

Witness K and Bernard Collaery: An Unjust Prosecution Gets Even Worse

Spencer Zifcak – *Pearls and Irritations* – 12 October 2020

The prosecution of former ACT Attorney-General, Bernard Collaery, and his client, Witness K, continues to play itself out before the ACT Supreme Court. This is a legal fiasco of the first order. The prosecution should never have commenced.

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This is Commonwealth Attorney-General Christian Porter's fault. Blame for the fiasco rests squarely with him. On the other side, even with the presumption of innocence, Witness K and Collaery's lives approach financial ruin. The ramifications of the case for freedom of expression, journalism and governmental accountability will resonate through Australian law and society for years.

Several important new details concerning the case have recently emerged. With each new revelation the situation gets worse. Before turning to these, however, a brief recapitulation of the relevant facts of the case may be helpful.

In 2004, at former Foreign Minister Alexander Downer's behest, the Australian Secret Intelligence Service (ASIS) planted surveillance devices in the Palaco Governo, the building that housed the offices of Timor-Leste's Prime Minister and the Cabinet conference room. The purpose of this intelligence gathering was to listen in to Timor-Leste's Cabinet deliberations concerning a legal dispute between the two countries as to the location of the maritime boundary between them. The outcome of that dispute would determine the share of rich oil and gas revenues that Timor-Leste and Australia would receive from prospective drilling in the Timor Sea.

Through this secret surveillance activity, the Australian government obtained crucial information regarding Timor's case concerning the maritime boundary before the International Court of Justice (ICJ). This provided it with an unfair advantage in the oil and gas argumentation. In the end, to evade the Court's judgment, the Australian government withdrew from its jurisdiction.

Witness K had been an ASIS officer involved in the surveillance operation. He had been troubled by it. His reservations were magnified when Alexander Downer obtained a highly paid consultancy with Woodside Petroleum, the company responsible for exploiting the oil and gas reserves in the Timor Sea.

Witness K lodged a complaint with the Inspector-General of Intelligence and Security concerning the legality of the surveillance. The Inspector-General agreed that Witness K could disclose relevant information in any related legal proceedings. After that, information regarding the secret surveillance operation made its way progressively into Australian and Timor-Leste's media.

In 2013, Timor-Leste sought to re-open proceedings with respect to the maritime boundary issue in the Permanent Court of Arbitration in the Hague. It briefed Bernard Collaery to represent its interests. Witness K also briefed him to guard against any legal action that may arise from his decision to give evidence before the Court. The Australian government put an immediate end to that. It cancelled his passport to prevent him from leaving the country to provide that evidence. His passport has still not been returned.

In the same year, the AFP raided Witness K's and Colleary's home and office. At Collaery's office, it uncovered and took a copy of a detailed legal memorandum containing his advice to Timor-Leste's government with respect to the location of the maritime boundary.

Things went quiet for five years. Then, late in 2018, for reasons that are quite unclear, Christian Porter approved the criminal prosecution of Witness K and Collaery. In essence, the allegation was that they had disclosed classified information with respect to the activities of ASIS, contrary to the provisions of the Commonwealth *Intelligence Services Act*.

Several new matters with respect to the prosecutions have recently come to light. Bernard Colleary's prosecution relates not only to the alleged disclosure of documents the release of which is said to adversely affect national security. There is an additional charge. This is that Collaery criminally conspired with Witness K to effect such a disclosure.

Witness K and Collaery believe justifiably that they acted in the national interest. That is by taking their case – that the Australian Government acted unlawfully by secretly tapping into the deliberations of the Timor-Leste Cabinet – to the international courts. In this context, the idea that they consciously engaged in a criminal conspiracy is fanciful.

Witness K has briefed the formidable barrister, Robert Richter QC, to advise him as to the criminal proceedings. Richter disclosed another remarkable fact at a recent webinar organised by Liberty Victoria. Richter stated that although he had tried, he had not yet been able to obtain any official documentation from the prosecution that would inform him of the precise criminal charges that Witness K might face. The prosecution has been on foot for almost two years. This is an extraordinary delay.

Attorney-General Porter has made an application to the ACT Supreme Court for parts of the prospective trial to be conducted in secret. A secret trial, of course, constitutes a radical attack on the fundamental principles of open justice and fair trial. Just a few weeks ago, Justice Mossop of the ACT Supreme Court provided his judgment as to the application. He agreed that parts of the trial should not be open either to the media or to the public.

Justice Mossop's reasons are enlightening. He has written a fine judgment. It is lucid, logical, and extensive. It has only one flaw. It is devoid of context. Two examples may suffice to demonstrate the problem.

The principal reason that the Justice accepted the argument that parts of the trial should be held in secret was that if Australia's 'five eyes' security partners learnt that sensitive intelligence documents were capable of public disclosure in Australia, the trust of our intelligence allies in the security of their own documentation here may be prejudiced.

Looked at abstractly, this is a persuasive argument. It neglects the fact, however, that the documents at the heart of this case are likely to expose governmental illegality and possibly

criminal activity. In that circumstance, our security allies would in all likelihood understand that to keep secret, documents disclosing unlawful governmental behaviour would be contrary to the national interest. No prejudice to Australia's international relations, therefore, would be likely to occur.

Another influential argument accepted by the Court was that should documents revealing ASIS operations become public, foreign intelligence agencies into whose hands such documents fell may be able, when combining them with other sources of information, to construct an intelligible mosaic from which the processes and methods of Australian secret surveillance activities could be ascertained.

Again, in the abstract, this argument makes sense. But in this case, the documents in question relate to a single intelligence operation that was conducted in a tiny country, sixteen years ago. It would come as a surprise to any informed lay observer, and probably to any capable intelligence analyst, if historical methods of surveillance utilised in 2004 were able to cast even the remotest light on the methodology of contemporary intelligence practice. In 2004, compared with the present, the methodologies and technologies of secret surveillance would have been, at best, rudimentary.

Bernard Collaery was in court to hear Justice Mossop deliver his judgment. He obtained a copy of the judgment and was directed read it in a room adjacent to the court. While he was absorbing it, plain clothes officials entered the room. They informed him that all copies of the judgment must be returned. When asked why, the officials explained that parts of Justice Mossop's reasons for decision contained material that the Attorney-General regarded as sensitive. Subsequently Collaery and Witness K received a heavily redacted version. Open justice? Hardly.

An appeal from Justice Mossop's judgment is likely to be heard early in the new year. One hopes that the appeal Justices will arrive at a contextually based conclusion permitting some parts of the veil of secrecy presently cast over the Collaery/K proceedings to be lifted, so that the principles of accountability and open justice may be given their full and proper rein.

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