

**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR  
IDENTIFYING PARTICULARS OF DEFENDANT UNTIL THE FINAL  
DISPOSITION OF TRIAL.**

**NOTE: PUBLICATION RESTRICTIONS APPLY PURSUANT TO S 19(1) OF  
THE BAIL ACT 2000. SEE  
[HTTP://WWW.LEGISLATION.GOV.T.NZ/ACT/PUBLIC/2000/0038/LATEST/  
DLM68927.HTML](http://www.legislation.govt.nz/act/public/2000/0038/latest/DLM68927.html)**

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

**CRI-2017-004-005092  
[2017] NZHC 3229**

**THE QUEEN**

v

**AHAMED AATHILL MOHAMED SAMSUDEEN**

Hearing: 18 December 2017  
Appearances: H Steele for Crown  
A Holland for Applicant/Defendant  
Judgment: 19 December 2017

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**JUDGMENT OF VENNING J  
Bail application**

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**This judgment was delivered by me on 19 December 2017 at 3.00 pm, pursuant to Rule 11.5 of the  
High Court Rules.**

**Registrar/Deputy Registrar**

**Date.....**

Solicitors: Meredith Connell, Auckland  
Counsel: A Holland, Auckland

[1] Mr Samsudeen faces the following charges:

- (a) nine charges of knowingly distributing objectionable material under the Films, Videos and Publications Classification Act 1993 (the Act);
- (b) one charge of possession of an offensive weapon;
- (c) one charge of failing to assist in the exercise of a search power; and
- (d) two charges of using a document for pecuniary advantage.

[2] Mr Samsudeen is currently remanded in custody for trial in this Court on 9 July 2018. He seeks bail.

[3] I take the background to the charges from the Police summary of facts. Mr Samsudeen is a Sri Lankan citizen who arrived in New Zealand in October 2011. He currently holds a New Zealand returning resident's visa.

[4] In March 2016 Mr Samsudeen operated a Facebook account. The account was drawn to the attention of the Police. It contained videos and pictures of graphic war-related violence, and comments advocating violent extremism and expressing support for terrorists involved in the Paris attacks on 13 November 2015 and the Brussels' bombing which occurred on 22 March 2016. The Police spoke to the defendant at his home address on 29 April and 25 May 2016. He was formally warned that possession of such material was an offence. The defendant was reported as being apologetic. He told the Police he had closed down the Facebook account.

[5] On 7 July 2016 the defendant re-opened the Facebook account. He later opened another Facebook account under a different name. On 20 October 2016 Police discovered the new Facebook accounts and through further inquiries detected a number of objectionable pictures and videos on them. The inquiries disclosed the defendant was then operating three separate accounts. The accounts were monitored and revealed numerous postings which included videos and pictures considered to be objectionable in terms of the Act because of the violence depicted in them.

[6] A witness who formerly flatted with the defendant reported his concerns to the Police about the defendant. He said the defendant had stated he wanted to go to Syria to fight for Islamic State and if prevented from doing so he would do something “outside in the street” and “kill someone with a knife”.

[7] The defendant was arrested at Auckland International Airport on 19 May 2017 when about to depart New Zealand to Malaysia and onwards to Singapore. A subsequent search of the defendant’s house located a hunting knife with an 18 cm blade.

[8] During the search the Police also located an Apple iPhone. The defendant refused to provide any PIN code and/or password for the phone.

[9] The dishonesty charges allege the defendant used false information to access credit. On 9 April 2016 the defendant went to Noel Leeming and while there purchased an Apple iPhone by applying for a credit card in store at the time of the purchase. He gave false details of his employer. He also later went to Michael Hill and purchased a watch by applying for a Q card, again giving false details.

