IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CRI-2019-409-000079
[2019] NZHC 2113

BETWEEN	PHILIP ARPS Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 16 August 2019

Appearances: AMS Williams for Appellant
S Dayal for Respondent

Judgment: 27 August 2019

JUDGMENT OF DUNNINGHAM J

This judgment was delivered by me on 27 August 2019 at 12.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date 27 August 2019

Introduction

[1] The appellant, Philip Arps, was sentenced to 21 months' imprisonment on two charges of distributing an objectionable publication.[1] He appeals that sentence on the grounds that it was manifestly excessive and that a community-based sentence or a sentence of home detention should have been imposed instead.

[1] Under ss 124(1) and 123(1)(d) of the Films, Videos, and Publications Classification Act 1993.

Facts

[2] On 15 March 2019, a male armed with several firearms entered two mosques in Christchurch, shooting and killing 51 Muslim people and injuring many more. He filmed the entire attack on a Go-Pro branded camera attached to the helmet he was wearing. The video showing the murder and wounding of his victims was livestreamed on Facebook. It was subsequently distributed by Facebook users and, within a short period of time, became widely available.

[3] Mr Arps was sent an electronic copy of the video on the day of the shooting. The following day he sent the video to another unknown person and instructed them to modify the video to include crosshairs and a "kill count". This would mimic a first-person shooter video game, with the "kill count" increasing as people were killed. Mr Arps had the modifications completed so he could distribute the video. Mr Arps also distributed the unmodified video to approximately 30 of his associates.

[4] When spoken to, Mr Arps admitted distributing the video to multiple people and requesting that the video be modified so that he could distribute it as a meme.[2] He also confirmed that the video was modified as requested and he received a copy of the modified version. When asked about his opinion on the objectionable video, he replied that "it was awesome". When asked about the deaths of the victims of the attacks, he replied "I could not give a fuck mate".

District Court decision

[5] Mr Arps sought a sentence indication on the two charges and that was delivered on 17 April 2019. Mr Arps accepted that indication and was sentenced on 18 June 2019.

[6] The reasons for sentence were traversed in detail in the sentence indication and reiterated, briefly, at sentencing. The sentence indication was then attached to the

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[2] A meme is an image, video or piece of text, typically humorous in nature, that is spread rapidly by internet users.

sentencing remarks given on 18 June 2019 and forms part of the Judge's sentencing notes.[3]

[7] In recognition of the unique circumstances of this case, and the absence of a guideline judgment or significant body of precedent, the Judge set out his reasoning fully, paying particular attention to comparisons with the only relevant New Zealand authorities identified.

[8] The Judge first discussed the definition of "objectionable" under s 3 of the Films, Videos, and Publications Classification Act 1993. He acknowledged the specific references in the definition to publications that promote or support "acts of torture or the infliction of extreme violence or extreme cruelty"[4] and "criminal acts or acts of terrorism",[5] as well as publications that represent particular classes of people as inherently inferior based on a prohibited ground of discrimination in the Human Rights Act 1993.[6] He noted that on 18 March 2019 the Chief Censor classified the full 17 minute video of the attacks as objectionable.

[9] The Judge said the relevant sentencing principles were the need to hold Mr Arps accountable, to denounce his conduct, to deter him and others from committing similar offending, to protect the community and to provide for the interests of the victims. He highlighted that deterrence was a particularly significant purpose of sentencing given the potential of the video to "cause psychological harm, increase the risk of further attacks and continue to engender racial and religious disharmony".

[10] In identifying the aggravating factors of the offending, the Judge accepted the Crown submission that s 9(1)(h) Sentencing Act applied, as Mr Arps committed the offending because of hostility towards a group based on their Muslim faith. He reached that finding, in part, because of Mr Arps' 2016 conviction for offensive behaviour after he placed a severed pig's head at the door of a mosque, and his comment in a subsequent video blog on the Judge's finding that his offending was a

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3 *R v Arps* [2019] NZDC 11547 at [10].
4 Section 3(2)(f) and s 3(3)(a)(i).
5 Section 3(3)(d).
6 Section 3(3)(e).

deliberate hate crime against Muslims, when Mr Arps said "Obviously he knows me well. White power… get those fuckers out… Bring on the cull".

