

SUPREME COURT OF VICTORIA
COURT OF APPEAL

S APCR 2018 0224

IBRAHIM ABBAS

Applicant

v

THE QUEEN

Respondent

<u>JUDGES:</u>	PRIEST, KAYE and T FORREST JJA
<u>WHERE HELD:</u>	MELBOURNE
<u>DATE OF HEARING:</u>	19 March 2020
<u>DATE OF JUDGMENT:</u>	3 April 2020
<u>MEDIUM NEUTRAL CITATION:</u>	[2020] VSCA 80
<u>JUDGMENT APPEALED FROM:</u>	<i>R v Abbas</i> [2018] VSC 553 (Tinney J)

CRIMINAL LAW - Appeal - Sentence - Conspiring to do acts in preparation for or planning terrorist act - Planned mass murder of civilians in Melbourne's central business district - Explosive vests, machetes and firearms weapons to be used - Sentence of 24 years' imprisonment with non-parole period of 20 years - Whether sentence manifestly excessive - Leave to appeal refused.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Applicant	Dr G Boas, Mr P Smallwood and Ms M Greener	Emma Turnbull Lawyers Pty Ltd
For the Respondent	Mr N Robinson QC with Mr P Doyle	Commonwealth Director of Public Prosecutions

PRIEST JA
KAYE JA
T FORREST JA:

Overview of the applicant's offending

1 In the two months leading up to his arrest on 22 December 2016, the
applicant, Ibrahim Abbas, conspired with others to commit the mass murder of
innocent citizens in the name of religion.

2 The applicant told police that the plan was that he and his co-conspirators
would go to the heart of Melbourne wearing explosive vests, and there ram a
policeman with a vehicle and steal his gun. They would then go to Federation
Square, where the applicant would give the gun to whichever co-offender he
deemed fit, to shoot whomever he could.

3 Armed with a machete, the applicant was going to 'chop' and kill people. He
said, 'obviously when the first person gets cut people are [going to] start running
away'. As people ran from the terror, however, he 'was going to run at them [and]
slice their necks'. He admitted that he had told others in his group: 'It's not hard to
kill a person with a machete. It just takes one slice to the neck'. At some point, the
applicant intended to have his co-offenders detonate their explosive vests to blow
themselves, and civilians, up. His goal, the applicant said, was 'to cause as much
chaos, destruction, fear [and] bloodshed' as he could. He made it clear that since, as
he thought, Australians were killing Muslims overseas, so much made innocent
people here a legitimate target.

4 In his reasons for imposing the sentence which is the subject of the present
application, the judge briefly summarised the offending, by observing that the

acts the subject of the conspiracy were the purchase of chemicals and other
items for use in the manufacture of improvised explosive devices, the
purchase of bladed weapons, and the conducting of reconnaissance of the
area around Federation Square in Melbourne. The terrorist act in prospect
was to involve the detonation of an explosive device or devices, and/or the
use of bladed weapons, and/or the use of firearms in the vicinity of the area
mentioned with the intention of pursuing violent jihad. The act if carried out

would have been such as to intimidate the Government of Australia and the Australian public.¹

Sentence and ground of appeal

5 On 6 February 2018, the applicant² pleaded guilty in the Supreme Court to conspiring between 21 October 2016 and 22 December 2016 to do acts in preparation for, or planning, a terrorist act.³ His co-conspirators were his younger brother, Hamza Abbas;⁴ his cousin, Abdullah Charani;⁵ and Charani's friend, Ahmed Mohamed.⁶

6 Following a plea, on 20 September 2018 Tinney J sentenced the applicant to 24 years' imprisonment, and fixed a non-parole period of 20 years.⁷

7 The applicant seeks leave to appeal against the sentence on the following ground:

1. The sentence is manifestly excessive.

Particulars

a. The learned sentencing judge failed to give sufficient weight in his sentence to the utilitarian benefit of the applicant's plea of guilty.

b. The learned sentencing judge failed to give sufficient weight in his sentence to the applicant's demonstrated post-offence cooperation.

8 For the reasons that follow, we would refuse leave to appeal.

Course of proceedings

9 The applicant was, as we have said, arrested on 22 December 2016. He made

¹ *R v Abbas* [2018] VSC 553, [1] ('Reasons').

² Born 29 January 1994.

³ *Criminal Code (Cth)*, ss 11.5(1) and 101.6(1). The maximum penalty is life imprisonment.

⁴ Born 19 March 1995.

⁵ Born 18 September 1990.

⁶ Born 28 September 1992.

⁷ Pursuant to s 6AAA of the *Sentencing Act 1991*, the judge declared that, but for the applicant's plea of guilty, he would have imposed a sentence of 28 years' imprisonment with a non-parole period of 23 years.

extensive admissions in the course of records of interview conducted by police after his arrest.

10 At the conclusion of a committal – during which he did not cross-examine witnesses – the applicant pleaded guilty.

11 On 6 February 2018, as we have mentioned, the applicant was arraigned in the Supreme Court and pleaded guilty. The hearing of his plea was then adjourned to a date to be fixed, to await the outcome of the trial of his co-accused. At that stage, the prosecution did not intend to call the applicant as a witness in that trial.

12 In July 2018, however, following the commencement of pre-trial argument in the trial of the co-accused, the applicant was informed that the prosecution now intended to call him as a witness. He was asked if he wished to be interviewed; and, through his lawyers, informed the prosecution and the trial judge that he wished to make a statement.

13 Accordingly, on 26 July 2018 the applicant was again extensively interviewed by Australian Federal Police, and, on 16 August 2018, signed a formal statement.

14 Thereafter, a plea hearing took place on 10, 17 and 18 September 2018, culminating in the applicant being sentenced on 18 September 2018.

15 Initially, save for one area of dispute, the plea proceeded on an agreed summary of facts. The area of dispute concerned the purpose of trips to Clonbinane (to which we will later refer).⁸ Although the defence did not dispute that the trips had been made, the defence argued that it could not be proved beyond reasonable doubt that their purpose was to test an improvised explosive device ('IED'). As it transpired, however, the sentencing judge found that the trips were indeed for that purpose.

