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ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF APPELLANT(S)/RESPONDENT(S)/ACCUSED/DEFENDANT(S) PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011. SEE

<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.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 2465**

THE QUEEN

v

MOHAMED SAMSUDEEN

Hearing: 19 September 2018

Appearances: F M T Culliney for the Crown
E Priest for the Defendant

Sentencing: 19 September 2018

SENTENCING NOTES OF WYLIE J

Solicitors/counsel:
Meredith Connell, Auckland
E Priest, Auckland

Introduction

[1] Mr Samsudeen, you appear for sentence today having pleaded guilty to the following charges:

- (a) two charges of dishonestly using a document for a pecuniary advantage. This is an offence pursuant to s 228(1)(b) of the Crimes Act 1961. The maximum penalty for each offence is one of seven years' imprisonment;
- (b) two representative charges of knowingly distributing restricted material. This is an offence pursuant to s 126(1)(a) of the Films, Videos, and Publications Classification Act 1993. The maximum penalty for each offence is three months' imprisonment, or a fine not exceeding \$10,000;¹ and
- (c) failing to assist a police officer exercising a search power. This is an offence pursuant to s 130(1) of the Search and Surveillance Act 2012. The maximum penalty is one of three months' imprisonment.²

Adjournment request

[2] You were due to be sentenced as long ago as 7 August 2018. Immediately prior to that date, you terminated the retainer of counsel then representing you. Ms Priest was instructed by Legal Services to take over your representation. She understandably applied for an adjournment. The sentencing date was adjourned. Sometime later, Ms Priest applied for a further adjournment. Again, that adjournment was granted. In both cases, it was granted on the basis that you were contemplating making application to vacate your guilty pleas.

[3] Earlier this week, I received a memorandum from Ms Priest advising me that her instructions had been withdrawn. However, at approximately 11.45pm last evening, the Registrar received some 45 pages of material from Ms Priest. She

¹ Films, Videos, and Publications Classification Act 1993, s 126(2)(a).

² Search and Surveillance Act 2012, s 178.

appeared in Court this morning. I granted her an adjournment so that she could speak to you. She tells me that she is now re-engaged to act on your behalf.

[4] She has requested yet again that the sentencing should be adjourned to give you the opportunity to vacate your guilty pleas. She has made available to me a letter written by you. As I understand it, you take the view that the Crown has reneged on an agreement and has re-laid a charge of being in possession of an offensive weapon which it dropped at the time that you entered guilty pleas to the charges I have already mentioned.

[5] Ms Culliney, appearing for the Crown, tells me that the charge of being in possession of an offensive weapon was withdrawn under s 146 of the Criminal Procedure Act 2011, and that that step was taken intentionally, so that the Crown had the ability to re-lay the charge in the event that there was a change of circumstances.

[6] I am advised that you have recently been charged with a number of further offences, which are similar to those in respect of which you have entered guilty pleas, and that you are currently remanded in custody in relation to those further charges. The Crown takes the view that this is change of circumstances and it has re-laid the charge of being in possession of an offensive weapon.

[7] I am not, in the circumstances, prepared to yet again adjourn the sentencing. You have already had ample opportunity to make application to vacate your pleas. Moreover, you can still seek to raise the issue on appeal if you wish to do so. Accordingly, I decline the application for adjournment, and proceed to sentencing.

Factual background

[8] You are a Sri Lankan national and a Tamil Muslim. You arrived in New Zealand in October 2011 as a refugee. You have since obtained a residency visa in this country, although the Refugee Status Board has recently served you with a notice of an intention to cancel your refugee status.

[9] Regarding the two charges of dishonestly using a document for pecuniary advantage:

- (a) In early April 2017, you went to a retail store at a shopping centre in Auckland. You purchased a cellphone. To fund the purchase, you applied for a Gem Visa credit card instore. You gave false employment details when filling out the required form. You were subsequently issued with a credit card and provided credit of \$6,000.
- (b) A few days later, you went to a retail store in Queen Street. You purchased a watch. To fund the purchase, you applied for a Q credit card instore. Again, you gave false employment details. You were issued with a credit card and provided with credit of \$4,500.

