Terrorism 2 - Online transcript

**Greg Muller**

Last episode we looked at completed terrorist acts, and why they attract such large sentences.

However, cases involving completed terrorist acts are rare, indeed the first one in Victoria was in 2019. And there’s been only one other since. Most terrorism cases which come before the Supreme Court occur before an act of terrorism has taken place.

They’re preparatory offenses. That is preparing to commit a terrorist act or conspiring to prepare for a terrorist act.

**Dr Patrick Emerton**

That preparing offense for terrorism has a maximum penalty of life imprisonment so it’s treated as the most serious thing you can do in our criminal law.

**Rob Stary**

Terrorism offences are designed to capture people pre-emptively before anything takes place.

**Justice Croucher**

It's difficult because it means that you're trying to capture thoughts much more than actions as a crime.

**Justice Croucher (court recording)**

Can you please stand? On the offence of engaging in conduct preparatory to the offence of entering the Philippines with the intention of engaging in a hostile activity in that country, Mr Cerantonio is convicted and sentenced to...

**Greg Muller**

Preparatory offenses for terrorism can be difficult to prove beyond reasonable doubt, which is why the trials are usually long and complex. There’s some difficult questions to resolve.

How developed were the preparations?

Where do you draw the line between dangerous talk and credible threat?

And what if those plans never had a chance of being realised? Does it matter?

The Commonwealth Criminal Code has a list of offenses which broadly fit into the label of preparatory. These include things like; doing an act in preparation for a terrorist act, membership of a terrorist organisation, and financing offences such as providing funds or making funds available to an individual terrorist.

There’s also, urging violence or advocating terrorism offenses. And these preparatory offenses apply even if a terrorism act does not occur.

With most criminal cases at the Supreme Court, such as murder and manslaughter, the laws respond to crimes committed.

Person ‘A’ is accused of doing this. Here’s the proof. Person ‘A’ goes to trial and if found guilty ‘A’ goes to prison.

But anti-terrorism laws not only criminalise a terrorist act, they pre-empt the commission of a terrorist act in the first place. And it’s still considered a very serious offense. Indeed, preparing for a terrorist act attracts the same maximum sentence as actually carrying out a terrorist act. That is, life.

The difficulty then is how far back in the planning is a terrorist act inevitable.

Dr Nicola McGarrity is a senior lecturer at the University of New South Wales in the faculty of law and also the director of the Terrorism Law Reform Project.

**Dr Nicola McGarrity**

What differentiates Australia's ordinary criminal laws from its terrorism laws is really the focus on what you might call prevention or precaution or preliminary activities.

What the authorities decided when enacting anti-terrorism laws is that far from adopting the traditional kind of reactive approach that you would take in the criminal space, that notion of waiting until a criminal act is committed before taking action against the perpetrator, terrorism has the potential to cause such grave harm, such considerable damage to the body politic, to the state itself, that we can't afford to simply wait until a terrorist act occurs.

And really what lies at the heart of whether it be the preparatory offences themselves, whether it be the laws to do with preparing for foreign incursions, whether it be the laws to do with surveillance, whether it be the laws to do with prescribed organisations and affiliated offences. What lies at the heart of all of them is this need to prevent. This need to prevent terrorist activities before they occur. And that's why with these offences we've seen a deliberate move by the legislature back in time towards giving an ability to investigators, to intelligence agencies, to police to pre-empt the activities of potential terrorists.

**Greg Muller**

So when is the right time to criminalise intent?

**Dr Nicola McGarrity**

I think the most difficult question in this space is how far is too far back? The question as to where you draw the line is really the intractable problem and it's really the one that scholars like myself and legislators, policy makers are continually grappling with.

**Greg Muller**

PhD law candidate at Cambridge University, Jessie Smith.

**Jessie Smith**

I guess in theory, the idea is that to do so is quite intrusive on human autonomy. You should allow people to self correct before they get closer to committing a catastrophic act. On the other hand there’s good public policy sense to intervene early when you have a very large scale attack being planned.

What this means in terms of actually prosecuting these matters is that when you combine early preparatory offences with the need to produce evidence of ideology, that tends to dominate the brief because you have conduct which is very thin on the ground, they haven’t really done much at that stage but they’ve probably said a great deal in relation to their politics, religion or other ideological matters.

So, prosecutions for preparatory acts tend to be a little controversial in that the manner in that the briefs are put together look very different to what we would ordinarily see in a criminal trial which would usually include the prosecution demonstrating very serious activity right at the pointy end and the police intercepting it there.

**Justice Croucher**

Yes, well it makes it different in a couple of ways because I suppose it's a bit of getting used to. We're so used to crimes being completed crimes, someone is killed or someone is seriously injured.

**Greg Muller**

Criminal judge, Justice Croucher heard a terrorism case in 2019 and sentenced six men for preparatory offenses.

**Justice Croucher**

These are preparatory offences often, and that was a deliberate choice by the Commonwealth Government post 9/11 to create crimes that we're nipping in the bud, if you like, terrorist plans.

Because, the concern was that if you leave it too late it's too dangerous, on the one hand. Secondly, the law as it was, was thought not to be capable of capturing that sort of behaviour in the form that it was.

And so they moved backwards in time earlier in the process and made that criminal, which makes, you know, it's difficult because it means that you're trying to capture thoughts much more than actions as a crime, and there are difficulties about where you draw the line with all that.