⁸ See [26] below.

The offending

16 It is necessary to say something about the main features of the applicant's
offending.

17 The applicant's cousin, Nabil Abbas, left Australia on 15 June 2015 to fight for
Islamic State ('IS'). Chaarani and the applicant spoke about this. The applicant
expressed the view that his cousin was doing a good thing going overseas and
'fighting for the sake of God'.

18 On 30 June 2015, Chaarani tried to follow suit. He purchased an air ticket to
Malaysia, with the intention of travelling overseas to join IS. The applicant drove
Charrani to Melbourne Airport on 9 July 2015, where he was interviewed by
Australian Border Force officers and not permitted to board his flight. Chaarani's
passport was seized and later cancelled.

19 In early 2016, Mohamed and Chaarani conducted internet research into the
manufacture of IEDs, and, on 2 October 2016, Mohamed saved an internet link to an
Al Qaeda publication, *Inspire*, Volume 1, on his mobile telephone, which contained
an article entitled, 'Make a bomb in the kitchen of your Mom'. The article explained
how to make an explosive device using items and ingredients commonly found in
the home.

20 On 10 October 2016, Mohamed and Chaarani arranged to see each other. At
3.11 pm and 3.38 pm that day, Mohamed used his mobile phone to search for the
Inspire article; and, at 3.39 pm and 3.43 pm, Chaarani used his mobile phone to take
photographs of bomb-making instructions from the article. Among other things, an
essential component of the device would be a small section of elbow iron pipe. One
section of the article, headed 'The electricity source', contained instructions on the
use of a battery and small light globes to create a circuit required for the bomb. In
the result, on 21 October 2016, Mohamed attended at the Bunnings store in
Broadmeadows and purchased a packet of two 50-watt halogen light globes.

21 Evidence gathered by investigators revealed that two days afterward, on 23
October 2016, Mohamed and Chaarani attempted to make an IED.

22 About a month later, on 21 November 2016, the applicant and Mohamed went
to the Bunnings store in Broadmeadows and purchased three boxes of Ramset brand
power load cartridges; four galvanised 25 mm pipe elbows; one galvanised 25 mm
hexagonal nipple; one galvanised 25 mm plug; and one galvanised 25 mm end cap.
It was their intention to extract the gunpowder from the cartridges and place it in the
galvanised piping to make an IED. They spent a number of hours that day
manufacturing, or attempting to manufacture, an IED. That evening, the applicant,
Chaarani and Mohamed made their first trip to Clonbinane.

23 In the meantime, Chaarani had acquired a Muela Mirage hunting knife, which
was seized from his premises after his arrest.

24 On 26 November 2016, the English-language media arm of IS released a video
entitled, 'You Must Fight Them, O Muwahhid'. The video, disseminated via the
internet, contained detailed step-by-step instructions on the construction of
homemade IEDs from common household products, and concluded with a
demonstration of a small IED being detonated inside the backpack of a Kurdish
prisoner, killing him instantly. It also contained detailed instructions on the use of
knives to kill, including a demonstration on a prisoner which appeared to result in
his death. The applicant admitted to police that he watched this video with
Chaarani and Mohamed.

25 A few days later, on 30 November 2016, the applicant and Mohamed visited
the Bunnings store in Broadmeadows, where Mohamed used his mobile phone to
photograph a description and price label for cable speaker wire. Both the *Inspire*
article and the video 'You Must Fight Them, O Muwahhid' specified wire as a
required component of an IED. Wire corresponding to the label photographed on 30
November 2016 was seized from Mohamed's vehicle and Chaarani's home when
they were searched.

26 On 1 December 2016, the applicant, his brother, Chaarani and Mohamed made a second trip to Clonbinane; and the next day, 2 December 2016, the four made a third trip. As we have mentioned, a disputed issue on the plea was the purpose of the trips to Clonbinane. The prosecution contended that the purpose of the three trips was to test IEDs. It was argued that all of the surrounding circumstantial evidence supported that inference. The applicant, on the other hand, suggested that the trips were for recreation. In the end, the judge was satisfied beyond reasonable doubt that the purpose of the three trips to Clonbinane was to detonate or attempt to detonate IEDs.⁹ That finding was not challenged in this Court.

27 In the evening of 2 December 2016, the applicant and his three co-conspirators purchased a 100 ml bottle of 'Gold Cross' brand hydrogen peroxide from Chemist Warehouse in Campbellfield, hydrogen peroxide being specified as a bomb component in the video 'You Must Fight Them, O Muwahhid'. The next day, 3 December 2016, the applicant, Chaarani and Mohamed unsuccessfully attempted to produce an explosive using instructions in the video.

28 Between 6 and 8 December 2016, Mohamed encouraged Chaarani to fill out an application form for a Victorian firearms licence; and, on 8 December 2016, Chaarani telephoned the Department of Environment, Land, Water and Planning. He stated he was applying for a firearms licence and had called to register his interest in hunting pest animals on Crown land. Chaarani paid the applicable registration fee. On 14 December 2016, Mohamed viewed an advertisement on Facebook which related to five longarm rifles for sale. He took a screenshot of the advertisement which depicted prices of an Adler brand A-1105 lever action shotgun. And on 20 December 2016, Chaarani rang the Sunbury Police Station and enquired about registering for a firearms course, relevant information being provided to him.

29 During the afternoon of 20 December 2016, the applicant, his brother, Chaarani and Mohamed met at the Hume Islamic Youth Centre ('HIYC'), for the

⁹ Reasons, [41]-[53].

purpose of discussing the reconnaissance of potential target sites for the execution of a terrorist attack. They drove to Melbourne CBD and parked opposite Federation Square. They looked at Flinders Street Railway Station, and went into Federation Square, where they sat together on the steps, looking around, pointing, gesticulating, talking and laughing. At one point after they left the steps, the applicant made a stabbing motion with his right arm. The four also looked at St Paul's Cathedral before leaving the area.

