MANAGING TERRORISM TRIALS

In 2016, the first terrorism trial to be heard in Queensland was set down in the Supreme Court. The Senior Judge Administrator asked me if I would manage the matter and conduct the trial. The defendant was 33-year-old Australian born Omar Succarieh, of Lebanese descent, who, amongst other activities, conducted an Islamic bookshop in Logan, a suburb on the southern fringes of Brisbane. His next younger brother, Abraham, was in Syria, apparently fighting with Jabhat al-Nusra, a banned terrorist organisation which was known at that time to be associated with Al Qaeda. His youngest brother, Ahmed, was thought by authorities to have been the first Australian suicide bomber in Syria.

As with any complex criminal trial, the first task is to manage it to ensure that the trial is conducted as fairly and efficiently as possible. In this respect a terrorism trial is much like any other complex criminal trial. So I shall refer to methods used to manage any complex criminal trial but also additional factors that are relevant particularly in a terrorism trial. The factors which seem to be of heightened relevance to a terrorism trial include the need for additional security and a particular need to remove any suggestion of bias against the defendant or defendants. These, as well as other matters concerning a complex criminal trial, had to be considered in the pre-trial arrangements made.

Of major concern in preparation for a terrorism trial is security. Unfortunately, courts have to accept that the publicity given to any terrorism matter makes the Court an attractive target for anyone who wants to make a splash on the news. On the other hand, Courts are places that must be open to the public and what we do must be and be seen to be done in public. I had a number of meetings with the Court Security Manager to review what was proposed for security measures.

The judge's objectives must be to keep everybody in the courtroom safe from harm but to do it in such a way that security measures are not obvious, particularly to jury members. An effective way of doing this, utilised in this case, is to have a second screening point after the screening point at the entry to the court building. The Succarieh trial was to be conducted in one Court and the adjoining courtroom was to be used as an overflow Court where the trial could be streamed into that Court so that if more members of the public wished to attend there was plenty of space for them. Another advantage was that if the defendant's supporters, many of whom appeared to be large men with a somewhat menacing manner, came to support him in court, they would readily be accommodated in the overflow court to prevent both any intimidation of the jury and, importantly, any prejudice against the defendant that members of the jury might gain by seeing his supporters. The second screening point was outside the entrance to the corridor to those two Courts.

The media were ordered not to report on the security measures so that knowledge of them did not contaminate the jury panel. The jury panel and then the jury to be chosen were to enter the Courtroom by another route that would not take them past the security measures. Other security measures put in place were required to be unobtrusive. Of course the extent to which armed police officers in plain clothes, particularly from the anti-terrorism squad, are able to be unobtrusive is a matter that may be open to question.

The only incident which occurred happened during my sentencing remarks. I was alerted to a potential threat when I broke mid-morning. I was advised to leave the court as soon as the expected trouble broke out. When I returned to Court to complete my sentencing remarks I observed a number of what appeared to be plain clothes police officers, presumably from the counter-terrorism squad, entering the courtroom and then a number of heavily-built, exclusively-male supporters of the defendant. The supporters proceeded to sit in a large and tightly knit group immediately behind the defendant. If they intended disruption, that grouping appeared to me not to be very wise so I asked them to spread out and asked the man who appeared to me to be the ringleader to sit on the other side of the Court. The plainclothes police shuffled to accommodate him in their midst. All meekly complied and no problem arose.

It is critical, in my view, that the judge is aware of, and ultimately responsible for approving, any additional security measures as it is the judge's responsibility to ensure that nothing is allowed to impact on the fairness and impartiality of the trial. The judge presiding should be alert to any potential threats and take whatever measures are necessary to avoid trouble occurring in the first place.

This leads me naturally to the question of bias, a matter of grave concern to judges conducting terrorism trials. One way of attempting to avoid it in the Succarieh case was to order that any security measures particular to the trial were subject to a non-publication order. The Courts Information Officer was able to ensure that all media knew of this restriction.