There was a lot of angst and discussion about all that sort of thing at the time that this legislation was passed, although, we're gradually coming to grips with it over time, and people often think, “How can this be a crime? It's just talk, it's just this." But of course it's more than that. It's usually preparation for something serious or something said to be serious at least. Sometimes it is terribly serious, sometimes it's not so serious, as it happens.

**Greg Muller**

Criminal judge, Justice Taylor

**JusticeTaylor**

I think there are still discussions to be had about at what point we criminalise what might be called preparatory offences, and if you call too soon on the trajectory of behaviour then that idea of thought crime comes into existence. But parliament has passed these laws and if all you do is think about doing something, you will not be found guilty of them.

Now, people may have differing views as to where the correct place to criminalise the start of behaviour lies, and terrorism crimes are not the only preparatory type offences that have been criminalised in Australia for example, if you look at the procuring and grooming of children, online-type offences, they are preparatory offences. They are preparatory to the physical sexual abuse of a child. Now, they thankfully don't always lead to that but they are crimes that are specifically enacted earlier in the trajectory of behaviour to stop the behaviour. And the terrorism legislation follows the same model.

So, I think it should be part of quite a broad question about, at what point do we criminalise action, but the fact that it occurs in the terrorist sphere is not unique.

**Greg Muller**

Former criminal judge Betty King heard a case in 2011 which was the first of its kind. It was not just planning a terrorist attack, but conspiring to plan.

More on that case later.

**Betty King**

It's sometimes described as a thought police material because so many of them are what you hope that they remain this way, that they are in fact people who are talking about doing something, not necessarily doing it. The police try and arrest before activity actually occurs. The interesting point is at what stage it becomes a criminal offence, when you go from talking to action.

A conspiracy to commit a crime is dealt with in exactly the same punishment level as the crime itself. So, a conspiracy to murder, the maximum penalty for murder is life imprisonment and the maximum penalty for conspiracy to murder is also life imprisonment. The difference is, often there's been no murder but they intended there to be one. So, it's the intent that really gets punished.

**Felicity Gerry QC**

I think what attracts me is difficult legal questions.

**Greg Muller**

Felicity Gerry QC has acted as defense counsel in various terrorism matters, both Islamic and right wing terrorist cases.

**Felicity Gerry QC**

I think the terrorism cases found me rather than me finding them, but I also think they suit me because they are such a big challenge and you are trying to, frankly take the heat out of a very difficult case so that everyone can consider it calmly.

Some of the problems in terrorism cases involve allegations of preparing and planning, rather than actually doing. And more recently, we've had situations where you have conspiracy to prepare or plan. So that on a conspiracy, something might not have happened at all. So, they might have agreed to do something, but they may not even have prepared or planned very much.

Usually on the indictment there's some allegation of what people have actually done. So, it's very different, for example, from a murder trial where the allegation is A shot B. Easy, somebody's done something, it's conduct.

Well, preparing to shoot or planning to shoot, suddenly you're thinking about, well, what do you actually need to do, to do those things? And then is it for political, ideological or religious cause that would make it a terrorism prepare or plan? So, you're adding in this element of politics or religion or ideology to what is already a step back from actually doing something.

And then if it's a conspiracy to prepare and plan, you've taken another step back to what people are thinking about and talking about doing before they actually go on and do it in the context of their politics.

So, it really stretches the limits of the criminal law in a way that no other area of law does.

We've always looked at conduct and state of mind, and terrorism, not only is it a label that makes everybody fearful, in no other area of law do you use that sort of label. We don't have ‘very scary murder’. We have terrorism as a fearful label. So, we're all frightened of it as a reaction.

But you're also placing criminal liability far earlier than you might do in another type of crime. So, as lawyers, you're constantly trying to think about, well, is this within the limits of criminal liability? Has the law gone too far? What's the way of challenging that?

Terrorism trials really test not only your own views about politics, religion and indeaology but test the limits of where the criminal law is stepping in to regulate people’s behaviour. So, it's complicated, because it's about the legal principle as well as the practicalities of getting a case up and running on a legitimate basis.

**Greg Muller**

So at what point in the preparation does a terrorism act become inevitable?

**Felicity Gerry QC**

At what points in preparation is an act inevitable? Well, there's actually quite a lot of law around virtual certainty. And there's some cases on what's known as oblique intention.

So, the law has discussed those things quite a lot. At what point are you intending to do something because it's, you mean to do it, you mean the consequences to happen or the outcome is a virtual certainty.

So, that question really depends not just on the evidence, but on the legal principle, at the point that something is being done, when does it switch from preparing to conduct?

One argument is that if you make a bomb for the purposes of violence, then maybe that's terrorism of itself, even if you never use the bomb, that's not preparing or planning. But what you have to do is look at what the whole story is.

So, if the prosecution case is that a bomb was being made for a particular event, it would be a bit ridiculous not to know about that particular event. So, you wouldn't say the bomb of itself is the conduct. You'd say that the future conduct of bombing that particular place is the terrorist act and everything else is preparing and planning.

Defending, we just react to whatever it is the prosecution is seeking to prove.

**Greg Muller**

That could be Nicholas Robinson QC.

Nick’s often in court as crown prosecutor in terrorism matters.

**Nicholas Robinson QC**

The essential distinction between carrying out a terrorist act and preparation is the difference between having done something and getting ready to do it.

And the very simple example of the way this is set up work is, if you took a bomb into a crowded place and set it off intending by doing that to intimidate the public and advance an ideological cause such as there should be no more football on Friday nights, that would be a terrorist act.

