that the proceedings should be permanently stayed as an abuse of the process of the court. In Mr Barker's submission the evidence that the Crown proposes to adduce at trial is not capable of proving the offence and it would be oppressive to allow the proceedings to go forward: **Barton v The Queen** (1980) 147 CLR 75 per Gibbs ACJ and Mason J at 96 and **Walton v Gardiner** (1992-1993) 177 CLR 378 per Mason CJ, Deane & Dawson JJ at 393.

59 That the Court may permanently stay proceedings on an indictment as an abuse in a case in which the evidence to be adduced by the prosecution is not capable of proving an element of the offence is undoubted. In **Walton v Gardiner** Mason CJ, Deane and Dawson JJ (at 392-393) considered that proceedings would constitute an abuse of process in a circumstance in which they can be clearly seen to be foredoomed to fail. Brennan J (with whom Toohey J agreed) at 410-411 spoke in terms of proceedings which will inevitably and manifestly fail.

60 In written submissions the Crown outlined the case that it anticipated making at trial. On 20 March 2003 the accused arrived at Kingsford Smith Airport, Sydney. He is a citizen of Australia and holds citizenship of Pakistan. He was aged twenty-years at the time. The Crown allege that the accused was returning to Australia after having undergone a twenty-one day period of training at a LeT camp in Pakistan. On his arrival his baggage was subject to a search by Customs officers. During the course of that search a number of books, printed articles and notebooks were located. The notebooks contained handwriting in both English and Urdu. There were references in the notebooks to (inter alia):

- Rocket launchers;

- Land mines;

- Multipurpose machineguns

The accused was in possession of printed material, including articles downloaded from an internet site named "Islam under attack" and other literature of a like nature.

61 The items found in the accused's baggage were seized by the Customs officers and handed to members of the Australian Federal Police. The documents that were written in a foreign language were translated. This material contained references to:

- Military style weapons including automatic weapons and rocket propelled grenades;

- Instructions for the use of "anti-human" and "anti-tank" mines; and

- Steps to be taken for the purposes of becoming a martyr in the Islamic struggle in Kashmir

62 It is the Crown case that in January 2003 LeT was an organisation that was engaged in preparing, planning, assisting or fostering the killing of Indian soldiers in Kashmir in order to advance a political, religious or ideological cause, namely the restoration of control of Indian occupied Kashmir to Muslims and that it was doing this with the intention of coercing or influencing the government of India or intimidating the public or a section of the public (including members of the Indian armed services). The Crown case at trial will substantially depend on the contents of three electronically recorded interviews between the accused and members of the Australian Federal Police conducted on 7 November 2003, 12 November 2003 and 9 January 2004. In the course of the second interview the accused was shown a large number of documents that were seized by

Customs officers when he entered Australia on 20 March 2003. The Crown also rely on the contents of a number of these documents.

63 The transcripts of the three interviews and copies of the documents shown to the accused in the course of the second interview were tendered on the motion. The Crown tendered two statements of a witness, K, that were annexed to the affidavit of Helen Elizabeth Brown, which was sworn on 28 June 2005. I consider that the evidence of K does not advance the Crown case in terms of proof that LeT was a terrorist organisation. The Crown Prosecutor accepted so much in the course of oral submissions on 16 August 2005 (T 35.49-58- 361-4).

64 While at any trial the Crown indicated that it may call witnesses whose statements were not before me on the motion, I understood the Crown to acknowledge that the only evidence available to it with respect to proof of each element of the offence was that contained in Exhibit A (T 15/8/05 at 13.57/58-14.1-4). In the Crown's submission a number of the answers given by the accused in the interviews are capable of constituting admissions of the fact that in January 2003 LeT was a terrorist organisation within the meaning of s 102.1(1)(a).

65 In Mr Barker's submission the accused's admissions cannot establish more than the fact that the accused undertook military style training at the camp and of his belief concerning LeT's aims and objectives.

66 In written submissions the Crown identified a number of passages in the three ERISPs upon which reliance was placed. I will refer to some of them.

