Why was there a lack of evidence against the radical cleric, ask Tim Lindsey and Ross Clarke

THE judges in the Abu Bakar Bashir trial are being blamed for the light four-year penalty the alleged leader of terror organisation Jemaah Islamiah received on Tuesday. This is unfair.

The weak evidence before them left the five judges little choice but to acquit Bashir on the main charges and convict him only on the lesser ones: immigration offences, forgery and involvement in subversion as an accomplice.

For these offences, four years may be at the light end of the scale, but it wasn't unreasonable.

The real question in this case is why the evidence before the court was so poor. After all, 50 witnesses were presented, including star witness Faiz Abu Bakar Bafana, JI's self-confessed treasurer, who gave evidence by video phone from detention in Singapore.

But quantity is one thing, quality is another. Some of the witnesses were vague, saying they only believed Bashir was their leader, while others even recanted on original statements. Bafana aside, none testified directly to Bashir's role.

The prosecution's case therefore depended almost entirely on supergrass Bafana. It appears, however, that he was not cross-examined. The defence even claimed he was under duress or had been offered a deal. Because he was not in court these claims could not be properly tested.

In a civil law system such as Indonesia, most evidence is accepted and its weight decided later. Bafana was heard but it was reasonable for the judges to ultimately give his statement little weight. Indeed, in the circumstances it is remarkable that there was any conviction at all.

So what went wrong? The prosecution case would have been strengthened had two alleged terrorists presently held by the US been made available, Omar Al Farouq, a senior al-Qa'ida operative captured in June 2002, and Hambali, an Indonesian recently captured in Thailand, who is allegedly the link between JI and al-Qa'ida. Both have now disappeared into US custody.

Both the prosecution and the defence recognised Farouq and Hambali as crucial witnesses and wanted them to give evidence. The court, accepting that Farouq's evidence -- whatever it was -- would be decisive, ordered the US to deliver Farouq as a witness. The order was refused.

The US Government stated it does not provide detainees for judicial proceedings in any country, including the US.

This probably explains US reluctance to comment on the Bashir verdict, saying only that the matter is the "subject of ongoing court proceedings", a reference to Bashir's appeal. Interestingly the same point did not stop President George W. Bush from publicly celebrating Amrozi's death sentence.

The Bush administration's unusual reticence is explained by their responsibility for the verdict. If key witnesses had been made available, convictions on the more serious charges might well have been obtained and a heavier sentence imposed. But the US and its allies won't do this for fear of intelligence leaks if terror suspects are examined in open court.

There is another, compelling motivation. If Farouq or Hambali testified in an Indonesian court then the Bush administration could hardly refuse to present other detainees in American courts. That would spell...
the end of the Guantanamo Bay loophole by which alleged terrorists have been kept out of the American (or any) justice system for years.

US hypocrisy is not the only reason for the unsatisfactory result in the Bashir case. The lack of witnesses has been compounded by big problems within the Indonesian prosecution service.

Little has changed since Suharto's New Order, when the prosecution was notorious for political subservience and institutionalised corruption. It is one institution that has remained highly resistant to reform. One result is the loss of core skills, which become irrelevant when cases are decided by money or politics. Today, the prosecution remains woefully inexperienced and incompetent. They are no match for brilliant advocates such as Bashir's lead counsel, Adnan Buyung Nasution.

The charges in the Amrozi case were constitutionally flawed but the evidence presented by the prosecution was impressive. This is partly thanks to co-operation between the Australian Federal Police and Indonesian authorities. It is this collaboration that provided the basis for Amrozi's conviction and is a model for future investigations. Australia now needs to give the Indonesian prosecution service the same support and assistance that the police received in Bali.

It also needs to pressure the US to reconsider its self-defeating strategy of holding terror suspects incommunicado, inaccessible even to its own allies and its own courts. The reality is that the war on terror is, in large part, a judicial war. If the US and its allies cannot win in open court, they won't win at all.

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