[10] Regarding the charges of knowingly distributing restricted material:

- (a) In March 2016, you were operating a Facebook account under the name Aathill Al-Ceyloni Al-Moori. The Facebook account was drawn to the attention of police. It contained videos and pictures of graphic war-related violence, comments advocating violent extremism, as well as comments expressing support for the terrorists involved in the attacks in Paris in November 2015 and the bombing in Brussels in March 2016.
- (b) The police spoke to you on 29 April 2016, and again on 25 May 2016. They formally warned you. You were apologetic and advised the police that you had closed down the account after researching New Zealand legislation.
- (c) However, on 7 July 2016, you reactivated the account. Further, you created another Facebook account under the name Aathill Ahmed.
- (d) On 20 October 2016, the police became aware of these accounts. The accounts contained numerous postings, including videos and pictures of concern to the police. The principal theme of the majority of the videos and pictures was the oppression of Muslims. They showed violence and atrocities committed against Muslims. One video for example depicted a male youth being dragged to a nearby tank by a male in military uniform. The youth was shot and the tank was then

driven over his body. There were also pictures showing severe trauma inflicted on males, females and children. For example, one picture showed a dead infant who had been stabbed through the abdomen with a large knife.

- (e) You were arrested at Auckland Airport on 19 May 2017. The following day, the police executed a search warrant at your address. You refused to provide the police with your PIN code to your mobile phone on two separate occasions.

[11] Following your arrest, you appeared before the District Court on a single charge of being in possession of objectionable material. You were declined bail. On 17 August 2017, Moore J ordered that the matter should be transferred to this Court. The Crown then filed a number of further charges, and as a result, you then faced a total of 18 charges of possessing and knowingly distributing objectionable material.

[12] On 2 November 2017, the publications which were the subject of the charges were referred to the Classifications Office pursuant to s 29(1) of the Films, Videos, and Publications Classification Act for a determination as to their character. On 22 November 2017, the Crown dismissed nine of the charges pursuant to a recommendation from the Classifications Office and, on 10 April 2018, the Classifications Office classified each of the nine remaining publications as being restricted to persons aged 18 years and above, rather than as being objectionable.

[13] On 13 April 2018, the Crown lodged an application for a review of the decision with the Film and Literature Review Board. On 26 June 2018, the Board issued a decision upholding the findings of the Classifications Office. The Crown then amended the charges and you pleaded guilty to the amended charges. I then released you on bail, given that you have been in custody since your arrest.

Pre-sentence report/s 38 report/report from Dr Clarke Jones

[14] The probation officer who interviewed you for the pre-sentence report advised that you have an isolated lifestyle, a high sense of entitlement and a propensity for violence. He commented that you show minimal insight into your offending, that you believe that the charges to which you have pleaded guilty are “fake”, and that you

describe yourself as an activist or journalist. With regard to the fraud offending, you told the report writer that you were helping out a friend, “because that is what Muslims do”. You stated that you did not give the police access to your cellphone, because it is your private property and that in any event, there was nothing relevant on your phone.

[15] You were assessed as posing a medium likelihood of reoffending, but with a low risk of harm. The report writer nevertheless recommended that special conditions should be imposed on your release. He suggested that you should reside at an approved address, that you should attend assessment with a departmental psychologist and that you should only operate one social media account on a public setting. It was also recommended that special conditions should be imposed requiring that you do not possess or use any electronic device capable of internet access, without the approval of the Probation Office, and that you surrender any device on demand for the purpose of checking its internet capability and so that its content can be analysed.

[16] I have also received a report from Dr Jeremy Skipworth, prepared at the request of your previous counsel, Mr Holland, on your behalf, pursuant to s 38(2)(a) of the Criminal Procedure (Mentally Impaired Persons) Act 2003.