If I knew you wanted to do that and I am very good with chemistry and you asked me to make you a bomb, if I gather the things together and make the bomb and then give it to you, I have done the act of preparation, knowing what you’re going to do.

And the hard bit in the prosecution and the making of the laws and the way in which this is all dealt with is, when something is so early that it’s preparing for another thing, the question is, are you sure they're actually preparing for what you say? And that becomes the very difficult forensic issue and it becomes the basis of, often, the basis of argument.

And so, within the terms of investigation, if police are investigating something and they think that the people they're watching and listening to, or whatever, are preparing to do a terrorist act, of course their concern is, one, they want to stop a terrorist act, that’s the main concern. But two, if they’re going to arrest and charge them, they need to have enough evidence that they can actually charge them with what they think is going on.

So there’s a balancing and a judgement of how much they’ve already got and is that enough to prove that these people are doing what they think they’re doing beyond reasonable doubt.

And that’s exacerbated in terrorist matters because they’re so early compared to ordinary crimes.

**Greg Muller**

So how do you go about proving to a jury - beyond reasonable doubt - what somebody’s intentions are?

Nicholas Robinson QC again.

**Nicholas Robinson QC**

Well, it’s the same I think in all criminal cases. Showing someone’s state of mind is sometimes very difficult. The thing in terrorism is that if you can point to an action which allows you to infer that it was intended you can prove it so the jury is satisfied. And if I can give a brief example, what I often say to a jury is that we do this all of the time.

People always infer what someone's mind is from what they do. And a very simple but I think good example is if you're watching a game of cricket and the person facing hits the ball into the out field, and both batters run, you know they agreed to run, because that’s what they did.

Now you might not hear them call, “Yes”. You might not see them look up and nod at each other but if you see them run, and it’s the same if you’re in a park or at the MCG where you can’t hear anything except the crowd, you know from their actions that they agreed to run.

People do that all the time, infer what somebody’s mind is. It’s a constant thing. The hard bit is being satisfied that it was the only thing beyond reasonable doubt and that depends on the facts in any case.

**Greg Muller**

My question is, how difficult is it to determine when something is just talk via phone taps or whatever, and when can it actually be proven as a precursor to a crime?

**Dr Patrick Emmerton**

So, Difficult question.

**Greg Muller**

Associate Professor of Law at Monash University, Dr Patrick Emerton.

**Dr Patrick Emmerton**

It’s very traditional in criminal law that there are pre curser - sometimes called inchoate offenses. So, attempt. Almost everyone’s come across the notion of attempted murder, and there’s also notions of conspiracy, so conspiring with a group of people to - well more than one person to commit an offense.

The way the terrorism offences are structured, there are a number of offences that are built around the basic concept of doing a terrorist thing. And these include very serious offences. 101.6 of the Commonwealth Criminal Code of preparing or planning for a terrorist act ...

**Greg Muller**

101.6 of the Commonwealth Criminal Code says:

**Actor**

Other acts done in preparation for, or planning, terrorist acts:

One: A person commits an offence if the person does any act in preparation for, or planning, a terrorist act.

**Greg Muller**

Penalty: Imprisonment for life.

**Actor**

Two: A person commits an offence under subsection (1) even if:

(a) a terrorist act does not occur; or

(b) the person's act is not done in preparation for, or planning, a specific terrorist act; or

(c) the person's act is done in preparation for, or planning, more than one terrorist act.

**Dr Patrick Emmerton**

That preparing offense for terrorism has a maximum penalty of life imprisonment so it’s treated as the most serious thing you can do in our criminal law.

So, what you can then have, because that preparing act which looks a bit like the concept of attempt or conspiracy, because that itself is a defined offense you can then have a conspiracy to do that or an attempt to do that, or an attempt to do that. So you can get two layers of precursors.

**Greg Muller**

Not just preparing but conspiring to prepare?

**Dr Patrick Emmerton**

That’s right. So, because a type of inchoate or precursor offense has itself been defined as a head offense, the normal precursor inchoate concepts can then dangle off that.

And so we have had people in the courts here in Victoria charged with conspiring to prepare. So, then the prosecution has to prove that indeed these people were engaged in collective endeavour and that that endeavour was working together to prepare or plan.

**Greg Muller**

But, again conspiring to commit a crime is not new.

**Justice Tinney**

There can be conspiracy to commit murder or any crime. So, that can be something that's gone no further than preparation in the end. So, you can be guilty of conspiring to carry out a murder or an armed robbery or whatever it is.

**Greg Muller**

Criminal judge, Justice Tinney.

**Justice Tinney**

In the case of the terrorist crimes, often they're charged as preparatory because the authorities are so closely looking at the particular people and in the end, they need to act, that is the authorities need to act before the crime can be carried out.

If the authorities, if the Federal Police or ASIO, if they're looking at a person of interest and they see that the person is going to Bunnings and buying items from which they can get gunpowder, and buying other things that might be going to, potential ingredients to make a bomb or if there are things that are going on, that can be a process that's unfolding for a long time, and a lot of it may be being looked at carefully by the authorities as it happens.

So, they then of course need to act before the crime is carried out, and, that's why there needs to be the law of preparatory offending where terrorist acts are concerned because you certainly don't want to be investigating these crimes after they've been committed.

**Justice Croucher (court recording)**

So, here we go. On the 10 May 2016, Robert Cerantonio ...

