Learn by trial and terror

Prejudice, lack of resources and the reluctance of witnesses are only a few of the problems encountered by lawyers acting for defendants in trials of terrorist suspects, explains Ali Naseem Bajwa

IN MANY WAYS, defending in a terrorism case is no different from defending in any other complex and serious criminal case.

This is because, no matter how many special regulations and offences are created for the wide-ranging conduct that can fall within the definition of 'terrorism', it is of course still a crime. For the moment at least, a terrorism trial is a regular criminal trial with the usual burden and standard of proof and rules of evidence and disclosure.

The problems that lawyers involved in such work have experienced in the preparation and presentation of the defence in terrorism cases can conveniently be described under three main headings, each of which I shall expand on below. These are:

- prejudice;
- resources; and
- witnesses.

This article focuses on terrorism trials at the more serious end of the spectrum because they tend to throw up the greater difficulties at trial.

Prejudice

It is a fact of life that a serious terrorism case attracts a vast amount of media coverage before and during the trial and I do not suggest for a moment that there should not be full and accurate reporting of such important matters.

However, a great deal of the reporting is speculative, disproportionate, grossly inaccurate, and, at times, inflammatory.

Whenever there is a major terrorist incident or series of arrests, the so-called 'public debate' that takes place in the media and places such as the internet is nothing of the kind. It is a rush to judgment against both those that are accused of terrorism and the communities from which they hail.

All of this leads to considerable prejudice, which does nothing for the prospects of a fair trial for those who are to be tried. One cannot measure the effect of the scale and type of media attention that these cases attract but it must contribute to the air of hostility towards persons who are even accused of having committed an offence of terrorism.

During the jury selection process in a recent terrorism trial, a prospective juror was excused from service following his frank admission to the judge that he would not be able fairly to try the case. His explanation was short and to the point. Nodding towards the dock, he said, "I don't like that lot". One does not know whether his dislike was directed at alleged terrorists, defendants or Muslims.

Even the lawyers who carry out their duty to defend those accused of terrorism are subject to a degree of resentment and ill treatment. To give but one example, certain newspapers persist in referring pejoratively to Muddassar Arani, the solicitor for Abu Hamza, among a large number of other people, as "Hook's Lawyer".

Time and time again, the same newspapers return to the issue of how much Ms Arani has received in legal aid from terrorism cases, the insinuation being that it is somehow immoral to earn money from defending alleged terrorists.

Adverse publicity

Recent Court of Appeal authorities make it clear that judges should be exceptionally slow to stay proceedings as an abuse of process on the grounds of prejudicial publicity and equally slow to impose any restriction on the reporting of a case. As far as the courts are concerned, juries are to be trusted to return fair verdicts no matter how much adverse publicity the defendant or the case has received.

So what is a defence lawyer to do about the inevitable prejudice? Not a great deal actually but one can begin by ensuring that all of the coverage is monitored very closely and any particularly grave misdemeanours brought to the trial judge's attention to seek such action as can properly be taken (such as issuing a warning).

The defence should endeavour to contribute to a careful jury selection process to explore the possibility of bias or contamination. In an extreme case, there may be an application to stay proceedings, or at least to adjourn the trial, on the grounds that the risk of an unfair trial has reached an unacceptable level.

Resources

In a major terrorism case, the Crown plainly has an enormous task in managing a vast amount of complex evidence and managing what must be an very difficult and sensitive disclosure exercise.

However, it also has a formidable amount and variety of resources at its disposal including an army of officers, a whole raft of experts and expert agencies, a number of lawyers and case workers at the CPS, and three or four counsel to manage the case preparation and present the case in court. Funding is also much less of a problem for the Crown and difficult and labour-intensive work or analysis can often be carried out fairly quickly.

The defence is then confronted by the same array of vast and complex evidence to deal with but its resources are, by comparison, modest. In *R v Barot & Ors*, which concerned a conspiracy to attack buildings in the US and detonate gas cylinder-based explosive devices in the UK, more than 40,000 pages of evidence was served. In *R v Ibrahim & Ors*, concerning the failed London bomb attacks on 21 July 2005, there were more than 30,000 pages of evidence.