30 The day after the reconnaissance in and around Federation Square, 21 December 2016, the applicant and Chaarani purchased two 18 inch Gerber brand machetes, telling the store attendant, 'We use them for hunting'. That evening, the applicant had a conversation with Mohamed, in which Mohamed expressed nervousness about the imminent terrorist attack that would result in his death. The applicant reassured him, saying that his 'sword' was 'like a part of me now'. At one point, Mohamed suggested that his wife could be co-opted into the terrorist attack and blown up. The applicant discouraged this idea, since the bomb might not blow up and then she would be caught. At another point, the applicant said that he saw martyrdom in the knives. Later, Mohamed repeated some words from a recording they listened to: 'Sins are filth, purged only by sharp swords at the necks of the disbelievers'.

31 On 22 December 2016, Mohamed went to the Bunnings store in Broadmeadows, and purchased seven boxes each containing 100 Ramset power load cartridges.

32 At 7.56 pm on 22 December 2016, the applicant was arrested at his residence. Various items of significance to the investigation were found in the residences and vehicles of the applicant and his co-conspirators.

The applicant's records of interview and statement

33 Following his arrest on 22 December 2016, the applicant took part in an

interview with police. He told them that he had been attending the HIYC for five years, and believed that Sharia law should be implemented for everybody. His brother, Hamza Abbas, Chaarani and Mohamed share his beliefs. The applicant said that, although he did not think everything IS did was correct, he believed its jihad against the Shia of Iraq and Alawites of Syria was legitimate. When police asked him about his activities on 20 December 2016 – police had observed the applicant, his brother, Chaarani and Mohamed that day carry out reconnaissance of various potential targets for a terrorist attack (including Federation Square and St Paul’s Cathedral) – the applicant said that he went to the city with his brother, Chaarani and Mohamed, but ended up just driving around and having a chat in Federation Square. He said he could not remember what they talked about. Mohamed, he said, had told him that IS had released a video of how to make a bomb, but he had not watched it.

34 Part way through the interview, police served the applicant with an application for an extension of the investigation period.¹⁰ He was thus able to glean the extent of a deal of the evidence against him, including some of the content of covertly recorded conversations in which he was involved. The applicant then told the interviewing police that he wanted to collect his thoughts and said: ‘I don’t know if it’s a confession or not but I wanna just say everything. Okay. I don’t want you guys to ask me anymore questions, okay. So I’ll just let you guys know everything you need to know from my perspective. Okay’.

35 A second phase of the interview then proceeded, in which the applicant made a number of significant admissions. In broad summary, he told police the following:

- Australia is attacking Muslims. This is an act of terrorism on his people and it is legitimate that Australian civilians deserve the same thing.
- He was propagating the message that his group, of which he was at the forefront, needed to do something here, since Australia kills and bombs Muslims overseas.

¹⁰ See *Crimes Act 1914* (Cth), s 23DF.

- As much as he could, he had pushed his brother Hamza Abbas to join him, and had managed to convince his brother that this is what they had to do.
- He had also told Chaarani and Mohamed that this is what they had to do, although Mohamed would often come up with excuses.
- His brother had not been involved in the planning.
- They could not properly follow the bomb-making video.
- He and Mohamed agreed to carry out a terrorist attack, and they then got Chaarani involved.
- The conversation he had with Mohamed on 21 December 2016 was led by him. He was talking about a machete he had bought so he could ‘chop some people’.¹¹
- Mohamed wanted to involve his wife in the attack, but he told him not to involve her.
- Mohamed did not want to use knives or guns, just a bomb.
- He wanted to carry out the attack as soon as possible, and wanted to be ready by Christmas Day.
- He bought a machete and planned to use it himself.
- His suggestion was that they should wear explosive vests, ram a police officer and get his gun. He would then give the gun to whomever he deemed fit to use it. They would go to the City Square to use the gun.
- He was going to chop to kill whomever he saw.
- They were then going to blow themselves up.
- Although the precise date for the attack had not been decided, they were contemplating Christmas Day, New Year’s Day or a day within the next few months.
- They had been discussing the plan to carry out the attack for one month.

¹¹ See [30] above.

- He and Mohamed watched a video on the website heavy.com which gave them insight. They realised it was not as hard as they had thought to make a bomb, so they commenced preparations. He only watched the video once to reduce his internet footprint.
- At Mohamed's suggestion he went with Mohamed to Campbellfield to purchase hydrogen peroxide. They had used the hydrogen peroxide to try to construct a bomb but it did not work. He then told Mohamed to dispose of it.
- If they had been successful in making an explosive, he intended to make a suicide vest to blow himself up.
- In the event that police caught him with the machete and tried to subdue him, the vest would have given him the opportunity to at least take someone with him.
- He wanted to carry out the attack in a place where Australian citizens gathered in order to cause lots of damage. The attack had to be carried out at a time and place of significance where it would hurt most and where it would instil the most fear.
- He ordered everyone to write nothing down, so that there was no evidence of planning.
- He held discussions about the planning with Chaarani and Mohamed at the HIYC gym, but he did not want his brother to attend these meetings. His plan for his brother was to bring him to the site on the day of the attack and put a vest on him.
- His attempt to construct a bomb in his garage with Mohamed was unsuccessful and he told Mohamed to dispose of it. He was not worried if the bomb exploded because he would have become a martyr.
- On 20 December 2016, he was with his brother, Chaarani and Mohamed at the Federation Square Entertainment Precinct in Melbourne, as it was a 'nice place of interest' to carry out the attack. They also drove to St Kilda within the previous month to have a look around.