**Greg Muller**

Justice Croucher heard a terrorism case based on preparatory acts.

**Justice Croucher (court recording)**

..and Kadir Kaya, all of whom hail from Melbourne, were arrested by police near Laura, a hamlet in the far north of Queensland. The group had travelled there from Victoria in a Hyundai SUV towing a seven-metre Haines Hunter boat. Police had had the men under surveillance for a considerable period and suspected that they had been preparing to head overseas in the boat to a foreign country for the purpose of engaging in a hostile activity.

Each man was charged individually with an offence of that nature against section 119.4, subsection 1, of the Criminal Code of the Commonwealth.

**Greg Muller**

Section 119.4 involves, “Preparations for incursions into foreign countries for the purpose of engaging in hostile activities”.

**Justice Croucher (court recording)**

Each of the six men entered the agreement intending that the offence be committed and in pursuit of that agreement, the offence was committed.

While the Crown needed to prove only a single preparatory act in Australia by any of the six men pursuant to that agreement, the evidence demonstrates that the following acts were carried out by one or more of the six men pursuant to that agreement.

Seeking to obtain and equip a boat suitable to enable the six men,or some of them to leave Australia covertly and purchasing a vehicle and a boat and driving the vehicle and the boat to the north of Queensland.

**Justice Croucher**

Yeah, the so-called Tinnie Terrorists. They were a group of Melbourne people, mostly young, who were attracted in particular to a fellow called Cerantonio, who was their leader if you like. He was a well-known preacher in the Islamic community who was recorded preaching a lot of bile at times and pretty serious stuff.

Their plan, in substance, was to head to the Philippines to be involved in one form or another with the goings-on over there in possibly a violent fashion.

**Greg Muller**

Like most terrorist plots, this one never came to fruition and was therefore a preparatory offense.

**Justice Croucher**

They were dubbed the Tinnie Terrorists by many, probably the media at least initially, because the boat that they were going to head to the Philippines in was small.

**Justice Croucher (court recording)**

It was alleged that, between 22 October 2015 and 10 May 2016, each accused joined in an agreement to engage in conduct in Australia, and did engage in such conduct, preparatory to one or more of them entering the Philippines with intent to encourage or join with others there in conduct aimed at overthrowing the government of the Southern Philippines by force or violence.

**Greg Muller**

What were some of the things that were instrumental in that case to prove that they were preparing something?

**Justice Croucher**

Their own words. You know, they were being taped lawfully, properly, by the police in all different ways. You know, all sorts of special devices, listening devices, telephone intercepts. The ability to get into their computers and read all their phones, their texts, their chat messages, all that sort of thing.

Sometimes, it was fairly explicit things said about what they wanted to do. Sometimes you can only infer it by piecing things together. By a combination of that and their actions, planning, talk about what they'd do when they got there, that sort of thing. Some of it vague, some not so vague.

**Greg Muller**

The fact they bought an SUV and a boat, that takes it beyond just talking though.

**Justice Croucher**

It does take it beyond talking, but at the same time, it was also naked. There was one part in the case, which didn't get the big mention, but they were up, I think it was in Far North Queensland or northern New South Wales where they stopped at a roadhouse to probably get a drink or whatever and then carried on. The police who were tracking them, of course, pulled up a few minutes later, and before the police said anything, the wag behind the counter said, “I think the people you're looking for have just gone through." In other words, they stuck out. It was obvious who they were, but that they were not locals, who were up to no good in some way. So, they're pretty easy to follow I think, in some cases.

**Greg Muller**

The other distinguishing factor in this case was the act was intended to happen in another country, namely the Philippines.

**Justice Croucher**

Yes, and I've been asked this question many times by many of my colleagues and many of my friends who are not lawyers whose view is, well, what has it got to do with us?

I suppose one way of answering it is to just turn around the other way and say, if they were a group of people from a foreign country who were planning to come to this country with a view to trying to overthrow the government by force or violence, which was the allegation made against these people, and which they accepted in the end, in substance, then you'd probably want the authorities in the other country to stop them or to try to do so and to prosecute them, and if necessary, jail them.

So, that's what we're doing. We're being good world citizens I suppose, at least in part.

**Justice Croucher (court recording)**

I turn now to the nature and gravity of the offence and its rationale. The offence carries a maximum penalty of life imprisonment.

Pursuant to Australia's international obligations, the Commonwealth Parliament has criminalised behaviour of the type encompassed by the offence and engaged in here to protect the people and institutions of other countries from citizens of this country who might be minded to head overseas and engage in hostile conduct.

The provisions are also designed to protect Australia and its institutions by preventing those who might be minded to head overseas and engage in hostile activities and then return to this country with enhanced capabilities which may be employed to facilitate terrorist or other acts in Australia.

In my view, this instance of the offence committed by Mr Cerantonio was very serious for several reasons.

First, the offence involved several substantial and sustained acts preparatory to the departure from Australia.

Secondly, the ultimate intention held by Mr Cerantonio, that he would be involved in encouraging others in the Philippines to attempt to overthrow the government of the Southern Philippines by force of violence, involved a moral culpability of a high order.

Thirdly, the offence was motivated by adherence to extremist and in my view, completely misguided and dangerous religious thinking.

**Greg Muller**

Often with cases where the offence is preparatory, it’s not uncommon to quickly realise that the chances of the accused actually pulling off the terrorist act were minimal. The intention is there nonetheless.

So does this affect the sentence?