[17] Doctor Skipworth records that in the past you have experienced symptoms of anxiety and depression. You have also suffered from insomnia. All of this has contributed to your sense of isolation. Although you have denied thoughts of suicide or self-harm, you said that your sense of isolation got to the stage where you self-presented to the Auckland Hospital emergency department on one occasion. You have also taken anti-depressant medication.

[18] You characterised falsely representing your employment details as something which, in Sri Lanka, would not be considered a criminal offence. You denied to Dr Skipworth that you have advocated violent extremism or expressed support for terrorist activities. Doctor Skipworth recorded that you have a very rigid way of seeing the “lies” in the summary of facts. You believe the description given in the summary of facts deliberately omitted facts and details which would have revealed your non-violent motivation for your actions, while including material which gives a false impression of you.

[19] Doctor Skipworth concluded that you pose a low risk of serious reoffending. While noting that, during your time in New Zealand, you have presented with signs and symptoms consistent with a recurring anxiety/depression syndrome related to the trauma you suffered during your time in Sri Lanka, he considered that your offending is largely unrelated to your depression and anxiety.

[20] Doctor Skipworth said that any form of home detention would tend to further exacerbate your mental health concerns, and that your successful community reintegration is likely to be assisted by cornerstones, such as stable housing, personal support, appropriate employment and medical care.

[21] Overnight, the Registry received some material from Dr Clarke Jones and from Mr Rasheed, a lawyer and a mediator here in New Zealand.

[22] Dr Clarke Jones is a criminologist based at the Research School of Psychology at the Australian National University. He has not met with you personally. His primary source of information has been by way of telephone conversations with Mr Rasheed. Dr Clarke Jones has compared your profile and case history to that of other individuals who have been accused of being radicalised in Australia. He is of the opinion that you do not fit the usual profile of a typical young Muslim person who has been deemed radicalised because of his or her extreme religious views and political ambitions. He says that you do not fit the characteristics of a person that seeks to commit violent acts against others. He considers that you have a poor understanding of Islam and that while you claim to be a devout Muslim, you neither show nor claim any sophistication or background in your knowledge of Islam. He considers that you would be an ideal candidate for a carefully designed, culturally sensitive and closely supervised intervention programme in the Auckland Muslim community.

[23] I have also received a letter from Mr Rasheed. Mr Rasheed, as I have noted, is a barrister and mediator. He is also a member of an entity known as Just Community. Mr Rasheed advises that Just Community is considering putting in place a rehabilitation plan for you, and that he intends to explore and develop that plan with a Mufti, Mr Musayyab Sahib. He considers that a detailed rehabilitation programme based on five key points might assist in your case. He advises that interim measures have already been put in place. In particular, you have been joined up to a Mizan

library, and you have been issued with mainstream, traditional religious books to assist you develop your understanding of the primary sources of Islamic law and faith.

Purposes and principles of sentencing

[24] In sentencing you, I have considered the principles set out in ss 7 and 8 of the Sentencing Act 2002. I have had regard to the need to hold you accountable for your offending, the need to promote in you a sense of responsibility for and an acknowledgment of that offending, and the need to denounce the conduct in which you were involved. I have also been mindful of the need to deter others from committing the same or similar offences. I have taken into account the gravity of the offending with which you were involved, including your culpability. I have considered the seriousness of such offending, and the general desirability of consistency of appropriate sentencing levels between similar offenders committing similar offences. I accept that these sentencing imperatives have, in large part, been met by your lengthy custodial remand.

[25] Importantly, in your case, I have also been mindful that I must impose the least restrictive outcome that is appropriate in the circumstances, and of the need to focus on your rehabilitation and reintegration into the community. If both are managed successfully, they will help protect the community and promote in you a sense of responsibility for your offending.

Analysis

[26] I agree with counsel that the two representative charges of knowingly distributing restricted material should be considered as the lead offending, notwithstanding the relative short sentences they carry.

