

Australian terrorism trial produces evidence of police entrapment

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Evidence of police entrapment—the use of undercover agents to entice or provoke someone into incriminating behaviour—has emerged in a major terrorism case in Australia. According to testimony last week in the trial of five Lebanese- and Somali-born men, a police officer who infiltrated the group convinced one of the defendants to visit a Sydney army base.

This evidence goes to the heart of the allegations against the men. For weeks in the lead-up to the trial, the media featured closed circuit television footage of Wissam Fattal walking near the Holsworthy base in Sydney's south west. He has been accused of conducting surveillance of the base, allegedly to plan an attack that would have involved breaking into the base and firing weapons at soldiers.

While the circumstances surrounding Fattal's visit to Holsworthy remain unclear, there seems little doubt that police personnel were closely involved in proposing, monitoring and video-taping it.

Fattal's barrister, Patrick Tehan, QC, suggested that the undercover police officer, identified only as "Hamza," incited Fattal to talk about "jihad" and later encouraged him to go to Holsworthy on the pretext of seeking employment. Cross-examining Hamza—who testified via video link to a courtroom reconfigured to protect his identity—the barrister further suggested that the officer sent Fattal directions and offered to arrange a car to travel to Sydney from Melbourne.

Hamza admitted encouraging Fattal to talk about jihad, but claimed he did this only to gain an insight into his character. He denied urging Fattal to go to Sydney, but admitted he might have said he could get him a car.

Earlier evidence revealed that Fattal's visit to Holsworthy was far too brief for a surveillance exercise. The 14-member jury viewed CCTV footage of Fattal's train trip to Holsworthy railway station, which is a few hundred metres away from the entrance to the base. Once there, his "surveillance" took about four minutes, from 10.15 a.m. to 10.19 a.m. By 10.22 a.m., he was back at Holsworthy station.

The filming of Fattal's entire trip to Holsworthy indicates that he was being monitored all along. He was arrested just four days later, on earlier unrelated assault charges.

On the face of it, this is a case of entrapment, which occurs when anyone is induced or persuaded by law enforcement agents to speak about, or prepare to commit, a crime. Such undercover operations have been central to at least two previous trials conducted under the anti-terrorism legislation introduced in Australia since 2001.

In 2004, a jury refused to convict Zeky "Zak" Mallah, who was only 18 at the time of the police operation against him. A police agent, posing as a freelance journalist preparing an exposé of the Australian Security Intelligence Organisation (ASIO), offered Mallah \$3,000 to make a video recording, purportedly vowing to conduct a suicide attack on an ASIO building.

In 2008, Muslim cleric Abdul Nacer Benbrika and six of his 11 co-defendants were convicted of being members of an unnamed terrorist organisation—apparently consisting only of themselves—after a police infiltrator offered Benbrika cheap ammonium nitrate. While being secretly filmed by police, the agent took Benbrika to a remote hilltop to show him how to detonate an ice-cream container of the explosive.

Australian law offers defendants little or no protection against such methods. Courts can exclude evidence that is illegally or improperly obtained, but only if they rule that the need to protect the individual against unlawful and unfair treatment outweighs the so-called "public interest" in securing a conviction. In practice, judges rarely rule evidence inadmissible, especially if the charge is serious.

The five defendants in the current prosecution were arrested in much-publicised dawn house raids in August 2009, accompanied by sensational media, police and Labor government claims of another "imminent" terrorist threat, like an earlier one proclaimed by the previous Howard government in November 2005.

The men are charged with "conspiring to prepare for a terrorist act". Conspiracy is a notoriously nebulous offence. Moreover, under the draconian anti-terrorism laws, it requires no proof of any specific terrorist plot; just a shared understanding to carry out an attack somewhere at some time in the future. The defendants, who have all pleaded not guilty, face jail terms up to life imprisonment.

