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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2018-004-7098
[2021] NZHC 1669

THE QUEEN

v

AHAMED AATHILL MOHAMED SAMSUDEEN
Defendant

Hearing:	6 July 2021
Appearances:	HDL Steele for the Crown K Raftery for the Defendant
Sentenced:	6 July 2021

SENTENCING NOTES OF FITZGERALD J

Introduction

[1] Mr Samsudeen, you may remain seated until I ask you to stand. These sentencing remarks, as I have just noted, will be transcribed and a copy of them will be made available to your lawyers later today.

[2] You appear for sentence this morning having been found guilty by a jury on two charges of possessing an objectionable publication with reasonable cause to believe that it was objectionable,[1] and one charge of failing to assist a Police officer exercise a search power.[2] The jury found you not guilty of a third charge of possession of objectionable material and of a charge of possessing a knife in a public place without reasonable excuse.

Facts

[3] I will now briefly summarise the facts behind your offending; and these will of course be well known to you and to the lawyers here in court today, but sentencing is a public process and it is important the public are aware of the factual basis upon which I am sentencing you today.

[4] The two publications in relation to which the jury found you guilty are two nasheeds, or what might broadly be described as religious hymns. They had been reviewed by the Office of Film and Literature Classification (which I will refer to for ease of reference as the Censor) and both classified as objectionable. The first nasheed, titled "What a victory for he who got shahada" features a still image of a man wearing a black balaclava and black clothing, holding a large machine gun and standing in a field of flowers. Behind him is a flag of ISIL or ISIS, a designated terrorist organisation under the New Zealand Terrorism Suppression Act 2002. The nasheed is sung in Arabic but with large English subtitles also displayed. The lyrics of this nasheed speak of obtaining martyrdom on the battlefield and being killed in Allah's cause.

[5] The Censor concluded that the combination of the lyrics and imagery in this nasheed promotes and encourages acts of violence and terrorism. The jury's verdict meant that it was sure that you had reasonable cause to believe that the nasheed did promote and encourage acts of violence and terrorism.

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1 Films, Videos, and Publications Classification Act 1993, s 131A. Maximum penalty 10 years' imprisonment or a $50,000 fine.

2 Search and Surveillance Act 2012, s 130(1). Maximum penalty three months' imprisonment.

[6] The second nasheed is similar, and is titled "We came to fill the horror everywhere". It contains a series of black and white images in the background, which are somewhat difficult to make out, but tend to show buildings with smoke around them, images of the ISIL flag flying from vehicles and being held by soldiers. Again, the nasheed is sung in Arabic but with English subtitles displayed. It speaks to matters such as making disbelievers taste the heat of swords, sending disbelievers to death without mercy, and to make countries of disbelief "rain with fire and a strike on their streets and attacks." Like the first nasheed, the Censor concluded that the combination of the images and lyrics meant this nasheed was also objectionable as a matter of New Zealand law, given it promotes and encourages acts of violence and terrorism. Again, the jury's verdict meant it was sure that you had reasonable cause to believe that this nasheed does promote and encourage acts of violence and terrorism.

[7] As to *why* the Censor considered the nasheeds promote and encourage acts of violence and terrorism, it said the following:

> …the manner in which both videos combine violent lyrics with ISIL branding promotes and encourages terrorism to a high extent and degree. While the lyrics are sung in Arabic they are subtitled in English, which New Zealand-based viewers will understand. While the lyrics alone may be traditional and/or about warfare in general, when coupled with ISIL branding and imagery of violence synonymous with terrorist warfare, they are appropriated as recruitment tools. They justify terrorist violence in the name of religion and glorify this cause with the promise of reward. The apparent intention is to motivate consumers of the video toward criminal violence.

[8] Having watched and listened to the two nasheeds a number of times during the course of your trial, I consider the Censor's description of the nasheeds to be a fair one.

[9] That you had these two nasheeds in your possession was not in dispute; indeed you watched and listened to them multiple times. Having heard and seen all of the evidence in this case, I do not accept that you were listening to them simply to improve your Arabic language skills. Rather, I accept that the broader context to your possession of these nasheeds, which included a range of other materials relating to ISIS or ISIL, suggests that you have an operative interest in ISIS. In other words, I do not accept that you might have simply stumbled across these and other ISIS related materials in your research of Islam or the historic Islamic State. I mention these

matters, as the Court of Appeal in a case called *Patel*, which I will speak about later, said that in relation to charges of making and distributing objectionable material, the *purpose* of the distribution or making will be relevant to sentencing. So too, in my view, will the purpose of possessing objectionable material.