[27] There is no tariff decision for offending of this kind. The Court of Appeal has, however, discussed the factors which can be relevant to an assessment of the gravity of similar offending – namely being involved in the distribution of material injurious to the public good.³ The Court identified the following:⁴

³ *Patel v R* [2017] NZCA 234.

⁴ At [35](a)-(e).

- (a) the nature of the publication or distribution;
- (b) the volume of material involved;
- (c) the number of people to whom the material was distributed;
- (d) the offender's role in the making or distribution; and
- (e) the harm caused by the offending.

It also considered that the purpose of the distribution is relevant, noting that if distribution is intended to recruit recipients to a terrorist organisation, this will be a significant aggravating factor.⁵

[28] In my judgment, some of these aggravating features are relevant in assessing the gravity of your offending. I consider each in turn:

- (a) The nature of the publication – in this case, the material which you distributed shows the real life killing of defenceless human beings and, in graphic detail, the aftermath of such acts. The publications depict extreme acts of torture, cruelty and mutilation. The levels of violence contained in them will be uncomfortable for many, although I am aware that you assert that the publications were simply picked up by you from other legitimate sites on the internet, including news sites.
- (b) The volume of the material involved – there were six videos, two picture montages and one picture.
- (c) The number of people to whom the material was distributed – this is unknown. The publications were posted on open source Facebook profiles – that is, they were posted on Facebook by you without restricting their availability. It seems likely, however, that most of the viewers would have been people known by you, and that the posts would not have featured on many other peoples' Facebook feeds.

⁵ At [36].

- (d) Your role in the making or distribution – in each case, you distributed material that had already been posted on social media by other individuals and/or entities. You were not responsible for the making of the material. You did add comments to some of the posts, although the comments made by you in March 2016 advocating violent extremism and supporting terrorists, are not part of the charges to which you have pleaded guilty and are being sentenced for today.
- (e) The harm caused by the offending – there is no evidence of any harm caused, and the Crown accepts that this is impossible to calculate.
- (f) The purpose of the distribution – your position has consistently been that you were trying to draw attention to atrocities committed against Muslims, which you considered were not being covered by the mainstream media. It is relevant that you were warned twice by the police, but that you persisted in the offending regardless.

[29] In my view, your offending was of moderate seriousness. But for the fact that you have spent some 13 months in custody on remand, I consider that the appropriate starting point for the two charges of knowingly distributing restricted material would be one of two months' imprisonment.

[30] I also consider that, but for the fact that you have spent a considerable time in custody on remand, an uplift of one month's imprisonment would be appropriate for the charge of failing to assist the police.

[31] Your fraud offending is different in kind and unrelated in time or circumstance.⁶ Again, but for the fact that you have already spent considerable time in custody, I would have adopted a community based sentence for this offending – namely a sentence of community work and supervision.

Personal circumstances

[32] I now turn to consider your personal circumstances.

⁶ Sentencing Act 2002, s 84(1).

[33] It was submitted by Mr Holland, who previously acted for you, that you should receive a discount for your previous good character. That submission has not been advanced by Ms Priest this morning, but I note that you have not previously offended in this country, or, insofar as I am aware, in Sri Lanka. I would have discounted your sentence by two weeks to allow for your previous good character.

[34] I would not have considered that you are entitled to any discount for remorse. You have taken no responsibility for your offending. You have continued to maintain your innocence and to deny any offending this morning through Ms Priest. There is no proper factual basis for any discount for remorse.

[35] Again, but for the fact that you have already spent time on remand, I would have allowed you a discount for your guilty pleas. I would have accepted that those pleas were entered shortly after the lead charges were amended by the Crown and that you would have been entitled to a discount of some 25 per cent for those pleas.

Supervision

[36] As I have already noted, you have spent 13 months in custody on remand. There is no basis for a further sentence of imprisonment or for a community based sentence such as a community work order.