**Justice Croucher**

Well, in my mind it does and it should. Every case turns on its own facts. But all else being equal, if you've got someone who's sophisticated, well resourced and has a high chance of succeeding in their plans of causing mayhem, destruction, even murder, then I think that is deserving of a heavier sentence, is more culpable, is more dangerous than a group who have got virtually no chance of succeeding, whatever their intentions might be. Yes, I think it does matter.

**Justice Croucher (court recording)**

The latter point brings me to the Crown’s concession that there are other features of Mr Cerantonio’s offence that limit its gravity.

First, the whole venture was poorly planned and, I fear, foredoomed to failure. Given the ill-suited vessel the group had purchased and their lack of serious boating experience, it is hard to imagine that they would have made it very far past the breakers off the far north of Queensland.

Further, there is no evidence of any starting point or timeline for the commencement of the encouragement of others to overthrow the government. Thus, the ultimate aim of the plan was extremely remote.

**Greg Muller**

Indeed, so remote that in his published reasons for sentence, Justice Croucher said the accused’s voyage rivalled that of the SS Minnow for its chances of failure.

The fictional boat which ran aground somewhere in the Pacific from the TV series Gilligan’s Island.

All up, six men were on trial in this case. Five of them were sentenced to between three years and eight months and four years. Robert Cerantonio was given a longer sentence due to his leadership role in the plot.

**Justice Croucher (court recording)**

I think that those remarks concerning general deterrence, curial denunciation and punishment apply but with greater force to Mr Cerantonio’s more serious example of the offence.

Further, given that same factor, his more serious offence, his long history of extremist thinking and his lesser prospects of rehabilitation, I think that specific deterrence and protection of the community are sentencing purposes that carry greater weight in Mr Cerantonio’s case.

Finally, despite those lesser prospects of rehabilitation, in my view, rehabilitation itself still remains an important sentencing purpose for Mr Cerantonio. Indeed, it is not only in his interests but also in the community’s interest that he be rehabilitated. It is far better that he too be returned to the community with his chances of reform maximised rather than crushed by a sentence that otherwise does no more than incapacitate him.

Mr Cerantonio, would you please stand?

On the offence of engaging in conduct preparatory to the offence of entering the Philippines with the intention of engaging in a hostile activity in that country, Mr Cerantonio is convicted and sentenced to seven years’ imprisonment.

In this case, the law requires that I fix a non-parole period and that that period must be at least three quarters of the length of the head sentence.

In Mr Cerantonio’s case , I fix a non-parole period of five years and three months.

**Greg Muller**

The Cerantonio case was a recent example of convictions for a preparatory terrorism offense. But terrorism charges can be laid one step back from preparing.

This happened for the first time in Victoria in 2011. The case of R Vs Fattal and others. Now retired, Justice Betty King heard that case.

**Betty King**

Yes I think before that, it had been planning a terrorist activity. This was a conspiracy to plan. So, it was based particularly on recordings of these people in discussions.

And you have to sometimes wonder when men get together, there's often a lot of boasting and a lot of chest thumping, shall we say, and how much of it was that and how much of it was reality was a matter that the jury had to work out, and they did. Five people were charged. Three were convicted and two were acquitted. So they made the distinctions, they understood and carried through their job.

**Court transcript reading**

The offence, of which you have all been convicted, carries a maximum penalty of life imprisonment, which is an indicator of the seriousness with which Parliament views offending of this type…

**Greg Muller**

That's a reading from the transcript of the sentence by former criminal judge, Betty King, delivered on 16th December, 2011.

**Court transcript reading. R v Fattal & Ors, 16 December 2011**

Other offences that come within the category of life imprisonment include matters such as murder, treason and some large commercial quantities of trafficking and importing of drugs.

What is unusual about the offending is that it relates to behaviour which, in the ordinary course of events, would rarely amount to criminal behaviour.

**Greg Muller**

So, an offence that on the one hand is considered one of the most serious crimes, attracting the harshest penalty available, and on the other hand, what occured would rarely amount to criminal behaviour.

**Betty King**

That's right. I have to say, this was really troubling in terms of sentencing because they were, I'm pretty sure I said this at the time, they were incompetent.

If they were a group of conspiracy terrorists we certainly have nothing to fear because all they did in terms of really action was to get Fattal, one of them, to walk up to the perimeter of the army base, have a look at the so-called guards on duty which were two civilians carrying a clipboard, and then walk back and catch the train home to where he was living in New South Wales. And that was really what they did.

They sought a fatwa from someone in Somalia. They didn't get it. Yeah, it was a series of real incompetent manoeuvres that may well have resulted in no action ever being taken. But they were, a jury looked at it. Were they guilty of conspiring to plan?

Well, they'd taken that step. At least two steps. The going around where the army base was, and all of that was on video and the obtaining of the fatwa, or the attempt to obtain a fatwa. So, they were actions that could have been in furtherance and a jury obviously came to the conclusion that they were.

It was interesting trying to work out what to sentence these people to, because the Commonwealth sentencing is quite rigid about what you can and can't do. So, it made for a challenging time.

**Rob Stary**

Well, terrorism offences are designed to capture people pre-emptively before anything takes place, And so, for instance, in certain cases, people have been charged with the conspiracy to commit an act in preparation of a terrorist act.

**Greg Muller**

Solicitor Rob Stary worked on this case for one of the accused, Saney Aweys.