[11] The Judge also said Mr Arps' actions in distributing the video the day after the attack, when families were still waiting to hear whether family members had been killed, "demonstrated particular cruelty". The Chief Censor had characterised the video as depicting a terrorist attack, and distribution of publications that endorse terrorist attacks had been cited as an aggravating factor in *Patel v R* and *R v S*.[7]

[12] In mitigation, the Judge acknowledged that Mr Arps did not distribute the video after the Chief Censor ruled the video was objectionable, and that emails containing video attachments received on 16 March 2019 were in the trash folder, which the Judge interpreted as Mr Arps intending to distance himself from the material.

[13] The Judge then discussed the only relevant authorities, *Patel v R* and, to a lesser extent, *R v S*. He adopted the Court of Appeal's framework for assessing the extent to which the making, possession and distribution of the objectionable material was injurious to the public good by reference to:[8]

(a) the nature of the publication;

(b) the volume of the material involved;

(c) the number of people to whom the material has been distributed;

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

(e) the harm caused by that offending, which will usually be closely linked to (a), (b) and (c); and

(f) the purpose of the distribution and making.

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7 *Patel v R* [2017] NZCA 234; and *R v S* [2018] NZHC 2465.
8 *Patel v R*, above n 7, at [35]-[36].

[14] The Judge held the video was at the high end of the scale of extreme violence or cruelty. However, the volume of the material was less than in *Patel*, and it was sent to 30 people rather than the 52 recipients in *Patel*. In respect of his role in the making or distribution, the Judge said Mr Arps' role in having the video edited into a meme (which is designed to be spread rapidly across the internet) created the likelihood of further distribution.

[15] He said Mr Arps' purpose was to endorse and support the gunman's acts and agenda on 15 March 2019, and to encourage others to endorse and support the gunman. In identifying that purpose, the Judge referred to Mr Arps' links to extremist groups, his 2016 video advocating a "cull" of Muslims, his comment that the video was "awesome" and his request to modify the video.

[16] He rejected Mr Williams' argument that no harm was caused as there was no evidence the recipients of the video objected to receiving it. The Judge, citing authority, said that harm was caused to those portrayed in the video and their families, as they would be distressed to know it was being shared, particularly where that was to endorse the gunman's agenda. It also harmed society as a whole because of the risk it would persuade others that terrorist acts should be supported and create demand for such material.[9]

[17] The Judge acknowledged that continuing to distribute material after being warned was a significant aggravating factor in *Patel* which was not present here. Not present in *Patel*, though, was the context of the video being distributed the day after the attacks, within the same community, while families were still waiting to hear whether loved ones had been killed and while there remained a high risk of imitation or retaliatory attacks.

[18] The Crown sought a starting point of three years' imprisonment, while Mr Williams submitted 18 months' imprisonment would be appropriate. The Judge decided a starting point of two and a half years' imprisonment would be appropriate.

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9 *Patel v Police* [2016] NZHC 2260 at [24]; *Webb v R* [2016] NZHC 2966 at [54]; *Patel v R*, above n 7, at [50].

[19] The Judge refused to make an uplift for Mr Arps' prior conviction for offensive behaviour, as sought by the Crown, as the offence was not punishable by a term of imprisonment.[10] The Judge had instead considered it relevant in considering Mr Arps' culpability.

[20] The Judge also refused to make any reduction to acknowledge the impact the offending and the media coverage of it had had on Mr Arps' business (which uses Nazi-related themes in its branding), nor for the threats and animosity Mr Arps and his family had received. He did, however, allow a reduction of two months to reflect that Mr Arps had been kept in a secure unit in custody for his own safety.