Purposes and principles of sentencing

[10] In sentencing you today, I have considered the purposes and principles of sentencing as 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 which gives rise to your offending. I have also been mindful of the need to deter others from committing the same or similar offending.

[11] In your case, I consider the primary sentencing principles engaged to be deterrence[3] – that is, incentivising both you and other potential offenders not to offend in this manner again – denunciation, which is to say condemning this behaviour and making it clear that the general community does not tolerate it – and, finally, community protection. I accept, however, that given your time spent in custody pending trial, these principles have largely been met. I am also mindful that I *must* impose the least restrictive outcome that is appropriate in the circumstances.

Starting point

[12] The convictions for possessing an objectionable publication with knowledge are the most serious charges, so I will set a starting point for them and uplift (in accordance with the principle of totality) for the charge of failing to assist a Police officer exercising a search power.

[13] There is no tariff case for this type of offending. Almost all sentencings for possession of objectionable materials relate to the possession of sexual material, and sadly that is most often child pornography, which is obviously quite different to the

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[3] The importance of which was recognised by the Court of Appeal in *Patel v R* [2017] NZCA 234 at [38].

material in issue in this case. Given the very different nature of that type of material, I have not found authorities relating to possession of child pornography to be helpful.

[14] There have been very few sentencings for possession of terrorism-related objectionable material in New Zealand. There are, however, two clearly relevant cases from which I have drawn some guidance: a 2016 sentencing of a Mr Patel[4] and your 2018 sentencing before Wylie J.[5] You are of course familiar with Wylie J's sentencing, and broadly familiar with Mr Patel's case, as your browsing history produced in evidence during the trial showed that you were following the news reporting on that proceeding and sentencing. In *Patel,* the Court of Appeal said that the following factors will be particularly relevant to an assessment of the gravity of the offending:

(a) The nature of the publication;

(b) The volume of the material involved;

(c) At least in cases of distribution, the number of people to whom the material has been distributed;

(d) The offender's role in the making or distribution; and

(e) The harm caused by the offending.

[15] As I noted earlier, the Court of Appeal in *Patel* also added to this list the *purpose* of making or distribution, which I apply in this case by considering the purpose of possession.

[16] In *Patel*, Mr Patel had pleaded guilty to four charges under the Films, Videos, and Publications Classification Act 1993 of making, possessing and distributing objectionable material. Mr Patel was also convicted on one charge of possession of an objectionable publication.

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4 *R v Patel* [2016] NZDC 11454.
5 *R v S* [2018] NZHC 2465.

[17] Mr Patel had 137 video files on his laptop, of which 62 were objectionable, and also image files containing further objectionable material. These were all ISIS related materials. They included footage of extreme cruelty and brutality. The Court of Appeal concluded that a starting point of five years' imprisonment, *before* taking into account Mr Patel's prior offending and any personal factors, was appropriate. I should observe that Mr Patel's offending was much more serious than the charges on which you were convicted, and it is not suggested that a starting point anywhere near five years is appropriate in this case.

[18] Turning to Wylie J's sentencing in 2018, you had pleaded guilty to two charges of dishonestly using a document for pecuniary advantage, two representative charges of knowingly distributing restricted material, and failing to assist a Police officer exercising a search power. This is obviously somewhat different to the offending here: the material involved now is perhaps more serious in nature, but you did not distribute it. Wylie J did, however, identify some aggravating factors that are also relevant to the present charges.[6] They are:

(a) The seriousness of the publication: in the case before Wylie J, the publications depicted the gratuitous murder of and violence towards human beings. They were not, however, created by or for a terrorist organisation (rather they showed violence and atrocities committed against Muslims);

(b) The volume of the material involved – which here is a relatively small amount, being only two publications;

(c) The harm caused by the offending – then, as now, it is not clear that any specific harm resulted from your possession of the materials, apart from the harm to society generally which is inherent in the consumption of such material; and finally

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6 The same factors were applied in *Patel v R* [2017] NZCA 234 at [32]. Most are not relevant to a simple possession charge.