- While he walked around Federation Square, he felt pride, like he was doing something honourable. At one stage he was thinking about how he was going to use his knife as efficiently as possible. When the first person got cut people would start running away, so he was thinking of where they might run and how he was going to catch them. His plan was to run at them and slice their necks.
- Mohamed expressed concern that another place for the attack might be better, because chasing people around Federation Square would slow them down. His brother doubted it was a good place. The group were worried about people running away and he said to them that: 'It's not hard to kill a person with a machete. It just takes one slice to the neck'. He illustrated using a chopping gesture to the neck of one his companions while they were gathered at Federation Square.
- He did not want to act alone because his goal was to create as much chaos, destruction, fear and bloodshed as he could. To achieve this end he needed the group.
- The group would regularly meet, chat about the plot and resolve any doubts they may have about carrying out the attack. He believed and told the group members that this life is short and temporary, and that they are going to another world.
- He believes that the Australian government, military and police are fighting against IS; and that because Australia kills innocent Muslims, it is fine to kill Australians.
- He was upset about the deaths of Muslims in Iraq, and by the fact that Australia was contributing to this by helping physically, morally and financially.
- He was hoping that if he killed innocent people here it would give Australians a taste of what his people are feeling. Australian citizens were to be targeted specifically because they are the people being killed in his country and in the land of his people.

- He intended to make a video on the day of the attack to explain why he was attacking Australians.

36 The applicant concluded the interview by saying: ‘What I planned to do did not have to happen if Australia was not killing Muslims’. He declined to make a written statement.

37 When the prosecution indicated that it was intended to call him at the trial of his co-accused, the applicant was, as we have mentioned, again interviewed on 26 July 2018, that interview forming the basis of a statement that he signed on 16 August 2018. In that statement, the applicant described the development of his radical religious ideology. He admitted that, at the time of the trip to Federation Square, different modes of attack were on the table, including ramming people, using explosives, shooting them or attacking them with knives. In CCTV footage, when he motions towards somebody’s neck, he is illustrating killing someone with a machete or knife to the neck. He said that he bought piping and Ramset charges with Mohamed at Bunnings on 21 November 2016, because, with Chaarani, they were trying to make a bomb.

38 Significantly, however, the applicant asserted that the trips to Clonbinane were for recreation, denying that they were to test IEDs. Further, despite admitting the reference to ‘swords’ in a covertly recorded conversation with Mohamed was a reference to machetes, the applicant asserted that he and Chaarani bought machetes merely to clear bushland, and he never saw them again. The applicant also said that the purpose of trying to make a bomb was to inspire others in his group to participate in a terrorist attack.

Applicant’s submissions

39 In the written case, counsel for the applicant submitted that a sentence of 24 years’ imprisonment following a plea of guilty at the earliest opportunity, by a man who has made extensive admissions and provided further ‘significant’ assistance to

police by way of further interview and statement, is manifestly excessive. By way of comparison, the applicant's co-accused elected to defend a trial, which occupied several months' court time.

40 The sentencing judge, it was contended, must have given insufficient weight to the utilitarian benefit of the applicant's plea and to his demonstrated post-offence cooperation. Counsel drew attention to s 16A(2)(g) of the *Crimes Act 1914* (Cth). *Phillips*¹² was relied on for the propositions that: first, a discount for the utilitarian benefit of the plea must always be allowed on the sentence to be imposed, save for the exceptional category of case;¹³ and, secondly, a greater discount for the utilitarian benefit may be justified where the plea involves very considerable savings of costs to the community or where some other very significant benefit can be seen to flow from the plea.¹⁴ Inadequate reflection of the utilitarian benefit of an offender's plea of guilty, counsel submitted, will discourage others from pleading guilty. In cases of terrorism offences, the prospect of a crushing sentence following a plea of guilty may act as a significant deterrent to an accused making that election. The sum total of what the judge said of the applicant's guilty plea, entered at the earliest opportunity, was:¹⁵

As to your entitlement to an allowance for the utilitarian benefit of your plea of guilty, there is no dispute. For those reasons alone, your plea of guilty would lead to a significant reduction in your sentence.

41 In their written submissions, relying on s 16A(2)(h) of the *Crimes Act 1914* (Cth) and *Cartwright*,¹⁶ counsel for the applicant contended that it is apparent from the reasons for sentence that the judge thought the applicant to have been so untruthful in his records of interview and statement to police (about a range of matters) and that this overwhelmed the determination of the discount to be afforded

¹² *R v Phillips* (2012) 37 VR 594.

¹³ *Ibid* 604 [36] (proposition 1).

¹⁴ *Ibid* 604 [36] (proposition 4).

¹⁵ Reasons, [120].

¹⁶ *R v Cartwright* (1989) 17 NSWLR 243 ('*Cartwright*').

both for the plea of guilty and the applicant's cooperation. Counsel submitted that, if the applicant's cooperation was not 'full and frank', it was something close to it, the prosecution having conceded that the applicant's cooperation was 'significant'. The sentencing judge, however, focused on what he described as a 'litany of deliberate lies'¹⁷ and concluded that, although the applicant made truthful admissions, he did not 'tell anything like the full truth'.¹⁸ It was submitted that the sentencing judge placed too great an emphasis on the applicant's lies – including a number of 'important ones'¹⁹ – leading to the imposition of a manifestly excessive sentence. Counsel also submitted that the judge conflated past and future cooperation.

42 Finally, counsel relied by way of comparison on the sentences in *Besim*²⁰ and *MHK*²¹ in an endeavor to demonstrate that the sentence imposed upon the applicant is manifestly excessive.

43 In oral submissions, counsel for the applicant submitted 'that there are some discernible errors in the reasoning of the sentencing judge which led him to a sentence that was manifestly excessive'. The reasons for sentence reveal 'an over occupation on the part of the sentencing judge with the quality of the admissions made by the applicant, and their effect on the principles of utilitarian benefit and cooperation'. Counsel submitted that the utilitarian benefit of the applicant's guilty plea was not adequately reflected in the sentence imposed. Moreover, so it was submitted, the utilitarian benefit 'ought be given greater emphasis' in cases of terrorism offences.

44 Counsel submitted that the 'emphasis' given to a number of lies set out in the

¹⁷ Reasons, [142].