The question of bias and impartiality is important not only for the perception of jurors and for the public but also for the defendant. Media reports of other matters interstate had shown that defendants who shared Mr Succarieh's religious faith were showing disrespect to the court by refusing to recognise the legitimacy of the power of the court and demonstrating that in visible ways by, for example, not standing when the judicial officer entered the court. My own view, known only to me at this stage, was that if Mr Succarieh decided not to stand that was really a matter for him and I would not endeavour to enforce it. After all, his decision not to stand would not deter me from conducting the trial according to law and, if he were convicted, sentencing him. However two matters concerned

me: I was concerned that the jurors might not be impressed by any disrespect shown to the court; and, secondly, I wanted to ensure that the defendant felt that he was being treated fairly.

Accordingly, at the first Directions Hearing, I raised the question of how the court could allow for Mr Succarieh's religious observances without disturbing the efficient running of the trial. After all, freedom of religion is one of the core tenets of the liberal democracy that our criminal law exists to protect. It seemed to me that Mr Succarieh's need for five daily prayers could reasonably easily be accommodated. The first one occurred at sunrise, well before he came to court. The mid-morning prayer break could be accommodated within the usual mid-morning break necessary during jury trials. Lunch time was no problem. I do not always take a break mid-afternoon but very often jurors' attention will flag during the afternoon and one or more may need to go to the toilet so it was no real problem to allow that there would always be a mid-afternoon break in the trial which enabled Mr Succarieh to attend to his mid-afternoon prayers. The evening prayer was after the end of the court day.

Additionally, in a very long trial it is sometimes desirable not to sit on Friday. This enables any matters which do not require the presence of the jury to be dealt with and accommodates jurors' needs to attend to the business of their lives outside of the trial. It is also a Muslim holy day, so I said right at the beginning

that the court would not sit on a Friday. I also indicated that a room would be set aside for the defendant's family which would give them some private space.

In my experience a judge cannot, and therefore should not, rely on counsel to raise or request any special requirements and judges need to be alert to raise these matters early. Reference to resources such as the Queensland Supreme Court's Equal Treatment Benchbook is helpful in this regard.[1] That resource, which can be found on the Court Library website (http://www.sclqld.org.au/benchbooks/),[2] aims to provide judges and lawyers with information and advice about ensuring that proceedings are fair for all the diversity of individuals that come before the courts. It includes, for example, a chapter on ethnic, religious, spiritual and linguistic diversity and a chapter on oaths and affirmations.[3] The latter chapter identifies non-Christian oaths, appropriate for people of non-Christian faith who nevertheless would prefer to take an oath rather than an affirmation. A Qur'an should be available for those who wish to take an oath on that holy book. The Equal Treatment Benchbook sets out in detail the way in which the Qur'an should be treated.

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[1] Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed, 2016).
[2] It can also be accessed on the Queensland Courts website <http://www.courts.qld.gov.au/court-users/practitioners/benchbooks>.
[3] Ibid chs 2, 5.

Mr Succarieh's counsel on the first hearing day of a pre-trial application after the directions hearing said that, before we commenced, his client had asked him specifically to thank the court for its indulgence in terms of his religious observance over the course of the trial. I never had, at any time, any difficulty with Mr Succarieh showing the court the kind of respect that the court requires of those who participate in its process. After the case concluded, his counsel informed me that it made an enormous difference to his client and his willingness to take part in our criminal justice system and, ultimately, to listen to his counsel's advice.

Let me give another example from a complex criminal trial which was not terrorism related but which raised many similar issues. I conducted a trial where escalating violence between two ethnic groups had led to the death of one Aboriginal man and serious injury to two others. The defendants were all of the same ethnic group, which was different from the deceased's. In pre-trial directions hearings I enquired about the use of the name and image of the deceased Aboriginal man. Permission was sought by the prosecutor and granted from the appropriate kinship group. At one point during the trial, a forensic pathologist was giving evidence on behalf of the defendants (who were not Aboriginal). He took the opportunity to query the court's use of the deceased man's name, asserting his superior knowledge of Aboriginal culture. The deceased's sister was present in court where, with her adamant agreement, I was

able to inform him that we had the family's agreement and he should continue with his evidence rather than worrying about telling me how to run the court in an appropriate way.