[21] With a full 25 per cent discount for guilty pleas, the Judge indicated that the final sentence would be 21 months' imprisonment, imposed concurrently on both charges.

[22] The Judge decided that converting the sentence to home detention would not achieve the purposes and principles of sentencing, in particular deterrence and denunciation. He referred to Mr Arps' low prospects of rehabilitation demonstrated by his lack of remorse, age and entrenched views. He noted, too, that Mr Arps' offending was largely conducted from home using the internet, which makes it difficult to detect and contain. As was observed in *Mundy v Department of Internal Affairs*, a case relating to possession of child pornography:[11]

> [W]hile no blanket approach should be adopted in relation to any particular type of offending, the "nature" of offences under the Films, Videos and Publications Classification Act 1993 s 123 are such that those offences might be thought a paradigm example of offending where leave to apply for home detention would be preternaturally inapt.

[23] Mr Arps accepted the sentence indication and was sentenced by Judge O'Driscoll on 18 June 2019. In the course of affirming his sentence indication, the Judge said:[12]

> Your offending glorifies and encourages the mass murder carried out under the pretext of religious and racial hatred. It is clear from all the material before

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10 Summary Offences Act 1981, s 4.
11 *Mundy v Department of Internal Affairs* [2004] 3 NZLR 251 (HC).
12 *R v Arps*, above n 3, at [12].

> me that you have strong and unrepentant views towards the Muslim community.

[24] The Judge discussed the pre-sentence report which was then before him. He said the report confirmed that "this was in effect a hate crime against the Muslim community", that Mr Arps' culpability was high, and that a sentence short of imprisonment would not achieve the purposes and principles of sentencing. The Judge noted Mr Arps' views, expressed in the report, that the mainstream media was corrupt and controlled by Zionist groups, and that adding the crosshairs and kill count was an attempt to lighten up the video and make it a bit funny. He noted Mr Arps showed no empathy or remorse, except for the cost the offending had had on him and his family. All these factors contributed to the report writer's conclusion that Mr Arps was at a high risk of re-offending.

[25] The Judge imposed the sentence indicated, 21 months' imprisonment, and imposed standard and special conditions of release until six months after the sentence expiry date. Those special conditions included attending a psychological assessment, not possessing or using any electronic device capable of accessing the internet or capturing, storing or distributing images, completing any recommended intervention for alcohol and drug use, and making any electronic device capable of accessing the internet available for inspection by a probation officer.

Principles on appeal

[26] Appeals against sentence are allowed as of right by s 244 of the Criminal Procedure Act 2011, and must be determined in accordance with s 250 of that Act. An appeal against sentence may only be allowed by this Court if it is satisfied that there has been an error in the imposition of the sentence and that a different sentence should be imposed.[13] As the Court of Appeal mentioned in *Tutakangahau v R* quoting the lower court's decision, "…[an appellate] court 'will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles".[14] It is only appropriate for this Court to intervene and substitute its own views if the

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13 Criminal Procedure Act 2011, ss 250(2) and 250(3).

14 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].

sentence being appealed is "manifestly excessive" and not justified by the relevant sentencing principles.[15]

Submissions

Appellant's submissions

[27] Mr Williams, for Mr Arps, submits that the sentence imposed was manifestly excessive and should be replaced with a community-based sentence, or, alternatively, that the sentence should have been converted to one of home detention. He also notes that Mr Arps' right to appeal the sentence is unaffected by the fact he accepted the sentence indication.[16]

[28] Mr Williams submits that an appropriate starting point would have been 12 months, not the two and a half year starting point adopted by the Judge. While he accepts that the maximum penalty for an offence under s 123 of the Act was increased to 14 years' imprisonment in 2015, he points to the discussion in *Pattison v Police* which suggests the increased penalty was intended to disrupt the cycle of production and distribution of child pornography.[17] He notes that overseas legislation provides for significantly higher sentences for possessing and distributing material which sexualises children compared with the distribution of non-sexual offensive material.[18]

[29] Mr Williams accepts that *R v Patel* and *R v S* are the only New Zealand cases which are of assistance. He submits that when Mr Arps' case is compared with that in *Patel*, it is significantly less serious. *R v Patel* concerned an appellant who had downloaded extensive material which portrayed murder by way of gratuitous violence, including beheadings, torture, limb amputation, mutilation, immolation and persons being run over by tanks. Furthermore, Mr Patel had received a warning from Vodafone that the material he was distributing was offensive but he distributed it again on a second occasion, a few days later.