67 The accused acknowledged that he had attended a military-style training camp in Pakistan (Q. 96). He gave an account that he had met a person, whom I will call Mr A, in Sydney in 2001. Mr A impressed him with his level of attachment to Islam (Q. 99). Mr A told the accused:

> Look, you know, what's happening to Moslems in Kashmir, you know in Indian-occupied Kashmir and, you know women being raped and, you know, people being – people being killed for no reason and this and that and so, you know, as a Moslem, you know we should do something in that direction. (Q. 103)

68 Mr A mentioned Jamaat-Ud-Dawah or Lashkar-I-Taiba. He said, "if you want to train then go with that group" (Q. 103). It would be open to the jury to conclude that Jamaat-Ud-Dawah and Lashkar-I-Taiba are the same organisation.

69 The accused was asked in the first interview:

> Q. 117 What was the purpose of that organisation?
>
> A. The purpose of Lashkar-I-Taiba is – as far as I know, to fight the Indian Army or Indian, what do you say, para-military or that sort of – you know, people with weapons on the streets and in the villages or whenever, you know, sort of people, you know, government agencies carrying weapons in Kashmir, alright, Lashkar-I-Taiba wants to fight them, fight those Indian forces, in India (... indistinct ...).
>
> Q. 118. I see. And how do you know that?
>
> A. Well, it's everyone in Pakistan knows that, you know you can talk to a ten-year old street kid and he'll tell you that and because I mean it's sort common knowledge, you know, that, you know, Lashkar-I-Taiba and, you know, (... indistinct ...) and all these groups, you know, they're fighting Indian forces in Kashmir and every day the news, you know, you get, "two killed", you know, in (... indistinct ...) you know, these are members of this organisation or the organisation says, you know, "two of our people were killed", or things like that, you know. So it's sort of very common knowledge, you know, it's in every day news, it's, yes, it's nothing, you know it's – yes.
>
> ...
>
> Q. 165. Whilst you were at the camp, did you learn how to fight against the Indians, did they teach you methods?

> A. No, they didn't tell, they didn't tell us, you know, to fight Indians specifically, you know. ... Everyone at the camp knew, you know, that this camp is for, you know, it's not, it's for fighting for Indian forces in Kashmir, you know, I mean, sort of, I'm sure, you know, they don't actually say it or maybe they mention it in their speeches, you know, but I mean, sort of everyone knows that, you know, even, even the small kid walking in Rawalpindi who is not related to Kashmir, he will know, you know, that, you know, that people have that intention, they want to go to Indian Kashmir and fight the Indians.

70 The accused registered at the Jamaat-Ud-Dawah Centre in Lahore before being taken to the training camp: This process involved giving his name and contact details to the registration or administrative people at the Centre and paying a fee of 300 or 500 rupiahs (A. 210, 211 & 381).

71 The accused gave a further account of his understanding of LeT's purpose in providing the training:

> Q. 239. Do you agree that you were receiving the training for the purpose of learning to fight the Indian army in Kashmir?
>
> A. Yes, but I would like to say that, as I told you earlier, it's very hard to actually become one of those persons that actually goes – who is sent by the LeT to the other side of the border. So this is sort of primary, you know, let's say a kindergarten thing, you know. It's just like the first step in the ladder, you know but people, I told you before, you know, a lot of people, they don't actually go to any, like, any stages after that, they just, you know, go back to society (... indistinct ...).

72 The accused believed that Mr A was a member of LeT (Q. 372). He held this belief because Mr A had assisted him to go to Pakistan and when he arrived at the LeT Centre in Lahore the registration and/or administrative staff knew Mr A (Q.372 – 381).

73 In the second interview the accused said that when he went to Pakistan he had the intention to fight Indian forces in Kashmir (A 177). He went on to

say that after the initial training he had been told by other people that it was necessary to spend three or four months doing tasks, such as cooking. He described it as being "a very committed process" (Q. 184). "It's not that you go in and they let you go to the border and then you fight and you get killed and you become a martyr you know. Maybe that was my sort of image when I started." He described the regime as involving a 21 day religious education course, the 21 day basic course that he had undertaken, three or four months working at the camp itself cutting firewood, cooking and cleaning or working for the organisation in the mainland distributing pamphlets and asking for donations. At the completion of the three or four moths service he had been told by persons at the camp that there was a more intensive and weapons-based training (A 188).

74 The accused was asked in the course of the second interview if he thought Lashkar-I-Taiba was a guerrilla movement. He said this:

> Look, I don't know the military definitions but I guess you could say that, you know, because it's not a – it's not a standing army, you know. It's like a bunch of people going in and fighting. So yeah, you can say it's a guerrilla movement (A 391).

