SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCR 2020 0118

DIRECTOR OF PUBLIC PROSECUTIONS (CTH) — Appellant

v

ALI KHALIF SHIRE ALI — Respondent

JUDGES:	MAXWELL P, McLEISH and WEINBERG JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	26 October 2020
DATE OF JUDGMENT:	18 December 2020
MEDIUM NEUTRAL CITATION:	[2020] VSCA 330
## APPEALED FROM:	[2020] VSC 316 (Champion J)

CRIMINAL LAW — Appeal — Sentence — Acts in preparation for or planning terrorist act — Planned mass murder of civilians and taking hostages in Federation Square, Melbourne on New Year's Eve — Rapid fire assault rifle to be used — Attempt to arrange purchase of rifle — Consideration of detail and manner of execution of plan for maximum impact — Plan likely to have been carried out but for arrest — Sentence of 10 years with non-parole period of 7 years and 6 months — Whether sentence manifestly inadequate — Weight to be given to youth, rehabilitation, remorse, and renunciation of terrorist ideology at sentencing — Appeal allowed — Respondent resentenced to 16 years' imprisonment with non-parole period of 12 years.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr P Doyle	Ms A Pavleka, Solicitor for Public Prosecutions (Cth)
For the Respondent	Mr D Dann QC with Ms G Morgan	Stary Norton Halphen

MAXWELL P
McLEISH JA
WEINBERG JA:

1 On 15 May 2019, the respondent pleaded guilty before a judge of the Supreme Court to a single charge of intentionally doing an act in preparation for, or planning, a terrorist act contrary to s 101.6(1) of the *Criminal Code* (Cth) ('the Code'). The maximum penalty is life imprisonment.

2 On 21 May 2020, the judge sentenced the respondent to a total effective term of 10 years' imprisonment, with a non-parole period of 7 years and 6 months.[1]

3 The respondent was 20 years old at the time of the offence and aged 23 when he was sentenced.

4 The Commonwealth Director of Public Prosecutions now appeals against the respondent's sentence on the single ground that the sentence and non-parole period are manifestly inadequate.

5 For the reasons set out below, that submission is well-founded. The appeal should be allowed and the respondent resentenced to a term of 16 years' imprisonment with a non-parole period of 12 years.

Overview of the respondent's offending

The planned terrorist act and level of preparation

6 The respondent planned to carry out a terrorist attack at Federation Square in the City of Melbourne while New Year's Eve celebrations were taking place in 2017. The core features of the planned attack were the killing of civilians; targeting a crowd of people to maximise casualties; and the respondent's eventual death, to achieve martyrdom. The respondent planned to repeatedly shoot into the crowd moments before midnight using a rapid fire assault rifle, before taking hostages in a neighbouring bar, and making one of the hostages hold the Islamic State ('ISIS') flag up to a window.

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[1] The judge stated that but for the plea of guilty, he would have imposed a total effective sentence of 13 years' imprisonment, with a non-parole period of 10 years.

7 In the course of planning and preparation, the respondent made enquiries about obtaining a fully automatic rifle, and up to 210 rounds of ammunition, from two men he believed might have been able to supply these items. Unbeknown to the respondent, the two men were undercover operatives ('UCOs') and his conversations with them were being covertly recorded. As the conversations reveal the nature and extent of the respondent's preparation and planning in his own words, we set out relevant extracts below.

8 The first meeting with the UCOs occurred on 31 March 2017. The respondent asked about obtaining a fake passport in order to travel overseas. The respondent wanted to join ISIS to pursue martyrdom by engaging in violent jihad. The UCOs advised the respondent about the difficulty in making fake passports, due to their modern security features. The respondent then asked whether the UCOs had any connections from whom he could obtain firearms. The respondent also asked how much a machine gun would cost, specifying 'like an AK or something like that'. The respondent meant an AK-47 assault rifle. At this meeting, the respondent revealed his plan to shoot into the crowd at Federation Square during the New Year's Eve celebrations. When the UCOs asked how many people the respondent wanted to 'take out' on New Year's Eve, the respondent replied: 'as much as I can'. The respondent added, 'I was planning to use a truck but then my licence got cancelled'.[2]

9 The UCOs asked the respondent where he would keep the firearm. He said that he would bury it.

10 The UCOs said that they wanted to ensure the respondent was '100 per cent ready'. The respondent replied:

> I'm a hundred per cent ready, bro. I've always been thinking about it, since the last year I've been thinking about it. Since last year, and then when they – it got to a point where I got to university and I was saying, shall I just do it now? Oh, no. Because that's how much I missed becoming shahid [a martyr].