**Rob Stary**

We thought it was important to really challenge the ambit of those laws. We were concerned about individual liberty, those sort of issues, those fundamental issues.

Because, it revolved around the language and the so-called planning, that's the conspiracy to commit an act in preparation.

**Greg Muller:**So, that's two steps back from anything actually happening.

**Rob Stary**

Yeah.

**Greg Muller**

Rob Stary is a well known Melbourne solicitor who has made a name for himself defending people accused of terrorism offences.

**Rob Stary**

It's incredible, the way we've developed that niche market, actually. It's because we first acted for Jack Thomas.

**Greg Muller**

Or Jihad Jack as he was better known. Jack Thomas was the first person to be convicted using Asutralian’s anti terrorism laws in 2006.

He was later aquitted of the terrorism charges and guilty of passport offenses only.

Considering time already served, Jack Thomas was released on 29th October, 2006 by Justice Elizabeth Curtain of the Victorian Supreme Court.

**Rob Stary**

Then, we acted for other people he had an association with, in the next terrorism trial. Then, when the Tamils were charged and accused of financing and supporting the terrorist organisation in Sri Lanka, they came to us and it's just grown from there.

**Greg Muller**

Was the fact you were testing laws which hadn’t been tested, was that an attraction?

**Rob Stary**

Yeah, I think so.

**Greg Muller**

With so many new laws, terrorism was becoming a specialist area.

**Rob Stary**

Even though we've created a, something of a niche market in that area, the fact of the matter is that we simply cannot be across all of those laws and that's why we develop a team of people, that's why we have lawyers within this office that devote their practice simply to terrorism offences.

**Greg Muller**

For the Fattal case, Rob briefed someone who hadn’t worked in Victoria before.

**Rob Stary**

Yeah, we briefed Nicola McGarrity, an academic from the University New South Wales, who'd done most of the really, the serious work on counter-terrorism and understanding the complexity of the legislation, particularly in that case, where they were charged with conspiracy to commit an act in preparation.

So, we thought, we could bring some intellectual rigour to the case and Nicola was the best person.

**Dr Nicola McGarrity**

My name’s Dr Nicola McGarrity I’m a senior lecturer at the University of New South Wales in the faculty of law and I’m a also the director of the terrorism law reform project.

**Greg Muller**

The same Nicola we heard from in the previous episode.

**Dr Nicola McGarrity**

My role was as junior defence counsel for Saney Aweys.

The role that my client was alleged to have played in the plan to carry out a terrorist attack on Holsworthy Army Barracks in Sydney was that he was the line of communication between the group and sheik's in Somalia.

The reason that my client was contacting sheik's in Somalia was alleged to be for the purpose of determining whether it was permissible under Islamic law to engage in a terrorist attack on domestic soil against a military barracks.

**Greg Muller**

And he didn't get one did he? Is that right?

**Dr Nicola McGarrity**

That's correct. The conclusion of the conversations between my client and the Sheiks and Somalia was after a number of conversations, the answer came back that no, it would not be permissible under Islamic law to commit a terrorist attack in Australia.

One of the critical issues relating to my client in particular was to determine what his motivation was? Why was he making these phone calls? What was his, whether, whether he had a willingness to engage in violence or to assist with the engagement in violence in the name of Islam.

So, a lot of the evidence in this case, in fact, virtually all of the evidence in this case, with the exception of a couple of witnesses, including an informant, revolved around telecommunication intercepts and surveillance device recordings.

So, in particular conversations between my client and others which indicated his views on the West, his views on Islam and his views on the role of violence in ensuring that the Islamic way of life was protected.

**Greg Muller**

Five people were charged. The jury found two not guilty and three guilty.

One of those acquitted, Yacqub Khayre went on to commit a siege in Brighton in 2017 near Melbourne where he killed a security guard and held a woman hostage.

Khayre was shot and killed by police.

At the time police did consider this a terrorist act. Then Deputy Commissioner Shane Patton gave a press conference after the siege.

**Journalist (press conference recording)**

Are you still treating this as a terrorist incident?

**Deputy Commissioner Shane Patton (press conference recording)**

We are still treating this as a terrorist incident based on our enquiries to date.

**Dr Nicola McGarrity**

In the aftermath of these events, Yacqub Khayre was labelled as a terrorist.

However, the reality is that terrorism is so interconnected with motive that we really won't ever know whether he was motivated by terrorism, whether he was motivated by a desire for money, whether he was motivated by something else. The fact is that in this particular instance, as in many of the instances in Australia of completed terrorist acts, Yacqub Khayre was killed in the course of those events and therefore his motivation will never be known.

**Greg Muller**

And I guess that explains why we've had so few trials of completed terrorist attacks.

**Dr Nicola McGarrity**

That's exactly correct. Why we've had so few trials of completed terrorist attacks is because as you can no doubt imagine, in circumstances where a person is standing on the street shooting someone with a gun outside a police station, driving a car into a group of civilians, attempting to stab someone with a knife. In those circumstances, police law enforcement are forced to take measures to protect the community and very often the perpetrator is killed. As soon as a perpetrator is killed, we can, we can make inferences as to what their motivation was.

**Court transcript reading. R v Fattal & Ors, 16 December 2011**

Wissam Mahmoud Fattal, Saney Edow Aweys and Nayev el Sayed, you were charged together with Abdirahman Mohamud Ahmed and Yacqub Khayre with one count of conspiring to do acts in preparation for or planning a terrorist act contrary to section 11.5 (1).