(d) The purpose of distribution, which in relation to your earlier offending, was a *mitigating* factor (in that Wylie J considered it plausible that you were trying to draw attention to atrocities against Muslims),

[19] In that context Wylie J considered that an appropriate starting point for the two distribution charges would be two months' imprisonment, with a one-month uplift for the charge of failing to assist Police.

The PAC reports

[20] I have also reviewed the Provision of Advice to Courts report, or the "PAC report", together with the more recent updating report. The report-writer takes the position that you take no responsibility for or have any real insight into your offending, and blame the Police for laying the charges. The report identifies as risk factors what the report writer describes as your extreme attitudes, isolated lifestyle, sense of entitlement and propensity for violence. The report writer suggests that you support the goals and methods of ISIS. The report writer concludes that the risk of you re-offending in a similar way to the present charges is high. It suggests that you have the means and motivation to commit violent acts in the community and, despite not having violently offended to date, as posing a very high risk of harm to others.

[21] The original PAC report made eleven recommendations for conditions attaching to your release, which I will address when coming to determine which of those are appropriate in this case. The updating report confirms the suitability and availability of a release address for you. The report writer also reports positive communications with you in the past few weeks to discuss your release plan and other related matters.

[22] I have also read the report of Dr Skipworth which was prepared in the context of Wylie J's sentencing. It is, however, now some three years old, so does not speak directly at least to your present attitude and state of mind.

The Crown submissions

[23] The Crown submits that the appropriate starting point in respect of the two charges of possession of objectionable publications is six months' imprisonment. Counsel emphasises your September 2018 sentencing before Wylie J, and that a starting point of six months is appropriate given that the materials for which you are being sentenced today are more serious than those involved in the earlier charges. Counsel submit that a one-month uplift for the charge of failing to assist Police is reasonable. They further observe that this offending took place while you were on bail for similar earlier offending, and suggests that this reinforces that your previous offending ought to lead to a higher starting point on this occasion. They suggest you show minimal insight and no remorse.

[24] The Crown nevertheless recognises that because you have been in custody for some three years, many of the purposes and principles of sentencing are already adequately met. Counsel submit that an end sentence of intensive supervision with special conditions, including GPS monitoring, is appropriate.

The defence submissions

[25] Mr Raftery on your behalf emphasises the need to advance your rehabilitation and reintegration into the community, with which I agree. He suggests that you "edited down" the lyrics of the nasheeds when posting extracts to your Facebook page and this, and your answers to questions on this topic at trial, reflect a degree of "insight" or innocent motivation in your offending. He also submits that your position that at least some of the charges were "fake" has been proved correct, given that the jury found you not guilty on some of those charges and a Judge had dismissed others. Mr Raftery emphasises that while the concept of "fake" charges is not one lawyers might use, it is understandable from a layperson's perspective.

[26] Mr Raftery suggests that the PAC report mischaracterises your earlier offending as involving objectionable material, when in fact it was only restricted material, and it did not derive from terrorist sources or expound terrorist ideology. Mr Raftery suggests that it also cannot be deduced from the jury's verdicts that they considered you to be supportive of ISIS' aims or methods.

[27] In this context, and taking into account your time in custody pending trial, Mr Raftery has submitted here this morning that Wylie J's sentence of supervision has not had an opportunity to be "tested", and thus a sentence of supervision, rather than intensive supervision, is appropriate.

[28] Mr Raftery also emphasises that in his submission, the risk of you fleeing the jurisdiction is not apparent and therefore GPS monitoring (only available with a sentence of intensive supervision) is not a necessary condition.

[29] Mr Raftery has also addressed in his submissions this morning the conditions that the PAC report writer proposes. And again, I will return to that topic later when discussing the conditions of your sentence.

An appropriate starting point

[30] I consider the following factors to be important in assessing an appropriate starting point:

(a) The nature of the objectionable material in this case, the two nasheeds, was relatively serious but not at the top end of the range. For example, and unlike the video in relation to which the jury found you not guilty, the nasheeds do not visually depict extreme violence and cruelty. As I noted earlier, however, I agree with the Censor's description of the material and why it nevertheless promotes and encourages violence and terrorism. Accordingly, while not as graphic as the material on which you were sentenced by Wylie J, the material is nevertheless overt in its promotion of terrorism.