The pre-trial hearings in *Succarieh* dealt with all the evidence the admissibility of which the defence wished to challenge. It is important to the management of complex trials that the trial judge has ample time to deal with ALL pre-trial applications well before the commencement of the trial. This has two main advantages – firstly, it means that the trial is able to be run efficiently without interruptions and, secondly, both sides can make an informed assessment of the quality of the evidence: the defence team knows precisely what evidence will be led and can make an assessment of it and give informed advice to the defendant on the strength of the evidence against him and it enables the prosecution to gauge any weaknesses in its case. In Queensland, we have a Supreme Court Practice Direction (No 6 of 2013) which provides that,[4] unless the Judge orders otherwise, criminal trials expected to take 15 sitting days or longer will be managed by a series of pre-trial reviews and an exchange of pre-trial memoranda between the prosecution and defence. These pre-trial memoranda, which must also be sent to the Associate of the judge managing the trial, ensure that advance notice is given of particular issues that may require special management, such as an intention to

[4] Supreme Court of Queensland, *Practice Direction No 6 of 2013 – Case Management in Complex Criminal Trials*, 5 April 2013.

adduce propensity evidence, bring an application to join or sever charges, or call a witness who has a disability or who is from a non-English speaking background. The Practice Direction is available on the Supreme Court's website (http://www.courts.qld.gov.au/courts/supreme-court/practice-directions).

In the end, each of the defendant's pre-trial applications to exclude evidence was unsuccessful. The most interesting of those was the challenge to expert evidence proposed to be led by the prosecution from Charles Lister. Mr Lister is a senior fellow at the Middle East Institute in Washington DC, where his work focuses on issues of terrorism and insurgency across the Middle East, with a particular focus on Syria. He is also a senior consultant to the Shaikh Group's Syria Track II Initiative, which since January 2014 has engaged intensively with approximately 1,000 influential Syrians and facilitated politically oriented dialogues on a Track II level. Within this multi-nationally backed initiative, Lister has co-ordinated the engagement with the leadership of over 100 Syrian armed opposition groups. Prior to moving to Washington DC, Lister was a visiting fellow at the Brookings Institution's Doha Centre in Qatar. Before that, he was head of Middle East and North Africa at HIS Jane's Terrorism and Insurgency Centre in London, UK.

In his report, Mr Lister set out the history and background to the Syrian civil war from its beginnings, in 2011, as a popular protest movement to which the Syrian government reacted with brutality, to the growth of the Free Syrian army and then

the establishment of the Islamic State in Iraq (or ISI) which established a Syrian wing.[5] Shortly after that, a terrorist group named Jabhat al-Nusra was formed. Mr Lister's report demonstrated, as I said in my sentencing remarks, that:

> "The Syrian conflict is complex and involves numerous actors pursuing a diverse range of objectives. In simple terms, the civil war involves the Syrian government headed by President Bashar Al-Assad, fighting against numerous opposition forces who seek to overthrow the government and replace the Assad regime.
>
> At the time the offences were committed, the civil and armed conflict in Syria had been ongoing for some time and numerous groups and organisations were involved in the armed hostilities. Those various groups and organisations were acting in pursuit of a wide range of objectives. Some of the opposition groups and organisations were motivated by ideals of nationalism and sovereignty and sought the removal of the Assad regime and the establishment of democratic governance within Syria. Others were motivated by more fundamentalist religious and ideological beliefs and sought to replace the Assad regime with a State governed by Islamic law.

[5] The Syrian wing of ISI, which became known as the Islamic State in Iraq and the Levant (or ISIL), was first established in August 2011 but it was not until April 2013 that ISI announced its formal expansion into Syria.