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15 *Ripia v R* [2011] NZCA 101 at [15].
16 Criminal Procedure Act 2011, s 245.
17 *Pattison v Police* [2018] NZHC 2163 at [32].
18 For example, he refers to s 127(3) Communications Act 2003 (UK); s 6 Indecent Articles and Publications Act 1975 (NSW, Australia); s 228 Criminal Code 1900 (Queensland, Australia); Classification (Publications, Films and Computer Games) Enforcement Act 1995 (Tasmania, Australia); and s 319 Canadian Criminal Code.

[30] In comparison Mr Williams says that in Mr Arps' case, the material was less offensive, only a single video was involved, and it was sent to only 30 people compared to Mr Patel's 52. Mr Arps did not make the footage or upload it to social media, he ceased distributing it as soon as it had been classified as objectionable, he only made one copy, the video was already widely available, and Mr Arps does not have links to an organisation that perpetrated or supported the acts in the video. Mr Williams repeats his submission in the District Court that Mr Arps' distribution of the video caused no harm. He stresses that the modified video was not further distributed.

[31] Mr Williams then submits that Judge O'Driscoll appears to have taken the view that Mr Arps' personal views increased his culpability, which he submits is wrong in principle. While Mr Arps' nationalist views are not popular, he is entitled to hold and express them under s 14 of the New Zealand Bill of Rights Act 1990.

[32] Mr Williams emphasises that Mr Arps operates a business with three full-time employees and several contractors and casual employees. His wife cares full-time for their six dependent children, so his family relies on his income. His current custodial sentence has been extremely difficult for Mr Arps' family and employees, particularly after the media coverage of his charges. His bank and insurers have ceased providing him with services and almost all of his clients and suppliers have gone elsewhere.

[33] For all those reasons, Mr Williams submits that the purposes and principles of sentencing did not require a sentence of imprisonment in this case. If the Court had adopted Mr Williams' new suggested starting point of 12 months, it could have stepped back and imposed a community-based sentence, namely community work coupled with supervision or community detention. Alternatively, he submits that home detention was clearly appropriate.

[34] He notes particularly that the Prime Minister's statement that the footage was objectionable resulted in Mr Arps deleting the footage. Thus, but for the request to modify the video, Mr Arps' actions were no different to those of many people; and Mr Arps' name and photograph being circulated in the media has a significant deterrent effect.

Respondent's submissions

[35] Ms Dayal, for the Crown, submits that both the starting point and the end sentence were in range with regard to *Patel*. She acknowledges Mr Arps' offending is less serious than Mr Patel's, but that was reflected in the Judge adopting a starting point which was half the five year starting point adopted in *Patel*.

[36] Ms Dayal submits that the degree of objectionableness of the video should be assessed in light of the context and immediate climate following the mosque attacks on 15 March. In that regard, the material did not relate to an unknown time where unknown people in an unknown country were affected, but rather the material depicted a mass murder occurring very close in time and place and it would be artificial to ignore that context.

[37] Ms Dayal submits that the harm caused by the offending goes wider than just the recipients of the material. There is inherent harm to the community in glorifying the actions of the gunman. Mr Arps' purpose in distributing the video and causing it to be modified was to communicate his own support of the gunman, showing a cavalier and callous attitude to the attacks. This purpose can be inferred from his 2016 conviction for offensive behaviour which involved posting a video of himself and an associate leaving pig heads on the front doorstep of the Deans Avenue mosque in Christchurch, and where he agreed with the Judge that it was a "deliberate hate crime".