[37] I do, however, consider that a sentence of supervision is appropriate. Both the Crown and Ms Priest this morning have submitted to me that such sentence would be appropriate to encourage your rehabilitation and reintegration, and to reduce the risk of further offending by you.

[38] The probation officer who prepared the pre-sentence report recommended a number of special conditions; so did Dr Skipworth, Dr Clarke Jones and Mr Rasheed.

[39] The Sentencing Act provides that a Court can impose special conditions if the Court is satisfied that there is significant risk of further offending, the standard conditions alone will not adequately reduce that risk, and that the offender requires a

programme to reduce the likelihood of further offending through rehabilitation and reintegration.⁷

[40] Here, I have conflicting opinions.

[41] The probation officer who prepared the pre-sentence report says that you pose a medium risk of reoffending. Dr Skipworth suggests that your risk of reoffending is low. So does Dr Clarke Jones.

[42] As against this, I am aware that a number of further charges have recently been laid against you. The police allege that you were in possession of an offensive weapon and further, that you were in possession of objectionable material. As I understand it from Ms Culliney, the material is said to be similar in kind or worse than that the subject of the present charges.

[43] I consider that I am entitled to take into account the fact that further charges have been laid in considering the risk you pose, notwithstanding that you are entitled to the presumption of innocence at this stage.

[44] I raised this issue with Ms Priest, appearing on your behalf. She accepted that without intervention, you do pose a significant risk of further offending. I have reached the same conclusion. I also consider that the standard conditions set out in s 49 of the Sentencing Act would not adequately reduce that risk and that you require an appropriate programme or programmes to reduce the likelihood of further offending, and for rehabilitation and reintegration.

Sentence

[45] I impose a sentence of supervision. That sentence of supervision is subject to the standard conditions set out in s 49 of the Sentencing Act.

[46] I direct that you are to reside at [redacted], and that you are not to move to any new residential address without the prior written approval of a probation officer.

⁷ Section 50.

[47] I also impose the following special conditions to assist in your rehabilitation and reintegration:

- (a) You are to attend an assessment for any programme as directed by a probation officer, and you are to attend and complete any counselling, treatment or programme as recommended by the assessment, and as directed by and to the satisfaction of a probation officer.
- (b) You are to attend a psychological assessment with a departmental psychologist as directed by a probation officer, and complete any treatment and/or counselling as recommended by the assessment to the satisfaction of a probation officer.
- (c) You are to participate in such rehabilitation programme as shall be offered to you by Just Community and as shall be approved by a probation officer.
- (d) You are to attend and complete any such rehabilitation programme to the satisfaction of a probation officer.
- (e) You are to operate only one social media account on a public setting and provide the name/identifying details of that account to a probation officer.
- (f) You are not to possess or use any electronic device capable of accessing the internet or capturing, storing, accessing or distributing images, including without limitation, any personal computers or cellphones, without prior written approval from a probation officer.
- (g) You are to immediately inform the probation officer of any electronic device in your possession or control and upon direction, to surrender any devices for the purposes of checking the internet capability of the devices and/or to analyse the content on the device. The probation officer is not entitled pursuant to the special condition to access legally privileged material.

This sentence of supervision is imposed for a term of one year.

[48] In addition, and by consent, I make a reparation order.

[49] The amount of \$3,920 which you had in your possession when you were arrested on 19 May 2017, is to be paid to Baycorp Limited by way of reparation. The total amount owed to Baycorp Limited is a rather larger sum, but I am satisfied that there is no point in ordering you to pay further reparation.

[50] But for the fact that you are currently in custody on remand in relation to the most recent charges which have been laid against you, you would now be free to leave the Court. However, you are in custody on remand. You have been denied bail by the District Court. I understand that you are appealing that decision and that that appeal is due to be heard on Friday of this week.

Addendum

[51] For the purposes of the Ministry's record-keeping, I record that charges 17004010395, 404, 397, 398, 405, 406, 407 and 417 in the original notice of charge dated 28 June 2018 were withdrawn.

[52] You may stand down.

Wylie J