One of the opposition groups involved was the prescribed terrorist organisation, Jabhat Al-Nusra. Jabhat Al-Nusra was an Al Qaeda affiliated militant Islamist group operating as an opposition force in Syria with the goal of establishing a State in Syria governed by Islamic law. When Jabhat Al-Nusra first entered the conflict in late 2011, the group had been formed and was operating as the Syrian wing of the Iraq based militant jihadist group Islamic State in Iraq. The ISI as it was then known had itself begun as an organisation with allegiance to Al Qaeda. ISI later established a self-proclaimed Caliphate and identified itself as an entity distinct from Al Qaeda. With expansion into Syria, ISI eventually became known as the Islamic State in Iraq and the Levant (or ISIL) or the Islamic State in Iraq and Syria (ISIS).

Over time, a dispute emerged between Jabhat Al-Nusra and ISIL. By April 2013 ISIL had expanded its operations in Syria and attempted to subsume Jabhat Al-Nusra. Jabhat Al-Nusra refused to submit to ISIL's control and instead reaffirmed its allegiance to the group Al Qaeda and the objective of establishing an Al Qaeda run Islamic Caliphate. The ensuing discord, or *fitna*, eventually led to open conflict and armed hostilities between members of Jabhat Al-Nusra and ISIL within Syria."

Mr Lister was cross-examined by telephone in the United States during the pre-trial hearing. His cross-examination did not go well for the defence. Indeed, after about an hour's cross-examination it appeared that Mr Lister had been perhaps unnecessarily modest in his CV and was immensely qualified to speak on the topic. He explained that the Track II process which he conducts is a politically focused dialogue that happens underneath official State backed peace processes. It meant engaging with hundreds of Syrians from all different types of backgrounds involving the leadership of Syrian armed opposition groups not including designated terrorist organisations. Outside the Track II process, he had engagement with designated terrorist organisations including Jabhat Al-Nusra, including with two of its seven founding members and many of its foot-soldiers, Syrian and foreign. In the course of cross-examination he revealed that he had written a 500 page book on the subject and indeed he has written a book called "The Syrian Jihad", subtitled "Al Qaeda, the Islamic State and the Evolution of an Insurgency".[6] Unsurprisingly, after the depth of his expertise was comprehensively displayed, the cross-examination was swiftly brought to an end and defence counsel on behalf of his client conceded his expertise.

Another pre-trial application was to exclude a Jabhat-al-Nusra branded propaganda video which the defendant had watched on the internet. It showed

[6] (Hurst and Company, London, 2015).

the preparation for and carrying out of a suicide bombing in Syria in a truck laden with explosives. Although the suicide-bomber's face was obscured, his voice was not. The prosecution intended to call evidence to identify the suicide bomber as the defendant's brother. The propaganda video was prejudicial but its watching by the defendant was relevant to his state of mind. I ruled that it was admissible.

After all the directions hearings had been heard and rulings made I adjourned the matter for a few weeks. I had arranged that the week before the trial was due to start was to be kept available for further directions hearings and then, as I said, a six week trial was to ensue. To this end, I had prepared my opening remarks to the jury, some documents to be handed to them and had started work on a question trail and integrated directions to the jury at the completion of the evidence and addresses.

In a long trial it is, in my view, important for jurors to have the structure of what they have to decide with them from the outset. For this purpose, I had prepared a handout for the jury setting out a summary of the counts, a statement of the burden and standard of proof, and the elements of the offences as applied to the facts of the case (taken from the relevant statute):

"**Counts 1 and 3:**

Omar Succarieh is charged with two counts of doing an act preparatory to an incursion into a foreign State, contrary to s 7.1(a) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).

Counts 2 and 4:

Omar Succarieh is also charged with two counts of making funds available to a terrorist organisation, contrary to s 102.6(1) of the *Criminal Code* (Cth).

Burden and standard of proof:

A defendant in a criminal trial is presumed to be innocent. So before you may return a verdict of guilty, the prosecution must satisfy you that the defendant is guilty of each of the elements of the charge in question, and must satisfy you of that beyond reasonable doubt.

Elements of count 1

1. Omar Succarieh intentionally facilitated arrangements for the safe passage of Agim Kruezi into Syria;
2. With the intention that Agim Kruezi would engage in a hostile activity in Syria.