11 The respondent told the UCOs he didn't have the money to purchase the firearm but would raise funds through a mobile phone scam.

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2 *R v Ali* [2020] VSC 316, [20] (Champion J) ('Reasons').

12 The respondent also told the UCOs that he had not yet sworn allegiance to ISIS but planned to do so in a video recording.[3]

13 The UCOs asked the respondent what he would do if there were Muslims at Federation Square on New Year's Eve. He replied that he would not shoot them. The UCOs asked him what he would do if he saw a 'kuffar'[4] woman holding a child. He responded:

> I wouldn't shoot them. Because – I thought about that actually, it is still halal, but I'm saying, like, just for the child, child's sake. But if she was alone, then yeah.[5]

14 The UCOs asked the respondent to describe what he wanted to do. The respondent told them:

> [D]id you ask me about how I want to do it? It's like, um, just before … twelve o'clock… You know, when it goes to, you know, eleven fifty-nine and it starts the countdown?... As soon as the countdown finishes I'll be in the middle of the, you know, the audience or the whatever, the people… And just from then on I just start going off at it. And I know there'll be police there. And next to the Federation Square there's a – there's a party… There's like a club type place. So, I go down and then hold people, hold the people hostage … Until the police comes and then whatever happens, I die then.

15 The respondent explained that he would conceal the firearm in a sports bag or other type of 'massive bag'.

16 A second meeting with the undercover operatives occurred on 6 April 2017. The UCOs told the respondent they could obtain an assault gun, which had been used in a bikie clubhouse shooting, for $3,000. The respondent stated that this would be fine, and he wasn't planning to do anything other than what he had told the UCOs already.

17 The UCOs then asked the respondent how many magazines of ammunition he needed, advising him that there were 30 rounds in each magazine. The respondent said he had no knowledge of this but guessed he would need five, six or seven magazines. The UCOs said that seven magazines was a lot, to which the

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3 Ibid [18].

4 The judge explained that 'kuffar' is a derogatory Arabic term meaning 'disbelievers'.

5 Reasons [26]. The judge explained that 'halal' is an Arabic word referring to what is permissible or lawful in traditional Islamic law.

respondent said that he was 'planning to go in hard'. When the UCOs commented that seven magazines equated to 210 rounds of ammunition, which could potentially kill 210 people, the respondent said:

> That's all right actually. That's all right. We've gotta get that. There's no problem with that. I'll get that one.

18 In response to a question by the UCOs about how serious the respondent was, he replied:

> To be honest, I'm invested through to – I can't really prove how serious I am. Last year, towards the end when I started thinking of it and towards this year I've been having a lot of dreams about it. Like, one – one night I've been getting a dream of me, for example, I see my own dead body and one of the brothers, they're looking over me, they're, like, the shahid never dies... Another one is where I see myself, you know, how I was said [sic] I want to run over people. How I see myself in the, um, Melbourne city with the truck and running over people like that, so that's how serious I – I'll get.

19 One of the UCOs again asked the respondent whether he was 'a hundred percent' and the respondent replied 'I'm a hundred per cent'.

20 The UCOs asked the respondent if he had thought further about the planning of his attack. The respondent told the UCOs that he had been thinking about it every day. He explained:

> I've been thinking, to detail on how exactly I'm going to hold hostages and this, that because I see the place, the club itself, it has a lot of windows, open windows … Open spots … For, like, snipers or whatever … So that's how I'm saying – that's how – in planning – in detailed planning I'll be – I'll be doing – thinking of.

21 The UCOs asked the respondent how he was going to carry out the attack. He answered:

> Right now – I'll probably have to obviously close all the blinds. And I'll have to find a spot inside the – inside the club where they can't – where it's a blind spot… Where they can't see me… I'll have to, you know, first go to the – go to the club myself… [a]nd then just, you know, give a – give a reconnaissance of what's going to happen … [a]nd I'll probably do that soon, maybe in the next three weeks … that's about it.

22 During this meeting the UCOs also asked the respondent if he had thought more about his video recording pledging allegiance to ISIS. He responded:

> First to the Australia public to explain why I'm doing this exactly and what the solution is for that – for not, you know, um, experience everything ever again… And then my second one is to the Muslim community I'm gunna rise them up… that's my main thing is [sic] I want to say.
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> …
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> I'll be explaining … to the Australian community [and to] the Australian government why I'm doing this and what the solution is to this and what you have done to us for – for this to happen … After that then I'll be giving a – another maybe two, three minute, um, explanation to the Muslim community, to the brothers I know that are … too scared to do anything.