75 During the course of the second interview the accused was shown notes that had made at the camp and a document that had formed part of the course materials and which concerned an explosive bomb (Q. 406 – 408). He was then asked:

> Q. 409. You must have some idea why they were teaching you these things?
>
> A. I guess, you know, they want to use this for someone who actually goes and fights in Kashmir or they're just giving general information about weapons, you might use or not use. But I mean I didn't, you know, ask them to teach me this, you know. That was part of the course and I don't know if this was part of the course.

Q. 410. But you agree with me ...

A. Yes.

Q. 411. ... that all of this training ...

A. Yes.

Q. 412. ... and this lectures ...

A. M'mm.

Q. 413. ... and the preparation ...

A. Yes.

Q. 414. ... was connected ultimately for the purpose of those people who would eventually go to Kashmir to fight?

A. Yes, yeah. It was, yes. That's true.

Q. 415. And that's the reason that you're being taught ...

A. M'mm.

Q. 416. ... was to prepare everybody who attended that training camp. Would you agree with that?

A. Yeah. I would agree to that. Yes.

Q. 417. And would you also agree that that preparation ...

A. M'mm.

Q. 418. ... was for the purpose of sending people to Kashmir?

A. Yeah.

76 In the third interview the accused was asked these questions and gave these answers:

> Q. 130. And Lashkar-I-Taiba was the organisation that you joined?
>
> A. Yep.
>
> Q. 131. Do you agree that the purpose of Lashkar-I-Taiba is to inflict casualties on Indian troops?
>
> A. Yes.
>
> Q. 132. Isn't it true that Lashkar-I-Taiba uses assassinations to achieve its aims?
>
> A. I don't agree with that and you know, I'm – I wouldn't know if they – if they are really assassinations or not, because I mean I'm not operating – I don't know how the operations work, yeah but I'm quite sure – as far as I know, I don't think so but maybe they are doing it, I mean not – not high in the chain or whatever you know, to know what's happening underground.
>
> Q. 133. Isn't it true that Lashkar-I-Taiba uses bombings to achieve its aims?
>
> A. Um, yeah I think they do bomb you know, police stations and – and um, army barracks. I don't know, I mean how they do it but I'm sure they – you know, they try to destroy any army or police people in whatever they can.
>
> Q. 134. Isn't it true that Lashkar-I-Taiba uses terror campaigns in Indian controlled Kashmir to achieve its objectives?
>
> A. What's a terror campaign?
>
> Q. 135. Acts of violence that cause terror.
>
> A. Like violence to which people?

> Q. 136. To Indian people, to the civilian population and to the Indian armed forces in that area.
>
> A. Well Okay, I agree that they (... indistinct ...) damage army – you know, terrorise – if you use the word, or you know, fight with the Indian army but I am sure they don't want – to do anything to civilian population because that's a very clear objective statement you know, that whenever news comes out of Kashmir you know, that these many civilians have been killed and whatever and they will mention – send off a statement, you know, from the start we not try to kill civilians, so I don't agree with this – with this thing.

77 The accused said that none of the training he had received had been given to him by the Pakistani Government (3rd interview at A 411). None of the instructors, to his knowledge, were members of the Pakistani armed forces or police (3rd interview at A 412). He said that Lashkar-I-Taiba was a private organisation:

> Q. 414. And it is a private organisation dedicated to doing what?
>
> A. It's dedicated to um, doing jihad against the Indian forces in Kashmir and secondly, um, on the – on the social side, you know, it – it provides, you know, social services and religious education to the Moslems in Pakistan itself.

78 In Mr Barker's submission, the accused's answers in his interviews with the AFP concerning LeT were based on hearsay and are incapable of proving that LeT was an organisation directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act. Mr Barker relied on the decision of the Judicial Committee of the Privy Council in **Surujpaul v R** (1958) 3 All ER 300 at 304:

> He can confess to his own acts, knowledge and intentions but he cannot "confess" as to acts of other persons which he has not seen and of which he can only have knowledge by hearsay. A failure by the prosecution to prove an essential element in the offence cannot be cured by an admission of this nature.