Note: "hostile activity" is defined as an act with the intention of achieving the objective (whether or not such an objective is achieved) of engaging in armed hostilities in the foreign State.

Elements of count 2

1. Omar Succarieh arranged for the transfer of USD$18,700 to Abraham Succarieh;
2. Omar Succarieh intended the funds to be made available to Jabhat al-Nusra;
3. Jabhat al-Nusra was a terrorist organisation;
4. Omar Succarieh knew that Jabhat al-Nusra was a terrorist organisation.

Elements of count 3

1. Omar Succarieh intentionally assisted Agim Kruezi to obtain or retrieve the sum of AUD$7,700 from Kare Vaevae which Agim Kruzi was to use (wholly or partly) to fund his preparation to travel from Australia to Syria;
2. With the intention that Agim Kruezi would engage in a hostile activity in Syria.

Elements of count 4

1. Omar Succarieh arranged for the transfer of USD$25,000 to Abraham Succarieh;
2. Omar Succarieh intended the funds to be made available to Jabhat al-Nusra;
3. Jabhat al-Nusra was a terrorist organisation;
4. Omar Succarieh knew that Jabhat al-Nusra was a terrorist organisation."

Counsel had been consulted and indicated their satisfaction with the content of the proposed jury hand out.

In addition, I had urged counsel to agree on a list of admissions to be made which could be handed to each juror when I was making my opening remarks to them. They were well on the way.

Integrated directions were first developed in New Zealand under the leadership of the Court of Appeal judge Rob Chambers. They have been comprehensively adopted in that jurisdiction and there has been much work done by Law Reform Commissions and judges with a view to their implementation in Australia. So far, we have been able to adopt question trails for use in many trials but the use of truly integrated directions has not yet become widespread. Such directions recognise the separate role of judge and jury. They embed the law into a question or questions of fact, the answer or answers to which will lead directly to either a

guilty or not guilty verdict. When they are well designed a jury should not need to be separately told what the elements of the offence are or to have terms within those elements defined.

The point of an integrated direction is that by framing the question properly the law is embedded within it and requires no other explanation. That is, if the jury answers the question then – because of the form of the question – it will necessarily have correctly applied the law. An integrated direction is necessarily intensely case specific. In Victoria, integrated directions have the backing of legislation. The following is taken from the Benchbook published by the Judicial College of Victoria:[7]

> "The *Jury Directions Act 2015* allows judges to give directions in the form of factual questions that address the matters the jury must consider or be satisfied of in order to reach a verdict (*Jury Directions Act 2015* s 67).
>
> Factual question directions are designed to reduce the difficulty of the jury understanding and applying abstract principles of law. Instead, the directions will ask the jury to resolve specific factual questions and spell

[7] Judicial College of Victoria, *Criminal Charge Book*, Section 3.8.1 - Bench Notes: Judge's Summing Up on Issues and Evidence, paras 59-63.

out the legal consequences of possible findings of fact. Such directions are designed to put the critical issues of fact before the jury, without complications from the interpretation of the relevant law (see, e.g., *Stuart v R* (1974) 134 CLR 426).

For example, in *Quail v R* [2014] VSCA 336, the trial judge, with the consent of prosecution and defence counsel, integrated the legal question of self-defence within the factual question of whether the accused or the victim was the original aggressor. Resolution of that question was sufficient to determine whether the prosecution had disproved self-defence.

The judge may combine directions in the form of factual questions with:

- Directions on the evidence and how the evidence is to be assessed;
- The reference to the way the parties have put their case in relation to the issues;
- The identification of evidence necessary to assist the jury determine the issues in the trial (*Jury Directions Act 2015* s67).

A judge who gives a direction in the form of a factual question or a factual question combined with another matter (an "integrated direction") does not

> need to also address the matter in another form (*Jury Directions Act 2015* s67).
>
> Under the *Jury Directions Act 2015*, it is only the elements and the absence of any defences which must be proved beyond reasonable doubt. When a judge directs on the elements in the form of factual questions, those factual issues must be proved beyond reasonable doubt (*Jury Directions Act 2015* s61)"

In order to prepare a question trail, one first starts with the applicable law. The goal is to put the facts of the case on the framework created by the legal principles, moving from the abstract to the concrete. The number of questions so created may be reduced in light of admissions made by the defendant.