[38] Ms Dayal submits the Judge was permitted to take Mr Arps' views into account in the manner he did. Mr Arps has demonstrated a pattern of behaviour exhibiting hostility towards people of Muslim faith. This goes further than simply holding those views; rather he has shown that he is willing to act on those views in a hostile manner, and this is relevant to his culpability. His right to freedom of expression under s 14 of the New Zealand Bill of Rights Act must be weighed against s 15, the right to manifest one's religion or belief in worship, and against s 19, the right to freedom from discrimination. For these reasons, she submits the starting point was within range.

[39] She submits a community-based sentence would be inappropriate when strong deterrence and denunciation is required for offending that glorifies and encourages a mass murder carried out under the pretext of religious and racial hatred. Furthermore,

Mr Arps represents a threat to the safety of the community due to his strong and unrepentant views towards the Muslim community.

[40] Ms Dayal notes that offending of the type Mr Arps committed can be done from home, can be hard to detect, and can affect a large group of people within a short period of time. Coupled with Mr Arps' lack of empathy and remorse, she submits a community or home-based sentence would be inappropriate.

[41] To reinforce these points, and counter the suggestion in the pre-sentence report that Mr Arps planned to "step back from his political activism and instead focus on rebuilding his business and his family" Ms Dayal sought leave to introduce, as further evidence, copies of letters Mr Arps had sent from prison. I received those letters along with submissions from both counsel on whether they should be admitted as evidence in the sentencing appeal. I address that issue before going on to determine the outcome of the appeal.

Discussion

Admission of letters written after sentencing as evidence on appeal.

[42] This Court may receive further evidence on a sentence appeal.[19] However, this Court may only do so if it thinks it is "necessary or expedient in the interests of justice".[20]

[43] In this case, the respondent submits that the letters demonstrate Mr Arps' unrepentant attitude towards the offending and also that he remains at a high risk of reoffending and so a lesser sentence would not be appropriate.

[44] While I agree that the letters portray the appellant as unremorseful, they do no more than confirm the information already provided by the pre-sentence report writer about Mr Arps' extreme and unrepentant views, and which had been taken into account by the Judge in sentencing. Mr Williams is not arguing that he does not hold those

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19 Criminal Procedure Act 2011, s 335.
20 Section 335(2).

views, but simply challenges the way they were taken into account in the sentencing process.

[45] Given the discretion this Court must exercise before allowing fresh evidence on a sentencing appeal, I am not satisfied that the letters provide any new relevant information. I therefore do not need to assess whether they are fresh, credible or cogent, and I decline to receive them in evidence for that reason alone.[21]

Starting point

[46] In the absence of a guideline judgment, the starting point must be assessed having regard to the maximum sentence of 14 years' imprisonment, and the guidance afforded by the Court of Appeal's decision in *Patel* where the District Court's overall starting point of five years' imprisonment was upheld on appeal.

[47] I accept that *Patel* is more serious than Mr Arps' case for the reasons identified by counsel. However, as discussed by Judge O'Driscoll, Mr Arps' offending occurred the day after the attacks, within the same community, while families were still waiting to hear whether loved ones had been killed and while there remained a high risk of imitation or retaliatory attacks. That displays a particular callousness. Mr Arps' actions in arranging for the video to be modified into a meme, to both glorify the gunman and trivialise the death of innocent people, sets his offending apart from *Patel*.

[48] In considering where the material fell on the spectrum of offensiveness, Mr Williams relied on the material in *Patel* being described in the High Court as "mid-range".[22] By comparison he submitted that the publications in Mr Arps' case "must be categorised as 'low range'". However, I reject that argument, both because the Court of Appeal reassessed the material in *Patel*, holding it was "of the most serious type",[23] and because I consider first person footage taken by a gunman recording the mass killing of innocent people at prayer could never be considered as low range in its degree of offensiveness.