¹⁸ Reasons, [139].

¹⁹ Reasons, [140].

²⁰ *DPP (Cth) v Besim* [2017] VSCA 158.

²¹ *DPP (Cth) v MHK (No 1)* (2017) 52 VR 272 ('*MHK*').

reasons for sentence²² – each of which counsel took the Court through – led to error. Four ‘points’ were made. First, it was submitted that it does not matter why the applicant confessed. The simple fact is that he did so in a record of interview immediately following his arrest. Secondly, such a confession is ‘particularly significant in a terrorism case because of the nature of these offences and these accused’. Thirdly, the judge had emphasised the fact that the confessional statements and admissions made by the applicant occurred after he was provided with a document used to apply to extend the time of his detention – that document revealing that the police knew a great deal about the applicant’s activities – leading the judge to observe that the applicant became aware that ‘the game was up’. Counsel submitted, however, that the discount on sentence otherwise available for the utilitarian benefit of the plea of guilty and cooperation should not thereby be reduced. Fourthly, the cooperation offered by the applicant was indeed ‘significant’, so that ‘the principles in *Cartwright* clearly apply’. It can be seen from the judge’s reasons, however, that he wrongly diminished the discount for the cooperation that was actually offered, since the ‘cooperation is significant on any account’.

Respondent’s submissions

45 In written submissions, the respondent’s counsel submitted that the sentencing judge was entirely justified in his treatment of the applicant’s plea of guilty and cooperation. The sentencing judge accepted that the applicant should receive a discount on his sentence purely on account of the utilitarian value of his plea, and recognised that a discount on this basis alone would be significant. Counsel for the respondent submitted that the judge’s findings about the subjective factors accompanying the applicant’s plea of guilty did not ‘overwhelm’ his reasoning. It was only the utilitarian value of the applicant’s plea that provided a reason to discount his sentence, since the applicant’s plea was not accompanied by remorse, and other subjective criteria of a willingness to facilitate the course of justice

²² See Reasons, [140].

and an acceptance of responsibility were found to have played little or no role in the applicant's decision to plead guilty.²³

46 It was common ground that the principles applicable to the assessment of the significance of cooperation were those stated in *Cartwright*. Counsel for the respondent submitted that the sentencing judge was right to treat the contextual evidence surrounding the applicant's decision to make admissions as inconsistent with the submissions of the applicant's counsel on both remorse and cooperation. For three reasons, so it was submitted, the principles in *Cartwright* lead to the conclusion that the applicant's cooperation did not merit any substantial discount: first, the applicant's admissions were clearly made following his recognition that, in the words of the primary judge, 'the game was up'; secondly, the applicant tailored his admissions based on what the investigators already knew; and, thirdly, the applicant was motivated to justify his conduct and assert his religious ideology, not to assist police in their investigation of his co-offenders.

47 Furthermore, the respondent's counsel argued, many of the lies the applicant told police, in his records of interview and statement, were designed to exculpate his co-offenders. That is, the lies were told in order to obstruct investigators from discovering the truth about the conduct of the co-conspirators. As such, the lies had the potential to undermine critical parts of the prosecution case. Indeed, when giving evidence in the trial of the co-accused, the applicant repeated many of the lies he had told police during his interviews, which were exculpatory of his co-offenders. His efforts to do what he could to assist his co-accused were so transparent that the trial judge commented that he was a 'hopeless' witness, and that it was open to the jury to reject anything he said which was to the benefit of the accused. So much reinforces the correctness of the view reached by the sentencing judge, that he had not provided the kind of co-operation which the authorities recognise as a significant mitigating factor in sentencing.

²³ Reasons, [143].

48 Moreover, the respondent's counsel submitted that the sentencing judge's treatment of the applicant's relative youth was unimpeachable. He was correct to recognise that youth is generally of reduced significance in cases of this kind. That the applicant acted in co-ordinated fashion with a group of adults was rightly considered by the sentencing judge to have elevated the seriousness of his criminality. The judge was also clearly justified in treating the applicant's recruitment of his brother as a serious aggravating feature.

49 In oral submissions, counsel for the respondent contended that, over the course of about two months, the applicant both planned and prepared for a terrorist attack involving the mass slaughter of innocent civilians in the centre of Melbourne's Central Business District. He was deliberately targeting a place where people would gather at a time of social and cultural significance. The plan was calculated (in both senses of the word) to generate as much chaos, bloodshed and fear as possible. In pursuit of that plan, he helped make and test bombs. The applicant recruited his brother to join the conspiracy, and he helped motivate his co-conspirators. With them, he surveyed Federation Square as a target site. When they expressed concern that at that location they might spend too much time chasing people and be slowed down, the applicant reassured them that it is not difficult to kill someone with a machete. The very next day he and one of his co-offenders bought two machetes. Counsel submitted that the plan to conduct the attack and intimidate Australia as an entire nation was a plan to do it in the name of Islamic State.

50 As a matter of legal principle, counsel for the respondent submitted, the Court should not accept the proposition that the utilitarian value of a plea of guilty needs to be given particular significance, and any discount be particularly conspicuous, in terrorism cases. The respondent had accepted on the plea that the applicant's cooperation was significant because, although the prosecution had a very powerful circumstantial case of what the conspirators were up to before the visit to Federation Square, and although there was video footage of them surveying the scene, the applicant was able to explain what was being discussed (there being no audio). It

was submitted, however, that although the applicant's admissions were significant in his own case, and as throwing some light on what the others were doing, his limited cooperation was not offered with any intention of assisting investigators.

51 Finally, citing *Elomar*,²⁴ counsel for the respondent submitted that criminal conspiracies are a more serious form of offending given the greater level of danger they may pose.

Cooperation: relevant principles

52 Section 16A(2)(h) of the *Crimes Act 1914* (Cth) provides:

16A Matters to which court to have regard when passing sentence etc. – federal offences

...

(2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:

...

(h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences; ...