Let me show you how this could be done in the Succarieh case, starting with Counts 1 and 2 as examples.

For Count 1, the applicable law was contained largely in ss 6 and 7 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).

Section 7(1)(a) provides that "a person shall not, whether within or outside Australia, do any act preparatory to the commission of an offence against

section 6, whether by that person or by another person." Rather than give all of that to the jury, one identifies the essential points from that section for the purposes of the case before the court. Relevantly here, the prosecution had alleged that the defendant had facilitated arrangements (the "acts preparatory") for Agim Kruezi ("another person") to commit an offence against section 6 of the Act.

What then was the offence against section 6 that the defendant was facilitating Agim Kruezi to commit? As you can see, it was a detailed provision:

Section 6: Incursions into foreign countries for purpose of engaging in hostile activities

(1) A person shall not-

(a) enter a foreign country with intent to engage in a hostile activity against the government of that country; or

(b) engage, in a foreign country, in a hostile activity against the government of that country.

Penalty: Imprisonment for 14 years.

(2) A person shall not be taken to have committed an offence against this section unless-

(a) at the time of the doing of the act that is alleged to constitute the offence, the person-

(i) was an Australian citizen; or

(ii) not being an Australian citizen, was ordinarily resident in Australia; or

(b) at any time during the period of one year immediately preceding the doing of that act, the person was present in Australia for a purpose connected with that act.

(3) For the purposes of sub-section (1), engaging in a hostile activity against the government of a foreign country consists of doing an act for the purpose of achieving any one or more of the following objectives (whether or not such an objective is achieved):

(a) the overthrow by force or violence of the government of the foreign country;

(b) causing by force or violence the public in the foreign country to be in fear of suffering death or personal injury;

(c) causing the death of, or bodily injury to, a person who-

(i) is the head of state of the foreign country; or

(ii) holds, or performs any of the duties of, a public office of the foreign country; or

(d) unlawfully destroying or damaging any real or personal property belonging to the government of the foreign country.

(4) Nothing in this section applies to an act done by a person in the course of, and as part of, his service in any capacity in or with-

(a) the armed forces of the government of a foreign country; or

(b) any other armed force in respect of which a declaration by the Minister under sub-section 9 (2) is in force.

However, the essential paragraphs for the purposes of this case can be identified as follows. Section 6(1) provided that a person shall not "enter a foreign State with intent to engage in a hostile activity in that foreign State or engage in a hostile activity in a foreign State." By section 6(3)(aa), a person will have engaged in hostile activity if they acted with the intention of achieving the objective of engaging in armed hostilities in the foreign State.[8] The Crown's case was that Agim Kruzei would engage in armed hostilities in Syria if given the chance to do so. This was the breach of s 6 that the defendant was alleged to have made arrangements to facilitate.

The final element of the offences is the *mens rea*. This is supplied by section 5.6(1) of the *Criminal Code* (Cth), which provides that for all Commonwealth offences that do not specify a fault element (as here), where the physical element consists only of conduct, intention is the fault element for that physical element.

[8] This was the relevant definition of "hostile activity" as agreed by the parties.

Putting all of these elements together, and incorporating the criminal standard of proof, we now have the following integrated direction to give the jury for count 1 on the indictment:

Questions for Count 1:

1. Are you satisfied beyond reasonable doubt that Omar Succarieh intentionally facilitated arrangements for the safe passage of Agim Kruezi into Syria?
    a. If yes, go to question 2;
    b. If no, then Mr Succarieh is **not guilty of Count 1** and you should go to the questions dealing with Count 2.