**Greg Muller**

This section deals with conspiracy. A person who conspires with another person to commit an offence.

**Court transcript reading. R v Fattal & Ors, 16 December 2011**

..and section 101.6.

**Greg Muller**

This deals with acts done in “preparation for, or planning, terrorist acts”

**Court transcript reading. R v Fattal & Ors, 16 December 2011**

...of the Criminal Code.

On 23 December 2010, after a trial lasting approximately six months, Abdirahman Mohamud Ahmed and Yacqub Khayre were acquitted of the offence and you three, were convicted.

**Greg Muller**

That's a reading from the transcript of the sentence by former criminal judge, Betty King.

Solicitor Rob Stary was defending Saney Aweys against the charge of conspiring to do acts in preparation for or planning a terrorist act.

**Rob Stary**

The breaching of the Holsworthy Army Barracks. That's right. But with the plan being cooked up in Melbourne.

So that aspect, that aspect was interesting and unusual, that they had to get authority from a religious leader overseas. Of course, in the Holsworthy Army Barracks, the whole of the perimeter and internally was captured on CCTV footage and so, if they tried to breach the barracks, one would have thought that they would have been immediately intercepted. It's not to say that I couldn't have caused some serious damage though.

It depended on the accused getting a fatwa from Somalia and they had approached two Sheikhs in Somalia, both of whom rejected the notion that there should be any attack.

**Greg Muller**

So, in the Fattal and others case you were ultimately successful. Three were found guilty and two acquitted.

**NIcholas Robinson QC**

Yeah three and two acquitted.

**Greg Muller**

Crown prosecutor, Nick Robinson QC.

**NIcholas Robinson QC**

And it was lengthy. It was very difficult. It was very interesting as a lawyer, as an academic view of it. In a sense, I think reflected that the nature of terrorism, of terrorism trials were here to stay.

After it there have been further trials since. Since then there have actually been a couple of trials for completed acts. They didn't just go away.

**Greg Muller**

What were some of the pivotal arguments which you think helped sway the jury?

**NIcholas Robinson QC**

Well I think, we had as part of the case telephone intercepts which your listeners are probably aware of, where lawfully a telephone is tapped, and there was a discussion between Aweys and a man identified on the other end of the phone in Somalia, advising about what they could do and so on and it was very clear that they were talking about going into Holsworthy and shooting and killing whoever they could until they themselves were shot.

And once the jury I think heard that and decided that it was legit, I think that was a very important argument.

The other one was perhaps more legal in the sense of the judge being satisfied that if you ask, “can we do this, yes or no?” And whilst of course you might be told “no”, to take a very mundane example, if your 15 year-old comes in and says, ‘can I go out on Saturday?’ You might say, “no”.

But, is it an act in preparation for going out to see if you can get permission? We say ‘yes’. And the judge in the end said yes and that was very important, obviously, because they could have got a ‘no’.

**Greg Muller**

Rob Stary remembers one pivotal moment which he thinks helped to turn the jury against his client.

**Rob Stary**

The things that struck me about the case, where we try to exclude evidence in which there was comment about, it was Allah's will that the fires, that catastrophic fires in Black Saturday, had occurred because of some religious reason. It was a very raw issue in Victoria and of course, when the jury heard that evidence, they reviled in horror, understandably.

**Greg Muller**

And that was a pivotal moment?

**Rob Stary**

I thought it was, I thought, of all of the evidence that damaged us and was probably the remotest piece of the evidence from the whole case. Just to identify what their ideology was, it had the most damaging effect in my view, because I was sitting there watching the jury and they were horrified that someone could say that and blame Allah, as causing the fire.

**Greg Muller**

Junior Counsel at the time, Dr Nicola Mcgarrity remembers these comments too.

**Dr Nicola McGarrity**

What I would say is that one of the big challenges that defence counsel face in these cases is that there is such a strong connection between evidence that is probative, evidence that is relevant because of how intertwined questions of association, questions of belief are with the nature of the offences themselves. There's this real difficulty in extracting probative evidence from what is inherently prejudicial.

So, what we end up with as with my clients Saney Aweys was a lot of very, very relevant information which indicated a sort of willingness to use violence or a hatred of the Western way of life or hatred of the Australian people being introduced in evidence that because it was probative, but at the same time it was prejudicial. So it's one of the biggest challenges that defence counsel face is the fact that probative evidence is very often highly prejudicial at the same time.

**Greg Muller**

Also, Betty King remembers this as an important moment in the trial.

**Betty King**

There was a comment made about the fact that Australia was on fire, or Victoria was on fire, particularly during the Black Saturday fires, and one of the accused had said that was God's punishment basically on Victorians for being who they are.

I think that that demonstrated an attitude and it probably was a factor in him being convicted on the basis that when he says, I'm an Australian, I love Australia etc. to have that sort of comment just shows a difference that perhaps what he's saying to the jury now isn't truthful.

**Court transcript reading. R v Fattal & Ors, 16 December 2011**

As time went on and it approached March, the expressions and statements made by you, Aweys, towards the people and the Government in Australia became more heated and more anti-Australian, including comments that related to bushfires and the fact that everyone was very happy that they had occurred, as a punishment for this country, and comments relating to the economy, stating things such as ‘these filthy people are coming down.The economy goes first, factories are shutting down, fire is coming and there is no water”.

It is clear that, at that time you were making that particular call on 11 March 2009, you held strong views against the Australian people.