23 The respondent also asked the UCOs if they knew where he could get the ISIS flag.

24 In this second meeting, the respondent and the UCOs discussed how the respondent would get into Federation Square for the attack while concealing his weapon. He responded:

> No, best way is to get, um, public transport like a train. Because by car, you can get stopped at any time … my sister's car, the one I was driving mostly, when they were overseas it got searched also [and] I had nothing on myself. So I'm like, best thing to do is get a sports bag, put that in, cover it up with stuff and just go by train. … Flinders Street Station is right next to, you know – right next to Federation Square … across the road. So I'm like, it's not a long walk that I have to walk, it's just right there.

25 At the suggestion of one of the UCOs, the three men then drove to Federation Square to take a look at the location. The respondent pointed to a bar and the UCOs asked him where he would stand. He replied:

> On New Year's Eve … they place a massive screen … Coz yeah, I've been to the, ah – it's the exact place that I want to do it. And the people, they congregate right in front of the screen. And they go – they're packed. So, I'm going to go from behind them … And there's going to be stairs, so I'm going to be a little bit elevated … And then once – you know, I told you when it goes fifty-nine to midnight and it's going towards – you know, once the countdown starts then I just go off from there … Once I see enough is enough, I'll go to the bar. And then, ah, I'll, you know, kill some and, ah, take some hostages. Close all the windows, you know, all the curtains and that. Probably make one of the hostages hold the – hold the [ISIS] flag on the window. Ah, probably that's a bit too far, though.

26 Asked to explain the last remark, the respondent said:

> They can – they can do something shifty while I'm not looking, they can just open a [window] a little bit for snipers to do something like that. But it depends on when I do reconnaissance to find if I can see a blind spot.

> Because after when I take hostages, I'll just wait for the police to come. … They're gonna come in, I know, with full army gear… And shields and all that.

27 On 28 April 2017, one of the UCOs sent the respondent a text message asking if everything was okay. The respondent did not reply.

28 On 12 June 2017, the respondent posted the following message to Facebook:

> Ikhwan wal akhawat [brothers and sisters] in Australia do not leave your house without something to defend yourselves with. Carry stuff from now on. These kuffar only target vulnerable people and they come in groups. Especially the sisters, learn self defence. Australian isn't like how it was 10 years ago. It will only get worse.[6]

29 In June 2017 the respondent downloaded, using encrypted messaging, a manual published by Al-Qaeda for conducting terrorist attacks called the 'Lone Mujahid Pocketbook'. He sent himself images of bomb-making instructions from that publication. On 8 August 2017, the respondent viewed on his mobile phone a page of a document titled 'The Permissibility of Martyrdom'.

30 On 31 August 2017, the respondent met with one of the UCOs in Footscray. He asked whether the respondent ended up getting what he was looking for. The respondent replied, 'no because I changed my mind a bit, because I realised more that I need to help my family, my mum is kind of sick at the moment, that's why'. By this time, the respondent suspected the UCOs were undercover agents.

31 Forensic examination of the respondent's mobile phone showed that in the six months prior to September 2017, the respondent had accessed jihadist material, including some relating to ISIS. Between 1 October 2017 and 8 November 2017, the respondent conducted a significant number of internet searches revealing an interest in, and sympathy for, jihadist ideology.

32 On 27 November 2017, the respondent was arrested. It was not disputed that the respondent's intention to engage in a terrorist act persisted up until his arrest. The sentencing judge considered that, if he had not been arrested, it was likely he would have carried out the attack.[7]

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6 Ibid [55].

7 Ibid [149].

Radicalisation and ideology for the planned terrorist attack

33 The respondent reported to clinical psychologist, Mr Guy Coffey, that his religious views began to change around 2014, whilst he was a student at RMIT. During this time, the respondent developed an increasing interest in learning more about ISIS and began to have daily contact with ISIS supporters around the world on social media. He began viewing ISIS videos for up to two hours in the evening. The respondent gave evidence at the plea hearing that by 2017, he had a more radical view of Islam and 'believed that Jihad had to be done now'. He conceded that over three years, he absorbed ISIS material and began to agree with what he was reading.