(b) The volume of the material in question is not high, comprising only two publications. You did not have a large personal library, for example, of objectionable material which can sometimes be seen in a case of this type.

(c) I *am* concerned about your purpose in accessing and possessing these materials. As already noted, I do not accept that you have simply stumbled upon these materials or have an idle curiosity in them. The Police and Community Corrections clearly have concerns that you pose a not insignificant risk to the broader community. I do not know whether those concerns are right and I sincerely hope that they are not, though having regard to all of the materials available to the Court, I can say that they are not wholly fanciful. Some of the background referred to by Wylie J in his sentencing on the earlier charges, including your postings in 2016 to your Facebook page, would tend to support this.[7]

(d) A further aggravating factor is that your offending occurred while you were on bail for earlier similar offending.

(e) It is also concerning that you actively took steps to delete your entire browsing history from the time of your first release on bail to 5 August 2018. This suggests that you were perhaps trying to ensure the authorities did not become aware of what you had been accessing and looking at over that period of time.

[31] Taking these factors into account, I consider that, but for your time already spent in custody, a six-month starting point as suggested by the Crown would have been well within the appropriate range on the two charges of possession of an objectionable publication with knowledge.

Failing to assist a Police officer exercising a search power

[32] As to this charge, I consider the situation to be essentially the same as that faced by Wylie J in your previous sentencing and a one-month uplift is appropriate.

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7 *R v S* [2018] NZHC 2465 at [10].

Personal circumstances

[33] I do not consider that your personal circumstances warrant either uplifts or reductions from the seven month starting point I have discussed. Neither party suggests that they should. In particular, I do not consider a discount for remorse is available. Like before, you do not appear to accept that society does not tolerate possession of the type of materials like the two nasheeds I have described. I am not persuaded that the matters to which Mr Raftery refers shows any real or deep insight into your offending, or at least of the type that would warrant a discount.

The final sentence

[34] Having reached this point, what then is the appropriate final sentence, taking into account your lengthy period in custody pending trial? I am of the view that the risk of you reoffending in a similar way to the charges upon which you were convicted remains high. Your rehabilitation is accordingly key. The real contest between the Crown and the submissions made on your behalf by Mr Raftery is whether I should impose a sentence of supervision or intensive supervision. A sentence of intensive supervision would permit me to impose conditions for a longer period of time than a sentence of supervision. That *may* help support your rehabilitation. It would also permit electronic monitoring. Nevertheless, I am very conscious of the lengthy time you have already spent in custody, and that I must impose the least restrictive sentence that is appropriate. In those circumstances, I propose to sentence you to one year of supervision, rather than intensive supervision. In a sense, and given your present attitudes, I do not consider that, say, 18 months of conditions will have any material and different effect than 12 months of conditions. The *substance* of your compliance with these conditions over a 12-month period will be key to your rehabilitation.

Conditions

[35] Turning then to the conditions proposed by the PAC report writer.

[36] The first condition recommended relates to your address while subject to supervision. I note that the updated PAC report confirms a suitable address and I will therefore direct that you are to reside at [Redacted], which is the address of a Mosque.

The President of that Mosque has confirmed its willingness to help and support you on your release, and the Court is grateful for this offer of assistance to you.

[37] The second and third conditions relate to electronic monitoring. I am sentencing you to supervision, and so I cannot impose conditions relating to electronic monitoring. Nor would I have done so even if I had sentenced you to intensive supervision. In my view, conditions relating to your online activity and monitoring of that activity are much more relevant to reduce the risk of you re-offending.

[38] The fourth condition prohibits you from entering or remaining at any travel terminals within New Zealand without the prior written approval of your Probation Officer. I agree with Mr Raftery's submissions on this condition, and do not consider it to be appropriate. It does not relate in any way to the evidence at trial or the nature of the offending for which you were convicted.