[10] In support of the application for bail Mr Holland makes the following points:

- (a) Mr Samsudeen has been in New Zealand for five or six years without committing any offences.
- (b) When arrested at the airport Mr Samsudeen was with his brother and sister-in-law. There is no suggestion they are a threat to anyone.
- (c) Mr Samsudeen had an explanation for the possession of the knife. The defendant volunteered that he had possession of the knife and is reported as saying:

There’s a knife in my house under my bed.

Some guys came last year and checked my passport and I was scared so a few months later I saw it and thought I’d buy it.

Those guys come when I wasn't home and moved my passport.

I thought someone could come in and kill me.

- (d) None of the publications in issue have yet been classed as objectionable. The Crown have already withdrawn half the charges. Mr Holland submitted that the test for an offence under the relevant section of the Act is complex and has a high threshold. There must be some prospect of promotion or support for the violence at issue. He submitted that was lacking in the present case. Some of the charges relate to footage of videos that were also distributed by journalistic agencies, such as Al Jazeera and the Daily Mail.<sup>1</sup> Mr Samsudeen's interest in geo-political issues is legitimate. Mr Holland emphasised that the material was not pro-ISIS as was the case in *Patel v R*.<sup>2</sup>
- (e) There is an insufficient evidential foundation for the links the Crown seek to draw between the defendant's Facebook posts and his alleged intention to carry out further offences. The former flatmate is possibly unreliable.
- (f) There is a real risk that Mr Samsudeen will be held in custody beyond any period of imprisonment he will be liable to serve even if convicted.

[11] In addressing the s 8(1) considerations Mr Holland submitted there is no evidence to suggest Mr Samsudeen may fail to appear if granted bail. Any risk of flight can be addressed by the surrender of his passport and appropriate conditions.

[12] Next, he submitted there is no risk of interference with evidence and/or Crown witnesses given the disclosure to date was mainly from Police investigations and the Crown have completed the briefing of all proposed witnesses. There could be a non-association condition if necessary.

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<sup>1</sup> For example a child being run over by a tank and children apparently being shot in Egypt.

<sup>2</sup> *Patel v R* [2017] NZCA 234.

[13] Finally, as to the risk of offending whilst on bail Mr Holland submitted any such risk could be addressed by conditions. There is an available address at [redacted]. [Redacted] offers pastoral support to inmates and ex-prisoners on release conditions at that address. [Redacted] visits the address three times a day for prayers and is responsible for maintaining the living facilities at the address. He has deposed that he is prepared to work with Mr Samsudeen to ensure his compliance with any bail conditions, and intends to provide him daily counselling sessions. The address does not have wifi. Mr Holland said the defendant would accept a condition he not have access to electronic devices.

### **Discussion**

[14] I agree with Mr Holland that that risks of failure to appear or of interference with witnesses can be met by appropriate conditions. The principal issue of concern is the risk of the defendant offending whilst on bail and whether that can be met by the proposed living arrangements and conditions.

[15] I consider there is a real risk that the defendant will offend if granted bail, either by distributing further objectionable material or even by committing an offence of violence. The defendant has shown that he is not deterred by Police attention. After being warned by the Police as to the material on his Facebook site he very shortly thereafter continued with the practice. Of more concern is that he also opened other Facebook pages under different names to distribute such material. If Mr Samsudeen was not trying to avoid detection, there would have been no reason for him to have operated under different names. It is also relevant that the Police have not been able to access data on Mr Samsudeen's phone as he has refused to supply his password. That could support an inference there is further material which he does not wish the authorities to see.

[16] There is also the evidence of the former flatmate, which is of particular concern. Mr Holland criticised it and suggested the witness was unreliable. But as Mr Steele submitted, aspects of the flatmate's evidence have been borne out by the defendant's actions. The witness is still available. The Police spoke to him as recently as last week. Relevantly his evidence is consistent with a number of the

posts on the Facebook pages, authored by Mr Samsudeen. When the publications that Mr Samsudeen shared are considered with that evidence and with regard to those Facebook posts a concerning picture emerges. In his Facebook posts the defendant said:

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

And:

One day I will go back to my country and I will find kiwi scums in my country (its very easy to find) and I will show them.. what will happen when you mess with Aathill while I'm in their country.

if you're Tough in your country.. we are Tougher in our country scums.