79 The Crown relied on **Anglim and Cooke v Thomas** [1974] VR 363, in which Harris J considered the admissibility of a hearsay admission in a criminal case. His Honour referred to **Surujpaul**, noting that:

> The language used in **Surujpaul v R**, supra, is certainly very strong. This may have been due to the seriousness of the matter, for the admission was by an alleged accessory to his co-conspirators committing murder, although he had no personal knowledge of the matter and although the co-conspirators were acquitted of murder by the jury who also tried the appellant.

His Honour concluded, after considering the judgments of the Judicial Committee **in Comptroller of Customs v Western Lectric Co Ltd** [1966] AC 367, the Full Court in **Horne v Comino; ex parte Comino** [1966] Qd R 202 and the High Court in the case of **Lustre Hosiery Ltd v York** (1935) 54 CLR 134 (a civil case), that evidence consisting of an admission based on hearsay is not inadmissible in a criminal case, but that the circumstances under which it is of any weight and is capable of supporting an adverse finding against the party making it may well be far more restricted than in a civil case (at 372). In that case the admission by a drug addict that various containers contained named drugs was received as evidence of the identity of the drugs.

80 In JD Heydon, *Cross on Evidence*, (Butterworths, 6th Aust ed) at [33460] the learned author refers to the line of authority including **Anglim** involving admissions by drug addicts of the nature of the substance in issue (and to **DPP v Parsons** [1993] 1 VR, a case concerning an admission that an instrument was a radar detecting instrument) at [33460] fn 14 observing that:

> It is immaterial that the admission relates to a matter of opinion if the opinion is formed upon a sufficient basis of personal experience.

81 The **Evidence Act** 1995 does not exclude admissions that are founded on hearsay in criminal proceedings, subject to the mandate of s 55 that the evidence, if accepted, have the capacity to rationally affect (directly or indirectly) the assessment of the probability of the fact in issue.

82 The accused's answers in the three interviews appear to be based on a number of sources. These include the things that the accused saw and did at the training camp, the things that he was told about LeT by Mr A, the things he was told about LeT by other persons at the training camp and matters that he describes as being of notoriety in Pakistan.

83 The things that the accused saw at the training camp and the training that he received may provide a basis for drawing some inferences about LeT and its activities. The accused's account of attending the Centre in Lahore and of paying a fee and completing a form of registration may admit of the inference that LeT is an organisation.

84 The definition of an organisation for the purposes of Pt 5.3 includes an unincorporated body, whether or not the body is based outside Australia, and whether or not it is part of a larger organisation. It is not necessary for an unincorporated body falling within this broad definition to have any formal processes for making and recording decisions. Statements made by a member of such an organisation may provide some evidence of the organisation's activities and the intention with which the activities are carried out.

85 A member of an organisation includes a person who is an informal member of the organisation: s 102.1(1). The accused's representations concerning Mr A may admit of the inference that in January 2003 Mr A was a member of LeT. It seems to me that on such a view the accused's account of what Mr A told him about LeT's activities, and its purpose in engaging in those activities, is capable of being some evidence of the fact. Although by no means the only inference, I consider that it would be open

to the jury to find that the accused was a member of LeT at the time (1st interview at A 382; 3rd interview at A 120).

86 The three interviews are lengthy and the accused's answers are discursive and susceptible of differing interpretation. I have not viewed the recordings of the interviews and some significance may attach to the way in which things are said. Nothing turns on this for present purposes since the application may only succeed if it is plain beyond argument that the accused's answers are not capable of proving the fact (that LeT was a terrorist organisation in January 2003). Significant to a consideration of the capacity of the admissions made by him to prove that LeT was engaged in, preparing, planning, assisting in or fostering the killing of Indian soldiers in Kashmir (with the requisite intention) is that they are based on personal experience; he was present at the LeT Centre in Lahore and at the LeT training camp. In the event that the records of interview are admitted into evidence I am not persuaded that the accused's answers are not capable of proving that LeT was a terrorist organisation within the meaning of s 102.1(1) at the material time.

87 For these reasons I decline to grant the relief sought in prayer one of the accused's amended notice of motion, which is dismissed.

88 The proceedings are stood over to the arraignments list before Barr J on Friday 3 March 2006 for the appointment of a trial date.

****

I CERTIFY THAT THIS AND THE 35 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR JUDGMENT/SUMMING UP HEREIN OF THE HONOURABLE JUSTICE BELL.

Associate

Date 8/2/06