

**NOTE: PUBLICATION RESTRICTIONS APPLY PURSUANT TO S 19(1) OF  
THE BAIL ACT 2000. SEE**

**<http://www.legislation.govt.nz/act/public/2000/0038/latest/DLM68927.html>**

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CRI-2017-004-005092  
[2018] NZHC 1522**

BETWEEN AHAMED AATHILL MOHAMED  
SAMSUDEEN  
Applicant

AND THE QUEEN  
Respondent

Hearing: 22 June 2018

Appearances: A J Holland and D A Manning for Defendant  
H D L Steele for Crown

Judgment: 25 June 2018

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**JUDGMENT OF COURTNEY J**

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## **Introduction**

[1] Mohamed Samsudeen is a 28-year-old Sri Lankan man who has lived in New Zealand for five years and has refugee status here. He has no criminal convictions in New Zealand. He is, however, currently facing nine charges of knowingly distributing objectionable material,<sup>1</sup> two of using a document for pecuniary advantage,<sup>2</sup> one of possessing an offensive weapon<sup>3</sup> and one of failing to assist in the execution of a search warrant.<sup>4</sup> He is for trial in July 2018.

[2] In December 2017, Venning J refused bail because he considered that there was a real risk that Mr Samsudeen would offend if granted bail either by distributing further objectionable material or by committing a violent offence. Since then the Office of Film and Literature Classification (Classification Office) has examined the publications that are the subject of the charges under the Films, Videos and Publications Classification Act 1993 (FVPC Act) and concluded that the publications are not objectionable outright but are classified as objectionable except if the availability of the publication is restricted to persons who have attained the age of 18 years. The Crown has applied for a review of that decision by the Film and Literature Review Board (Review Board).

[3] Mr Samsudeen has made a fresh bail application, relying on the Classification Office's decision as a significant change in his circumstances.

## **Alleged offending**

[4] The most serious charges against Mr Samsudeen are those brought under the FVPC Act. They relate to images posted by Mr Samsudeen on Facebook showing war-related violence, including a number said to have been inflicted on Muslims. Some of the images were graphic and extreme, such as that of a baby stabbed through his or her abdomen and a baby decapitated. The charge of possessing an offensive

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<sup>1</sup> Films, Videos and Publications Classification Act 1993, s 123(1)(d), which carries a maximum penalty of 14 years' imprisonment.

<sup>2</sup> Crimes Act 1961, s 228(1)(b), which carries a maximum penalty of seven years' imprisonment.

<sup>3</sup> Crimes Act 1961, s 202A(b)(b), which carries a maximum penalty of three years' imprisonment.

<sup>4</sup> Search and Surveillance Act 2012, s 178, which carries a maximum penalty of three months' imprisonment.

weapon relates to a large hunting knife found under Mr Samsudeen's bed when the police executed a search warrant at his flat. The other charges are relatively minor fraud charges.

### **Change in circumstances?**

[5] Mr Holland, for Mr Samsudeen, argues that, as a result of the Classification Office's decision, the strength of the evidence and seriousness of the available charges has been significantly reduced and, as a result, there is real risk that Mr Samsudeen will be detained for longer than any sentence likely to be imposed in the event of a conviction. This is because, if the material that is the subject of the charges is, in fact, only "R18", the maximum penalty would be three months' imprisonment.<sup>5</sup> The remaining charges are relatively minor and, given Mr Samsudeen's lack of previous convictions, it is highly unlikely that a significant term of imprisonment would be imposed.

[6] Mr Holland's argument depends on the status of the Classification Office's decision. Under s 29, where a question arises in court proceedings (civil or criminal) as to whether a publication is objectionable except in the specified circumstances (including restriction to persons having attained a specified age), the court must refer the question to the Classification Office for decision and the Classification Office has exclusive jurisdiction to determine the question. That decision provides conclusive proof as to the classification.

[7] However, s 31 relevantly provides that where a publication is referred to the Classification Office pursuant to s 29(1) and the Classification Office makes a decision with respect to that publication, then if an application for review is lodged, the Classification Office's decision shall be of no effect in relation to the proceedings until the Review Board has made its decision.

[8] Since the Crown has applied for a review of the Classification Office's decision this case plainly falls within s 31(d) and Mr Holland did not contend otherwise. As a result, the circumstances that can be taken into account for the purposes of a bail

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<sup>5</sup> Sections 125 and 126.

application are unchanged from those that Venning J considered in December 2017. That means that the application must fail. For completeness, I briefly record the submissions that Mr Holland made.

### **Serious risk of offending while on bail?**

[9] The police opposition to bail, both last year and now, focused on the risk of Mr Samsudeen while on bail. The evidential basis to the Crown's opposition for bail was:

- (a) Statements made by Mr Samsudeen on Facebook that included a post that:

I will fill the enemies with stabbing and cut off their heads violently.

Other statements included references to martyrdom for Allah and concern over the treatment of Muslims in other countries.

- (b) Evidence from a former flatmate, [redacted] of Mr Samsudeen's interest in watching videos about ISIS, wishing to go to Syria to fight for ISIS, statements to the effect that if he could not travel to Syria then he would seek to kill someone in New Zealand, the fact that he had acquired a knife and that he knew how to make a bomb;
- (c) Similar evidence from other (unnamed) associates.

[10] Mr Holland argued that the Facebook statements (while misconceived) represent only a fraction of the many statements posted by Mr Samsudeen on his Facebook pages. He also criticised the Crown's reliance on [redacted], whom he characterised as unreliable, no longer in New Zealand and with a motive to lie.

[11] To the latter criticism, Mr Steele responded that [redacted] was still available, would be called to give evidence by AVL and, significantly, that many of his statements had been corroborated by evidence subsequently obtained. For example, Mr Samsudeen had travelled to Samoa for four days in November 2016 and had made

enquiries with the Department of Internal Affairs to obtain travel documents and to enquire as to the countries he was able to travel to. When the Police executed a search warrant they found a 31 centimetre hunting knife under his bed.

[12] I see no basis on which to take a different view from that which Venning J took, that there was a risk of violent offending if bail were to be granted.

[13] That leaves the question of whether the severity of the punishment likely to be imposed would result in Mr Samsudeen serving longer on remand than any sentence imposed. Because of the effect of s 31(d), I would need to proceed on the basis of the current charges being proved and I accept the Crown's submissions that a comparable, though somewhat more serious case would be *Patel v R*.<sup>6</sup> That case concerned the making, possession and distribution of objectionable material in the form of images and film footage showing torture and extreme violence and cruelty and some of which specifically promoted a group designated a terrorist entity under the Terrorism Suppression Act 2002. It was described as being at the most serious end of the spectrum, distributed for the purpose of endorsing terrorist acts and encouraging others to do so and potentially creating support for an organisation that promotes and encourages criminal acts or acts of terrorism. The Court of Appeal considered that the totality of the offending justified a starting point of five years.

[14] Clearly, the material that is the subject of the charges against Mr Samsudeen is less serious than that in *Patel*. However, even if a starting point of half that taken in *Patel* was taken in this case, there would be no real risk of Mr Samsudeen being detained for longer than he was likely to be sentenced.

## **Result**

[15] The application for bail is dismissed.

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P Courtney J

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<sup>6</sup> *Patel v R* [2017] NZCA 234.