[17] Those posts are consistent with the evidence of the former flatmate that the defendant said that if he was prevented from travelling to Syria, that he intended to kill someone with a knife. Mr Samsudeen's possession of the knife and the type of knife is also of particular concern in the context of the flatmate's evidence and Mr Samsudeen's own statements. Mr Samsudeen's explanation of the perceived need for it is of itself of further concern. Even on his own admission he had it to use it against another person.

[18] I am satisfied there is a risk of further offending and even possibly violent offending if bail is granted. The issue is whether that risk can be dealt with by way of appropriate conditions.

[19] The proposed bail address has some positives, in that [redacted] will offer some support for Mr Samsudeen. However, there are issues with the address, and particularly with the number of people visiting it. Approximately 30-40 visit each day for prayers. It would only take one person to supply Mr Samsudeen with a cell phone or other electronic device for him to be able to operate his Facebook page again.

[20] While I accept the bona fides of [redacted], his contact will be limited and he cannot be responsible for the actions of the defendant. There is a further point about that particular proposed address. In 2016 the Police executed a search warrant there

following the arrest of a Niroshan Nawarajan. Mr Nawarajan subsequently pleaded guilty to offences under the Act similar to those faced by Mr Samsudeen.

[21] I turn to the other issues raised by Mr Holland which are relevant to the s 8 considerations.

[22] Mr Holland submitted Mr Samsudeen is entitled to the presumption of innocence. He also argues the posts do not promote or support the violence depicted in them. However, while s 3(2) of the Act deems the publication objectionable if it promotes or supports acts of torture or the infliction of extreme violence or extreme cruelty, a publication can also be objectionable under s 3(3) if it depicts acts of torture, the infliction of serious physical harm or acts of significant cruelty, having regard to the s 3(4) factors.

[23] It is unnecessary in this decision to detail the publications and the content of the publications. However, having reviewed the material, I cannot accept Mr Holland's submission it is unlikely the relevant publications will be found to be objectionable. There can be little dispute they were distributed by Mr Samsudeen given the Facebook posts associated with them.

[24] The final matter is the length of time Mr Samsudeen may spend in custody pending trial and whether, if convicted, he may have already served his sentence.

[25] In *Patel v R* the Court of Appeal upheld a starting point of five years' imprisonment in respect of two charges of distributing, one of making, downloading objectionable materials for data storage devices and one of possession of objectionable material.<sup>3</sup> While Mr Patel's posts supported ISIS and Mr Samsudeen does not go that far in his posts, the Court of Appeal noted the following factors were relevant to an assessment of the gravity of the offending:

- (a) the nature of the publication;
- (b) the volume of the material;

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<sup>3</sup> *Patel v R*, above n 2.

- (c) the number of people to whom it was distributed;
- (d) the defendant's role in the distribution; and
- (e) the harm (linked to (a), (b) and (c)).

[26] In fixing the start point at five years' imprisonment, the Court considered that the nature of the material, depicting the taking of human life in a brutal and cruel fashion, was at the extreme end of the scale. The material the defendant has distributed is of that nature. It depicts extreme violence. While the posts do not directly refer to ISIS, there are other aggravating factors in the defendant's case. In particular, the defendant faces other charges, including possession of the knife. I do not accept Mr Holland's submission it is likely that by the trial date the defendant will have spent more time in custody than the likely sentence. However, even if that were the case, it is only one factor to be taken into account. While a powerful factor it is not determinative.

[27] In conclusion, I am satisfied that the defendant poses a risk of offending whilst on bail. The proposed conditions do not satisfactorily address that risk. Having regard to the discretionary factors under s 8(2) I find there is just cause for continued detention.

[28] The application for bail is declined.

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Venning J