**Greg Muller**

Like the Cerantonio case heard by Justice Croucher, most of the evidence pointed to the fact that the plans had little chance of coming to fruition.

What if the plans really, once you look at them, had little chance of succeeding? Does that mitigate at all?

**Betty King**

I think it mitigates to a degree.

**Court transcript reading. R v Fattal & Ors, 16 December 2011**

Nevertheless, the provisions creating the offence are directed to preparatory acts and the seriousness with which Parliament regards such acts is manifest in the maximum penalty.

By the extended range of conduct which is subject to criminal sanction, going well beyond conduct hitherto generally regarded as criminal, and by the maximum penalties provided, the Parliament has indicated that, in contemporary circumstances, the threat of terrorist activity, requires condign punishment.

Sections 101.4, 101.5 and 101.6 of the Criminal Code make offensive acts of a preliminary nature falling short, some well short, of attempt. Because of their especially serious nature and the commensurate need to protect the public from the consequences that might follow, the legislature has prescribed very long maximum sentences.

**Greg Muller**

That’s an actor reading from the court transcript of Betty King’s sentence.

**Court transcript reading. R v Fattal & Ors, 16 December 2011**

You, el Sayed, and you, Aweys, have a continuing ongoing involvement in relation to activity in respect of this conspiracy, particularly, the seeking of a fatwa or approval, permission from Muslim clerics to carry out an attack upon the Australian Army Base at Holsworthy.

The activity undertaken by Khayre, of leaving Melbourne, going to Somalia, the Crown allege, that he was in fact going there to seek a fatwa.

The jury’s verdict, in the case against each of you, meant that it must have been satisfied beyond reasonable doubt that a conspiracy to do acts in preparation for a terrorist act was in existence at the relevant time nominated in the indictment.

Further, the jury must also have been satisfied, beyond reasonable doubt, that each of you was a willing participant in the agreement, and that each of you intended that the acts in preparation would be for an action, or threat of action, involving an armed attack on the Australian Army Barracks at Holsworthy in New South Wales.

**Betty King**

Sentencing days are really quite interesting in that you get very wound up about it, particularly when something's taken a long time, you've thought about it, you've written it, you've rewritten it and you've revised it, you've gone over it, again and as you're walking into court, you're still thinking, have I got it right? And still wondering.

Then you sit down and it's almost like an anti-climax when you've actually done it because it sometimes takes, with three accused you can take up to an hour to read the sentence out and you just have all that time, all that work, all that effort and there's nothing left.

So, sentencing is possibly the hardest thing any judge ever does.

**Court transcript reading. R v Fattal & Ors, 16 December 2011**

Wissam Mahmoud Fattal, Saney Edow Aweys and Nayev el Sayed, you are each convicted and sentenced to be imprisoned for a period of 18 years.

The non-parole period fixed in respect of the sentence imposed upon each of you will be 13 years and six months.

**Greg Muller**

The sentence was also memorable because the accused had to be removed from the court.

**Betty King**

I think I had to actually eject Mr Fattal.

I think he had to be taken out because he wouldn’t stop yelling at me. And so, it was difficult for people to hear. Yes, I had to have him removed. But that's not uncommon.

That’s probably one of half a dozen people that have just started yelling and screaming at me during the sentencing process and so you either talk over the top of them, which I've done or you just ask to have them removed because it doesn't make any sense for anyone else but, they're supposedly the people you're talking to and sometimes they can't stay.

**Greg Muller**

So this was one of the first cases where we had a conspire to prepare. What's it like as a judge determining something where there's really little or no precedent?

**Betty King**

In all honesty, a bit scary. You worry that you're going to get it right. One of the things we all are used to is having someone else having done it before us. So, there's something to look at, give you an idea. We didn't have that so, when I was writing what the jury had to be satisfied of, that is the elements of the offence and precisely what it was. I was looking at the legislation and just trying to follow what it was and what that translated to.

So, it was quite difficult but that makes it a bit scary because at some stage if there is a conviction, it's likely to go to the Court of Appeal who will give you a pass or fail.

**Greg Muller**

Was this appealed?

**Betty King**

Yes it was. I passed.

**Greg Muller**

So, the appeal wasn't upheld?

**Betty King**

No, no, so I got a pass. I think it was probably a bare pass, but I got a pass.

I thought I got this sentence right because the convicted men, the sentenced men appealed against the severity of it and the Commonwealth appealed against the leniency of it. So, I figured if they both hated the sentence I must have got it right.

**Greg Muller**

Links to the full sentences of the cases discussed in this episode can be found on the Gertie’s Law website or in the episode description in your podcast app.

If you have any questions for a judge regarding terrorism we’re preparing another episode where judges answer your questions.

So email them in as text or audio to [gertie@supcourt.vic.gov.au](mailto:gertie@supcourt.vic.gov.au)

And we love getting your feedback, so please rate and review if you can.

Gertie’s Law is brought to you by the Supreme Court of Victoria.

I’m Greg Muller, Thanks for listening.

**Transcripts of Sentences used in this episode**

[The Queen v Cerantonio & Ors](http://classic.austlii.edu.au/au/cases/vic/VSC/2019/284.html)

http://classic.austlii.edu.au/au/cases/vic/VSC/2019/284.html

[R v Fattal & Ors](http://classic.austlii.edu.au/au/cases/vic/VSC/2011/681.html)

http://classic.austlii.edu.au/au/cases/vic/VSC/2011/681.html