53 In *Cartwright*, it was emphasised that it is an offender's full and frank cooperation that must be encouraged, no matter the motive for that cooperation:²⁵

In order to ensure that such encouragement is given, the appropriate reward for providing assistance should be granted whatever the offender's motive may have been in giving it, be it genuine remorse (or contrition) or simply self-interest. *What is to be encouraged is a full and frank co-operation on the part of the offender, whatever be his motive. The extent of the discount will depend to a large extent upon the willingness with which the disclosure is made. The offender will not receive any discount at all where he tailors his disclosure so as to reveal only the information which he knows is already in the possession of the authorities. The discount will rarely be substantial unless the offender discloses everything which he knows. To this extent, the inquiry is into the subjective nature of the offender's co-operation. If, of course, the motive with which the information is given is one of genuine remorse or contrition on the part of the offender, that is a circumstance which may well warrant even greater leniency being extended to him, but that is because of normal sentencing principles and practice. The contrition is not a necessary ingredient which must be shown in order to obtain the discount for giving assistance to the authorities.*

²⁴ *R v Elomar* (2010) 264 ALR 759, 775–6 [64] (Whealy J) ('*Elomar*').

²⁵ *Cartwright*, 252–3 (Hunt and Badgery-Parker JJ; Mahoney JA agreeing) (emphasis added).

Again, in order to ensure that such encouragement is given, the reward for providing assistance should be granted if the offender has genuinely co-operated with the authorities whether or not the information supplied objectively turns out in fact to have been effective. The information which he gives must be such as could significantly assist the authorities. *The information must, of course, be true; a false disclosure attracts no discount at all. What is relevant here is the potential of the information to assist the authorities, as comprehended by the offender himself.* Information which turns out to be significant, but which is neither comprehended nor intended as such by the offender, has not been given in the spirit of willingness which the discount is designed to achieve. The circumstance that objectively the information subsequently turned out to be effective may perhaps demonstrate that the information possessed such a potential if it is not otherwise obvious upon the face of the information itself, but such effectiveness is not a requirement. *As we have already pointed out, the offender will not lose the discount because in fact (unknown to him) the authorities are already in possession of that information.* Nor should he lose it if the authorities do not in the end act upon his information, because (for example) they subsequently receive or they have already received more cogent information from another source – or if the offender does not in the end give evidence as promised, because (for example) the person who is the subject of his information has pleaded guilty.

54 Axiomatically, each case must depend on its own facts. Hence, Nettle JA (with whom Buchanan and Ashley JJA agreed) made the following observations with respect to informer ‘discounts’ in *Johnston*:²⁶

... Although, recognising that the quantification of informer discount involves a degree of arbitrariness which adherents to the shibboleth of intuitive synthesis may prefer to avoid, in the circumstances of this case I would set the discount at 50%.

*So to say is not to suggest that the level of discount could not be less or more in another case involving drug-related offences. Each case is unique.*²⁷ Nor is it to say that it is necessarily the only figure to which one could properly come in the circumstances of this case. It goes without saying that, within a given range of acceptability, views may reasonably differ. But, in my view, less than 50% would be an inadequate recognition of the quality of the information which the applicant has provided to authorities in this case, and the risks to which he has subjected himself by agreeing to do so; and more would tend to undermine public confidence in the sentencing process in relation to serious offences which arise out of organised drug trafficking activities on the scale here involved. I am strengthened in that conclusion by the analysis undertaken by Wells J in *R v Golding*.²⁸

55 In *Cooper* the Court once more emphasised that there is no standard discount

²⁶ *R v Johnston* (2008) 186 A Crim R 345, 350-1 [20]-[21] (emphasis added; citations as in original).

²⁷ *R v Schioparlan* (1991) 54 A Crim R 294 at 299, 305 (Young CJ, Marks and Brooking JJ).

²⁸ *R v Golding* (1980) 24 SASR 161 at 173-174; 3 A Crim R 26 at 37-38.

for cooperation:²⁹

A discount of fifty per cent on sentence was thought to be justified in *Johnston* because of the very high level of assistance provided to authorities. It should not be thought, however, that there is a ‘tariff’ or standard discount, or that the assessment of the discount that should be given can generally be approached in a mechanical or mathematical way.³⁰ The amelioration of sentence to be afforded for cooperation in every case must be determined according to a range of factors, including – but not limited to – the nature and extent of the cooperation; any willingness to give evidence against co-offenders; and any danger flowing from the cooperation. As was said in *Freeman*, however:³¹

... it is the genuine co-operation of the person furnishing the assistance which is important, whether or not the information turns out in fact to have been effective. The information must be such as could significantly assist the authorities. Any such discount should not be lost, for example, by reason of the offender not having to give evidence because the person the subject of the information pleads guilty.

56 The applicant in this case was not an informer in the sense that he provided information about his criminal confederates and their activities that was otherwise unknown to police. He did, however, confirm a deal of information already in the hands of police – albeit that it might be said that he put his own ‘spin’ on it – and provided significant insight as to what he and his co-conspirators discussed as they walked around Federation Square and its environs (as depicted in CCTV footage).

Discussion

57 Turning to the merits of the present application, it is to be noted that, at the time of the offending, the applicant was aged 22 years.

58 Although the applicant had attributed to himself a dominant role in the conspiracy, the judge was prepared to accept that – save for the fact that he

²⁹ *DPP v Cooper* [2018] VSCA 21, [45] (Weinberg, Priest and Beach JJA) (*‘Cooper’*) (citations as in original).

³⁰ *R v Kohunui* [2009] VSCA 31, [25], citing Vincent AJA in *R v Cuthbertson* (Unreported, Court of Appeal Victoria, 13 November 1995).