2. Are you satisfied beyond reasonable doubt that Mr Succarieh intended that Agim Kruezi would engage in armed hostilities in Syria?
    a. If yes, then Mr Succarieh **is guilty of Count 1** and you should go to the questions dealing with Count 2;
    b. If no, the Mr Succarieh is **not guilty of Count 1** and you should go to the questions dealing with Count 2.

Rather than putting before the jury troublesome legal jargon such as ‘acts preparatory’ or the overwhelming burden of all possible section 6 breaches, the

integrated direction focuses the jury's attention on the relevant factual questions they need to decide in order to produce a verdict on a legally valid footing.

Turning next to the integrated direction for Count 2, I acknowledge the additional work done on this by Saul Holt QC who appeared for the defendant. As a New Zealander working in Australia he has a sophisticated understanding of the topic. The applicable law for this count was contained in s 102.6(1) of the *Criminal Code* (Cth). That section relevantly provides that if:

a) A person intentionally makes funds available to an organisation (whether directly or indirectly); and
b) The organisation is a terrorist organization; and
c) The person knows the organisation is a terrorist organization

then the person is guilty of an offence punishable by up to 25 years' imprisonment.

To develop the integrated direction, it is necessary to clearly identify which facts alleged by the prosecution would constitute 'making funds available' to Jabhat al-Nusra for the purposes of s 102.6(1)(a).

It was agreed by the parties that the defendant sent his brother, Abraham, USD$18,000 and that his brother was then living in Syria and received that money. Moreover, there was no dispute that the defendant knew, at the relevant time, that Jabhat al-Nusra was a proscribed terrorist organization. In those circumstances, the key issues were, firstly, whether in providing the money to Abraham the defendant was making those funds available to Jabhat al-Nusra (either because Abraham was receiving the money on behalf of the organisation [i.e., directly] or because Abraham was to use the money to undertake the organisation's activities [i.e., indirectly]) and, secondly, whether the defendant *intended* to make the funds available to Jabhat al-Nusra in either of those ways.

By stripping away the clutter of legal jargon, accounting for the defendant's admissions, and incorporating the criminal standard of proof, one is left with a question trail for the jury to follow that might look something like this:

1. Has the prosecution proved beyond reasonable doubt that when Abraham received the money from Omar Succarieh, he received it on behalf of Jabhat al-Nusra?

   If **no**, go to question 2;

   If **yes**, go to question 3.

2. Has the prosecution proved beyond reasonable doubt that when Abraham received the money from Omar Succarieh it was to be used by him to undertake activities of Jahbat al-Nusra?

If **no**, you will find Omar Succarieh not guilty of Count 2 and you will go on to consider the questions dealing with Count 3.

If **yes**, go to question 3.

3. Has the prosecution proved beyond reasonable doubt that when Omar Succarieh arranged for the money to be sent to Abraham he **intended** either:

a. That Abraham would receive that money on behalf of Jabhat al Nusra; **or**

b. That the money would be used by Abraham to undertake activities of Jabhat al Nusra.

If **yes**, having already answered yes to either question 1 or question 2, you will find Omar Succarieh guilty of Count 2 and you will go on to consider the questions dealing with Count 3.

> If **no**, you will find Omar Succarieh not guilty of Count 2 and you will go on to consider the questions dealing with Count 3.

Questions one and two are directed to two ways in which the physical elements of the offence could be satisfied on the evidence, whether directly or indirectly. The third question directs the jury's mind to the necessity for the prosecution to prove the mental (or 'fault') element of the offence. This approach minimizes uncertainty about whether the jury would correctly apply the law to the case. So long as they follow the question trail, they will have done so. Moreover, by providing directions in the form of this question trail, it makes it comparatively easy to explain to the jury the law concerning the need to reach a unanimous verdict.

As there are multiple routes to conviction or acquittal, the jury can be told that they must all be agreed on the verdict, whether that verdict is guilty or not guilty, but that they need not agree on the precise reason why the defendant is guilty or not guilty. To make that direction concrete, reference can be made to the question trail and concrete examples given. For instance, one might say to the jury:

a. If some of you answer yes to question 1 and question 3 while the rest of you answer yes to question 2 and question 3 your verdict would be "guilty" because you have all agreed on the outcome just for different reasons.