A single solicitor and two counsel had to contend with all of it. It is true to say that the defence too can instruct experts but the prior authorisation for the instruction of any expert from the Legal Services Commission. This is sometimes refused and not always for good reason. Moreover, it takes the defence two or three months to receive an expert opinion which the Crown can obtain in a week.

Experts can be scarce

The availability of defence experts can also be a problem. Some experts are either hard to come by in some very specialised areas of expertise raised in terrorism cases or are unwilling to become involved because of the taint of being involved in a high-profile terrorism trial.

For example, in the 21 July case the Crown relied heavily on expert evidence from the Forensic Explosives Laboratory regarding how close the devices were to being viable and how and why, in their view, they failed to explode. Many hundreds of thousands of pounds were spent and a fantastic array of resources deployed to test, analyse and replicate the devices. At trial, the Crown called upon the expertise of 14 explosives experts.

The defence took issue with the Crown's explosives evidence and sought to instruct an explosives expert of its own. The search for a single

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appropriately qualified expert willing and able to take on the task of acting for the defence in such a notorious terrorism case took approximately six months.

To give an idea of the kind of difficulties encountered, many explosives experts had unsuitable expertise in hydrogen peroxide-based explosives, some could not accept the instructions because they were already subject to government contracts and one eminently suitable expert declined to become involved because he was concerned that being associated with a high-profile terrorism case might affect his commercial interests.

Over 63 potential experts and institutions were approached by the defence before an explosives expert was engaged. His analysis and testing was carried out in a university laboratory and he put in an enormous number of hours of hard work for a total payment of less than £20,000. And, of course, the defence could still only call on a single expert to the Crown's fourteen.

Subject to suspicion

There are many dangers in coming out in the open and admitting to a connection to anyone or anything that might be terrorism-related. The first danger is that anyone doing so might themselves be subject to suspicion and be arrested under the Terrorism Act. That opens up the possibility of being held at a high security police station without charge for up to 28 days.

There are then many possible terrorism-related offences for which one can be prosecuted and anything but the most minor terrorism charge means being kept in a prison on remand until trial. Even if one avoids the criminal track altogether, there is the possibility of receiving a control order or an asset freezing order.

Moreover, people are understandably concerned about their being the subject of covert police attention or their personal affairs being looked into closely. If nothing else, giving evidence in a terrorism trial, particularly for the defence, carries a taint and a risk of being harassed by the media or members of the public.

All of this makes it no wonder that people are reluctant to come forward as defence witnesses in a terrorism case. By way of an illustration of the practical effect of this problem, in a terrorism case yet to come to trial it took a solicitor more than six months to get hold of a very important piece of real evidence because the individual in possession of it was too frightened to have anything to do with the case, even to the point of having contact with a defence solicitor. Had that evidence, which had nothing whatsoever to do with terrorism and was entirely lawful, been destroyed, the consequences for the defendant might have been catastrophic.

Again, what can the defence do? Solicitors must, of course, tread very carefully. Potential witnesses often have to be advised to seek independent legal advice. If the witness is unwilling to co-operate, the defence must consider applying for a witness summons or, if possible, applying to introduce evidence under the hearsay provisions. The possibility of having special measures should be canvassed with the witness to see whether that might persuade him or her to give evidence.

Fairness preserved

Judges are alive to the difficulties that I have outlined above and, in the main, do everything in their power to assist the defence. Generally speaking, the trial process is robust and fair enough to deal with most of the problems that arise.

I believe that the vast majority of persons tried for offences of terrorism can, and do, receive a fair trial. However, one must remain mindful of the problems faced by the defence in such cases and remain vigilant to ensure that we do not have any repeats of miscarriages of justice that we saw in some of the terrorism cases in the 1970s and 1980s.

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