³¹ *R v Freeman* (2001) 120 A Crim R 398, 405 [37] (Coldrey AJA, with whom Brooking and Tadgell JJA agreed), citing *R v Su* [1997] 1 VR 1, 78–9. See also *Scerri v The Queen* (2010) 206 A Crim R 1, 9 [35] (Maxwell P and Buchanan JA); *R v Cartwright* (1989) 17 NSWLR 243, 252–3 (Hunt and Badgery-Parker JJ; Mahoney JA agreeing).

recruited his brother – the applicant was more or less an equal participant in the offending with Chaarani and Mohamed. The applicant’s recruitment of his younger brother – including his plan to take him to the scene of the terrorist attack and fit him with an explosive vest – was, the sentencing judge thought, one respect in which the applicant’s role in the conspiracy was more serious than those of Chaarani and Mohamed. The prosecution described the applicant as a ‘motivator’ in the conspiracy, and his own counsel submitted that he ‘had a leading and encouraging role’ in it.³² In any event, the judge was of the opinion that the applicant was an ‘enthusiastic, committed and important member of [his] criminal group’. He sentenced the applicant on the basis that he ‘had a commitment to the aim of the proposed terrorist attack which was seemingly unwavering, even as the time for the attack drew nigh’. There is no reason to doubt the correctness of these views.

59 Indeed, in describing the objective seriousness of the applicant’s offending, we can do no better than to adopt what the sentencing judge said:³³

The objective circumstances of the intended crime at the heart of the conspiracy for which you are to be sentenced are of the highest order of seriousness. You harboured extreme and unacceptable views about the need for and propriety of carrying out outrageous violence against innocent civilians. These views have no place at all in this society, or indeed, in any civilised society. Acting with three like-minded people, with whom you constituted a dangerous team, and as such posed even more of a threat to the safety of the public than if you had been acting alone, you went about preparing for a multi-faceted attack which would have been designed to cause maximum death and suffering and maximum trauma and distress to the community. For the two months of the conspiracy, as you made the substantial preparations so clearly demonstrated by the evidence, you were on the path towards carrying out a mass murder of innocent civilians in a public area in the CBD of Melbourne. It would have been, as was your intention, a crime which would shock this country to the core. It would have represented a shocking and entirely unjustified attack upon our democratic system, a system under which you were brought up and have always lived, but whose rules you so flagrantly chose to ignore. As I said earlier, I am satisfied that the plan to carry out this attack was well-advanced, that the attack was imminent and that your timely arrest by the dedicated and expert investigators of the *Joint Counter Terrorism Team* was all that prevented a devastating and murderous terrorist attack in the heart of the City of Melbourne.

³² Reasons, [151].

³³ Reasons, [160].

In *Elomar*, when sentencing for a terrorist-related conspiracy, Whealy J made a number of observations which are apposite to the present case. He said that³⁴

the level of criminality involved in the present conspiracy was far more substantial than the criminality involved in the individual acts of each offender, such as might have warranted the bringing of individual substantive charges against him. Matters indicating the added level of criminality involved in the conspiracy include the following:

- (a) The formation of an agreement (and the entry into it) by a group of people to acquire materials that might subsequently be used for the carrying out of terrorist act or acts is of its nature likely to be more advanced than a sporadic individual acquisition.
- (b) A conspiracy, involving the joint effort of a number of like-minded individuals, is more likely to succeed than the isolated actions of an individual.
- (c) In addition, a conspiracy involving a number of people acting at different times, different places and in different ways is much more difficult to detect.
- (d) Importantly, a conspiracy of the present kind is much more difficult to shut down. As can be seen from the facts I have found, where one member of the conspiracy was detected buying ammunition, another person, perhaps unheralded prior to that time, moves in and acts in furtherance of the conspiracy. The conspiracy is like a Hydra, a multi-headed monster. When one head is removed, another simply springs up in its place.
- (e) Most importantly, the overall extremist zeal of a group venture is more enduring, more fanatical, more determined, more resourceful and ultimately likely to be more successful than an individual acting alone. ...

Further, in *MHK* it was said³⁵ that

in *R v Lodhi*,³⁶ Whealy J, in sentencing an offender for three terrorism offences under ss 101.4, 101.5 and 101.6 of the *Criminal Code*, stated:

the legislation under which these offences has been created was specifically set up to intercept and prevent a terrorist attack at a very early or preparatory stage, long before it would be likely to culminate in the destruction of property and the death of innocent people. The very purpose of the legislation is to interrupt the preparatory stages leading to the engagement in a terrorist act so as to frustrate its ultimate commission. An evaluation of the criminal culpability involved in any particular offence requires an analysis not only of the act itself, which may be relatively innocuous, but as well an examination of the nature of the terrorist act contemplated, particularly in the light of the intentions or state of mind of a person found to have committed the offence.³⁷

³⁴ *Elomar*, 775–6 [64].

³⁵ *MHK*, 287 [49]–[51] (Warren CJ, Weinberg and Kaye JJA) (citations as in original).

³⁶ *Lodhi* (2006) 199 FLR 364.

³⁷ *Ibid* 373 [51].

In similar terms, in *Fattal v The Queen*,³⁸ this Court, in determining an appeal against conviction and sentence for offenders convicted of conspiring to do acts in preparation for or planning to do a terrorist act contrary to s 101.6(1) of the *Criminal Code*, stated:

while someone convicted of a terrorism offence involving doing acts in preparation for a terrorism act does not stand to be sentenced as though he had committed the terrorism act he was preparing for, nevertheless what was contemplated must inform the nature and gravity of the preparatory act.³⁹

Unsurprisingly, in cases involving terrorist offences, and preparation to commit terrorist acts, the principles of general deterrence, and protection of the community, are given substantial, if not primary, weight. In *Lodhi v The Queen*,⁴⁰ Spigelman CJ quoted, with approval, the following passage from the judgment of Crockett J in the Court of Criminal Appeal in *R v Sakr*,⁴¹ in which the offender had placed explosive devices with intent to cause an explosion likely to endanger life or cause serious injury or property. Crockett J (with whom Murray and Hampel JJ agreed) stated:

If ever there were a case in which the nature of the offence and the circumstances of its commission, called for a deterrent penalty, then this is that case. The court is justified in believing that the community would expect that the punishment to be imposed should mark its intention, so far as it might be within the power of the court to do so, to arrest the insipient growth of terrorist style of criminal activity in this community.⁴²