Another example one could give is that:

b. If some of you answer yes to question 1 and no to question 3 while the rest of you answer no to questions 1 and 2 your verdict would be "not guilty" because you have all agreed on the outcome just for different reasons.

Finally, you could clarify that:

c. If some jurors answer yes to question 3 on the basis of 3(a) and the rest on the basis of 3(b) the unanimous answer to question 3 is still "yes".

Taking the same approach for each of the remaining counts alleged against the defendant, the remainder of the question trail might look like this:

<u>Questions for Count 3</u>

1. Are you satisfied beyond reasonable doubt that Omar Succarieh intentionally assisted Agim Kruezi to obtain or retrieve the sum of

AUD$7,700 from Kare Vaevae which Agim Kruzi was to use (wholly or partly) to fund his preparation to travel from Australia to Syria?

a. If yes to Question 1, then go to Question 2;

b. If no to Question 1, then Mr Succarieh is **not guilty of Count 3** and then go to the questions dealing with Count 4.

2. Are you satisfied beyond reasonable doubt that Mr Succarieh intended that Agim Kruezi would engage in armed hostilities in Syria?

a. If yes to Question 2, then Mr Succarieh is **guilty of Count 3** and then go to the questions dealing with Count 4;

b. If no to Question 2, then Mr Succarieh is **not guilty of Count 3** and then go to the questions dealing with Count 4.

Questions for Count 4

1. Are you satisfied beyond reasonable doubt that when Omar Succarieh arranged the transfer of USD$25,000 to Abraham Succarieh that he intended the funds to be made available to Jabhat al-Nusra?

a. If yes to Question 1, then go to Question 2;

b. If no to Question 1, then Mr Succarieh is **not guilty of Count 4** and you do not need to consider any more questions.

2. Are you satisfied beyond reasonable doubt that Omar Succarieh knew that Jabhat al-Nusra was a terrorist organisation?

    a. If yes to Question 2, then Mr Succarieh is **guilty of Count 4** and you do not need to consider any more questions;

    b. If no to Question 2, then Mr Succarieh is **not guilty of Count 4** and you do not need to consider any more questions.

I listed the matter for directions at 10.00am in the week prior to the trial starting. The Crown presented a new indictment charging Mr Succarieh with four counts under the *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth). Two of them, counts one and three, were the same as on the original indictment but counts two and four had been changed to lesser charges. Mr Succarieh pleaded guilty and the following week I heard submissions and proceeded to sentence him.

That raised the question to be considered of any application by the media for filming of the sentencing remarks. No application was made in this case; I suspect because the media realised that such an application was unlikely to be successful. In New South Wales an application was made to film the sentencing remarks in Alqudsi. The application was referred to the Chief Justice by reason of s 128(3)(d) of the *Supreme Court Act* 1970 (NSW). He refused the request. The trial judge was Justice Adamson but she played no part in the application since, under s 128(3)(d), the decisions were a matter for the Chief Justice. Section

128(3)(d) provides that one of the exclusionary grounds for the broadcast of judgment remarks is "that the Chief Justice has directed that the judgment remarks not be recorded or broadcast because, in the Chief Justice's opinion, the broadcast of the judgment remarks would be detrimental to the orderly administration of the Court."

The reasons for that decision were not given but matters that a judge would have to take into account would include the well-known use of social media by terrorist groups. It would be easy enough to take a portion of a video in which, for example, a judge referred to defence submissions and turn that into a propaganda video to be widely distributed on the internet. There is a real danger for judges to consider that any part of their sentencing remarks could be used as a propaganda tool.

My view is that there exists a serious risk that any video of a judge's sentencing remarks which made any reference to the defence submissions would be taken out of context and misused by the very people and the terrorist organisations that the sentence is meant to deter from further offending.

Conclusion

A terrorism trial is not unlike any other high profile complex criminal trial in the challenges it presents and the way of managing it is with thorough preparation in

collaboration with the legal representatives to tease out and meet all the challenges of the particular case.