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21 Being accepted considerations for admitting new evidence on appeal. *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at 34; *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273.

22 *Patel v Police*, above n 10, at [28].

23 *Patel v R*, above n 7, at [39].

[49] I also reject Mr Williams' argument that no harm was done by Mr Arps' offending, and endorse the District Court Judge's clear analysis on this point. Even if those who received Mr Arps' message were not distressed by it, the public depiction of extreme violence causes "immense distress to all those associated with the victims" of the terror attacks,[24] particularly in this case where the video was distributed so soon after the attacks. Additionally, as discussed by the Court of Appeal in *Patel*:[25]

> … the distribution of material which appears to glorify terrorist acts is inherently injurious to society. First, it risks, indeed in this case intends, the persuasion of others that such terrorist acts should be supported. Secondly, the distribution of this material risks creating demand for the generation of further material depicting terrorist acts.

[50] While Mr Williams submitted that the appellant's previous conviction was unrelated and of a different nature and so should not have been considered as part of the present sentencing process, I am satisfied that it was relevant to the motivation for the offending and therefore to culpability, which is how the Judge took it into account.

[51] Mr Williams also traversed Mr Arps' personal circumstances, including the impact of his conviction and imprisonment on his dependent family and on his business. However, it is clear the impact on Mr Arps' business is largely because of the publicity about Mr Arps' use of the business to promote far-right views through its Nazi-related themes and branding. These factors do not justify a reduction in starting point.

[52] Mr Arps' views were properly considered in setting the starting point in two ways. First, the Judge recognised the statutory aggravating feature under s 9(1)(h) Sentencing Act, which was that Mr Arps committed the offence because of hostility towards a group of people based on their faith. Second, as discussed by the Court of Appeal in *Patel*,[26] the Judge considered the purpose of the distribution, which he found to be to endorse and support the gunman's acts and agenda on 15 March 2019 and to encourage others to endorse them.

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24 *Patel v Police*, above n 10, at [24].
25 *Patel v R*, above n 7, at [50].
26 *Patel v R*, above n 7, at [36].

[53] Mr Arps' views also came into account in relation to his lack of remorse and rehabilitative potential. This meant he did not receive a discount for that factor over and above the discount received for his guilty pleas, but equally there was no separate uplift for personal aggravating factors. Thus, in my view, making reference to Mr Arps' views in setting a sentence for him, in the way the Judge did, was appropriate and justified.

[54] For all these reasons, I am satisfied the two and a half year starting point adopted by the District Court Judge properly reflected the seriousness of the offending, particularly in light of the available penalty and by comparison with the five year starting point upheld in *Patel*.

Home detention

[55] While Mr Williams suggested that a community-based sentence would be appropriate, that submission cannot succeed in light of my conclusions on the appropriate starting point for sentencing.

[56] That leaves the final argument, which is that the Judge should have commuted the sentence to one of home detention.

[57] The Judge decided that home detention would not serve the sentencing purposes of denunciation and deterrence. I agree. The pre-sentence report noted that Mr Arps is at a high risk of reoffending in a similar manner. He is not a youthful offender and his entrenched views confirmed in the pre-sentence report indicate little rehabilitative potential. His offending was committed at home. While a condition can be put in place to restrict his use of devices capable of accessing the internet, this is difficult to police, and widespread harm could be caused before authorities were alerted. Offending of this kind requires clear denunciation and prioritising of both specific and general deterrence. In all the circumstances, I see no reason to depart from the Judge's view that home detention would not be appropriate.

Release conditions

[58] While Mr Williams identified a concern about the imposition of release conditions in his notice of appeal, that was not pursued in submissions. I can see no reason to revisit the release conditions imposed and the appeal on that ground, too, fails.

Conclusion

[59] The District Court's decisions on the starting point, end sentence and refusal to convert to home detention were all justified.

[60] The appeal is therefore dismissed.

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