62 The Court in *MHK* distinctly emphasised the need for general deterrence and protection of the community:⁴³

... In each case, as in the present case, the preparation and planning for a terrorist act takes some time. It is during that time frame that the concept of general deterrence may have some important effect. Put simply, those planning to commit acts of terror must appreciate that, if they are apprehended in the process of preparing to perpetrate such acts, they will forfeit their liberty to live within our community for a very lengthy period of time. It is in that way that those seeking to enjoy a perverted form of glory, or satisfaction, from the perpetration of such acts, can be brought to understand that the cost to them, if they are intercepted, will be particularly high. Further, and in any event, it is not for the courts to 'second guess' the mentality of persons intending to embark on acts of terror. No doubt the mindset of such persons may well vary. The law can only do its best to endeavour to deter such acts, by imposing sentences that may alter the calculations of persons minded to commit such abominable acts as those that were under contemplation in the present case.

38 [2013] VSCA 276.

39 Ibid [165].

40 (2007) 179 A Crim R 470.

41 (1987) 31 A Crim R 444.

42 Ibid 451.

43 *MHK*, 288 [53]–[55] (citations as in original).

Further, the authorities have made it clear, and properly so, that the concepts of protection of the community, and incapacitation of the offender, are separate considerations to that of general deterrence. As we have stated, the very purpose of provisions, such as s 101.6, contained in Div 101 of the Code, is to intercept and interrupt planned acts of terror. Persons who commit such an offence ordinarily only desist from doing so because they are apprehended. As such, at the time of their apprehension, they are, a fortiori, persons who pose a very real danger to the community. Unless the courts give adequate weight to the concepts of protection and incapacitation, they would fail to comply with the clear intent of the legislature in creating offences of the type with which this case is concerned.⁴⁴

It follows that, given the nature of the offence, and the purpose of the statutory provisions, mitigating factors of a personal nature, such as prospects of rehabilitation and the like, are given substantially less weight than in other forms of offending. ...

63 Finally, in *MHK* the Court recognised that the principles that inform the sentencing of youthful offenders need to be appropriately moderated where, as in a case such as the present, the offender has been involved in serious and dangerous offending.⁴⁵

64 The applicant's counsel, as we have indicated, submitted that the utilitarian benefit of a plea of guilty ought to be given greater emphasis in the case of a terrorist offence. As a general proposition, that cannot be accepted. The weight to be given to a plea of guilty and its utilitarian value will fall to be assessed according to the particular circumstances of each individual case. In the present case, the judge said that the utilitarian benefit of the applicant's plea would lead to a reduction in sentence. We see no reason to doubt that the judge afforded the applicant an appropriate reduction in sentence for his plea.

65 Similarly, we see no reason to doubt that the judge afforded the applicant an adequate reduction in sentence for his cooperation. It seems plain enough that the applicant commenced to provide most relevant information to police only once (as the judge put it) the 'game was up', that information being carefully tailored in an endeavour to minimise the roles of his co-offenders. Thereafter, as is also tolerably

⁴⁴ *Lodhi v The Queen* (2007) 179 A Crim R 470, 492–494 [94]–[109] (Spigelman CJ).

⁴⁵ *MHK*, 289 [57].

clear, the most significant information that the applicant gave was his description of the discourse between co-conspirators as they reconnoitred Federation Square and its surrounds.

66 Self-evidently, assessment of the contention that the sentence imposed is manifestly excessive requires a determination of the objective seriousness of the applicant's offence. As a starting point, the law provides that those who, like the applicant, conspire do acts in preparation for, or plan, a terrorist act, are liable to imprisonment for life. So much reflects the inherent seriousness of the offence.⁴⁶

67 Furthermore, attacks of the kind connived in by the applicant are calculated to – and do – create mayhem in civilian populations. Such attacks are inspired and driven by a morally corrupt creed, anathema to the liberal, democratic and tolerant values of Australian society.⁴⁷ The applicant planned the massacre of innocent, defenceless civilians according to his concept of religious imperatives. Over a period of two months, he and his co-conspirators acquired the weapons necessary to carry out their planned attack on society. During the period of plotting, the applicant's conduct bespoke an attitude of unmitigated callousness and evil. He demonstrated no qualms, or pangs of conscience, about the tragedy and suffering he was about to unleash upon the community of which he was a member. Indeed, the applicant's moral bankruptcy may be judged by the fact that, apparently devoid of any anxiety or emotion, he was prepared to contemplate that Mohamed's wife be fitted with a bomb and blown to pieces as part of an attack.

68 Ultimately, balancing the objective seriousness of the applicant's offending against the matters relied upon in mitigation – his relative youth, the utilitarian plea of guilty (unaccompanied by any contrition or remorse) and his cooperation with authorities – we remain unpersuaded that the sentence imposed on the applicant is manifestly excessive. If anything, when one looks objectively at the horrifying

⁴⁶ *MHK*, 290 [61].

⁴⁷ *Ibid.*

nature of what was contemplated, and the sheer magnitude of the slaughter anticipated by the applicant in his fanatical zeal, the sentence imposed is to our mind quite moderate. According to the evidence, there can be little doubt that a bloodthirsty and vicious attack of monumental scale by the applicant and his criminal cohort was imminent. That murderous attack was thwarted only by the resolute and dedicated efforts of law enforcement authorities, rather than by any hesitation, reluctance or repentance on the applicant's part.

69 Indisputably, the objective gravity of the applicant's crime, and his moral culpability for it, were both of an extremely high order. Although relative youth, the guilty plea and cooperation needed to (and, in our view, did) result in appropriate amelioration of the applicant's sentence, in the circumstances of this case pre-eminence needed to be given to both general deterrence and community protection.

70 For these reasons, we consider the complaint that the sentence is manifestly excessive to be unsustainable.

Conclusion

71 The application for leave to appeal against sentence should be refused.