[39] The fifth condition proposed to prohibit you from possessing or distributing any material that promotes the destruction of or hatred for any group of persons on the grounds of the colour, race, or ethnic or national origins of that group of persons. You have never been convicted of possessing objectionable material that was objectionable on that basis. Furthermore, if you are found possessing objectionable material of any kind that will, of course, constitute a crime regardless of whether or not I impose that condition today. It would also be a difficult condition to monitor and, importantly, for you to understand its boundaries. It is crucial that sentencing conditions have sufficient clarity about them so that an offender knows precisely what they must or must not do to comply with them. I do not consider this condition appropriate.

[40] The sixth condition prohibits the possession or use of any electronic device capable of accessing the internet, other than a device approved in writing by your Probation Officer. Your offending is obviously linked to the internet and this condition is necessary to ensure that the Probation Officer knows of all of the devices you might use in order to inspect their contents if necessary. I will approve this condition.

[41] The seventh condition would require you to disclose all of your social media accounts to your Probation Officer and provide access to them on request. I consider

this appropriate in light of your offending and Mr Raftery, on your behalf, does not object.

[42] The eighth condition requires you, on request, to make available to the Police, your Probation Officer, or any agent thereof, any electronic device in your possession capable of accessing the internet or storing data for the purpose of checking or cloning the device. Mr Raftery suggests that this should be narrowed to only permit the Probation Officer to make this request, and that not doing so increases the risk of conflict and sets you up for failure. I agree that the suggestion to narrow this condition is appropriate, and enables there to be only one "contact point" in relation to this step. You will need to be aware, Mr S, that you *must* comply with your Probation Officer's requests in this regard, and that he or she may make any material of concern available to the Police for review. I will accordingly impose this condition, but narrowed as suggested by Mr Raftery.

[43] The ninth condition requires you to attend a rehabilitative assessment, including a psychological assessment, and any subsequent recommended treatment or programme, as directed by the Probation Officer or your treatment provider. Mr Raftery does not object, though we have discussed today the usefulness of consultation with your private health providers in this context. As all parties agree, I consider that your rehabilitation would be best served by participation in appropriate programmes and so I will be approving this condition.

[44] The tenth condition prohibits you from contacting or associating with any victims of your offending unless you have the prior written approval of your Probation Officer. I agree with Mr Raftery that there are no specific victims of your offending, although I note that it was nonetheless not victimless, given the harm to society generally from persons being in possession of objectionable material. This condition nevertheless appears to be something of a "boilerplate" condition inserted without regard to your unique circumstances so I will not be imposing it.

[45] The eleventh condition, at least as initially proposed, suggested that you be prohibited from associating with other persons known to you to have extreme religious views. Again, I agree with Mr Raftery that this condition is ultimately unworkable

and unclear. I note that it is no longer proposed in the updated PAC report, presumably for these reasons. I will not be imposing a condition of this nature.

[46] Mr S, would you please now stand.

[47] On each of the three charges for which you were convicted, I sentence you to one year of supervision, on the standard conditions contained in s 49 of the Sentencing Act. Each of those sentences is to be served concurrently. I direct that you are to reside at the Mosque located at [Redacted] and that you are not to move to any new residential address without the prior written approval of a probation officer. I also impose the following special conditions:

(a) Not to possess or use any electronic device capable of accessing the internet, other than a device approved in writing by your Probation Officer;

(b) To disclose all of your social media accounts to your Probation Officer, and to provide access to them on request;

(c) On request, to surrender to your Probation Officer any electronic device in your possession capable of accessing the internet or storing data, for the purpose of checking and/or cloning the device or the material contained on it, by the Police or another relevant agency (for the avoidance of doubt, the Probation Officer, or any other agency to whom the device is provided by the Probation Officer, is not entitled pursuant to this special condition to access legally privileged material); and

(d) To attend and engage in a rehabilitative assessment, including a psychological assessment, and to attend any subsequent recommended treatment or programme as directed by the Probation Officer or your treatment provider, including your own private treatment provider, Dr Wotherspoon. In this context and while a matter for your Probation Officer, I record

that it would likely be of assistance for Probation to engage with or at least speak with Dr Wotherspoon in this context.

[48] Mr S, but for your remand in custody by the District Court, you would now be free to leave the Court. However, as Mr Raftery has confirmed this morning, that remand in the District Court remains in place for the time being and as you have heard, your lawyers will be engaging with that Court in that context. At this stage therefore, you may now stand down.

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Fitzgerald J

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