Police allege the men were preparing to storm the Holsworthy

base with automatic weapons, yet extensive police raids reportedly found no weapons. Two of the men are also charged with either preparing to travel to Somalia, or helping another man travel there, to “engage in hostile activities”. A US-backed government in that country is confronting considerable popular resistance, including from Islamist groups. The post 9/11 legislation defines “terrorism” to include supporting armed activities directed against any foreign government.

From what has been reported from the trial, the evidence against the men is based primarily on vague and wild statements that they allegedly made while under police surveillance. A member of the group was secretly recorded speaking of entering an unnamed location and “taking out” up to 10 people.

Other statements, however, contradicted the notion of planning for an attack in Australia. Hamza, the police agent, testified that when he asked Fattal what a committed Muslim could do for jihad in Australia, Fattal replied that many Muslims were going to fight in Somalia. “Fattal stated there’s not much the brothers can do here but they can go overseas to fight,” Hamza said in log notes of their conversations.

What is apparent from the previously-reported police files is that the five immigrants had troubled backgrounds—sometimes involving drugs, petty crimes and police. They were incensed by the atrocities being committed by the US-led forces in Afghanistan and Iraq, and became susceptible to Islamic fundamentalism.

In August 2009, the Labor government seized upon their arrests to foreshadow a package of measures to further toughen the anti-terrorism laws. The amendments had not been passed when parliament was prorogued for the August 2010 federal election, but were reintroduced by Prime Minister Julia Gillard’s government last week—amid the ongoing trial—as soon as parliament resumed.

Key amendments include extending an “urging violence” offence (currently called sedition) to cover any incitement to use force, even if it does not affect “the peace, order and good government of the Commonwealth”. The changes also expand police search powers, lengthen the proscription periods of “terrorist organisations” from two to three years, allow the prosecution to appeal against the granting of bail to terrorism suspects, and streamline secrecy measures for semi-public trials.

The timing of the police operation, prosecution and legislation points to the same methodology as that of the former Howard government, which used the 9/11 attacks in the US, the 2002 Bali bombings and its own terrorist scare in 2005 to push through counter-terrorism laws that overturned basic legal and democratic rights such as no detention without trial.

These laws define terrorism so broadly that it covers any form of anti-government protest that attempts to “coerce” a government for political or ideological reasons, and causes

fears of violence or property damage. These provisions, and the methods of police provocation that have accompanied them, could be used against political opponents, anti-war activists and striking workers.

Under the Labor government, accusations of terrorism have already been widened to include alleged supporters of two non-Muslim movements—the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka and the Kurdistan Workers Party (PKK) in Turkey (see: “Police conduct ‘terrorist’ raids on eve of Australian election”).

Last week, the Gillard government also cited the supposed Holsworthy plot to justify another unprecedented boost to the powers of the military. It tabled legislation to allow soldiers to use lethal force to protect defence premises and to search and detain people on those premises—which include military bases, defence department offices, vehicles, ships and aircraft. Anyone fleeing military arrest could also be shot.

These measures extend the domestic “shoot to kill” powers first given to the military in 2000, on the pretext of protecting the Sydney Olympics Games from terrorism. There are 88 military bases across Australia, as well as numerous defence buildings and more than three million hectares of military-controlled land. Protesters at any of these sites could be threatened, if the military deems there is a risk of serious injury or “the commission of a criminal offence”.

A factor in Labor winning the 2007 election was growing popular opposition to the Howard government’s anti-terrorism laws and their use to persecute innocent men like Zeky Mallah, Mohamed Haneef, David Hicks, Mamdouh Habib, Jack Thomas and Izhar ul-Haque.

In office, however, the Labor government has also sought to divert political discontent by whipping up fears of terrorism and Islamic “extremism”. Under conditions of ongoing global economic turmoil, these alarmist campaigns are being used to help establish anti-democratic legal precedents that can be invoked more broadly including against opponents of US-led wars and the government’s austerity measures.

The author also recommends:

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[13 November 2009]



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