34 The respondent also told Mr Coffey that over the course of 2017, he began to doubt whether a terrorist attack was consistent with Islam. Whilst the respondent had stated in March 2017 that he was 100 per cent ready to perpetrate an attack, in the months leading up to his arrest, his plans did not become more concrete. However, despite the respondent's misgivings, he said that he did not lose the sense that something had to be done, and he remained under the influence of ISIS.

35 It is convenient to adopt the sentencing judge's description of the respondent's ideological motivation for the planned attack:

> In the months following the last of [the respondent's] meetings with undercover operatives, [he was] still planning to conduct a terrorist attack at the end of 2017. [He] downloaded a document on 27 June in connection with this plan, called the Lone Mujahid Pocket Book ('The Pocket Book'). The Pocket Book is a collection of articles from the Al Qaeda publication *Inspire*, which describe various techniques for conducting terrorist attacks. It contains instructions in the use of firearms (including AK-47 assault rifles) and steps to create bombs at home. During this period [the respondent] also accessed extremist video propaganda material, and contemplated pledging allegiance to Islamic State by making a video explaining [his] intended actions.
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> [The respondent was] motivated to carry out this attack in pursuit of [his] ideological and religious objective to wage violent jihad against those [he] considered to be disbelievers ('*kuffar*') and the enemies of Muslims. [He] had an allegiance to the group known as Islamic State, or ISIS, which encouraged its supporters to carry out terrorist attacks in western countries. ISIS is a listed terrorist organisation pursuant to the Code.
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> [The respondent] wanted to intimidate the Australian community because of what [he] saw as the Australian government's complicity in the persecution of Muslims overseas. [He] also wanted to motivate other Muslims to rise up

against the Australian government.[8]

Reasons for sentence

36 The judge applied the non-exhaustive list of mandatory sentencing considerations for federal offences under s 16A(2) of the *Crimes Act 1914* (Cth), and other relevant matters, as described further below.

Objective gravity of the offending

37 The sentencing judge characterised the respondent's offending as being in an 'inherently serious category'.[9] He found that the very serious nature of his offending could not be doubted. The acts the respondent prepared for were intended to kill and injure as many people as possible. His aim was to commit an act of terror and horror by causing maximum harm to members of the community 'in pursuit of twisted religious and political objectives to wage violent jihad against those [he] considered to be disbelievers and the enemies of Muslims'.[10] Further, the respondent sought to motivate other Muslims to rise up against the Australian government and the wider Australian community.

Culpability

38 In considering the respondent's level of culpability, the judge took into account that he was a young man absorbed in and heavily influenced by terrorist propaganda and other extremist material. The respondent put significant effort into engaging with ISIS to acquire a weapon and other items to carry out the planned attack. However, the acquisition of items and preparation, beyond talking and thinking, did not develop past the second meeting with the UCOs.[11]

39 None the less, the respondent's intention to carry out the plan persisted until he was arrested.[12] As already mentioned, the judge found that it was likely that he

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8 Ibid [6]−[8].

9 Ibid [130].

10 Ibid [140].

11 Ibid [147].

12 Ibid [148].

would have carried out the attack had the authorities not intervened.[13]

40 No mental illness, cognitive deficiency or behavioural issues materially contributed to the offending.[14]

41 In all the circumstances, the judge assessed the respondent as having 'a high level of culpability', moderated by his youth and susceptibility to persuasion by the nature of ISIS propaganda.

Plea of guilty

42 The judge noted that the respondent's plea of guilty was not an early one, coming after a contested committal and 13 days of pre-trial argument. However, the plea facilitated the administration of justice and saved the need for a jury trial.[15]

Subsequent remorse and renunciation of extremist beliefs

43 The judge regarded as an important factor the respondent's evidence that he was remorseful for having committed the offence. The respondent gave evidence that he had now gained an understanding that his planned actions would give rise to fear, division and anger in the community, and he did not want to be the person who caused those consequences. The respondent also explained that he did not want his actions to be representative of Islam, that his actions were a mistake, and that he was deeply grateful for the intervention of the authorities. The respondent said in his evidence that he now felt joy from family, friends and his faith, and he did not intend to harm, threaten or injure innocent people in the future.[16]

44 The judge was satisfied that the respondent had expressed genuinely-held remorse for his actions. He described the respondent's evidence as frank and candid, and supported by the evidence of family members and Mr Coffey. The judge concluded that the ongoing support and positive influence of the respondent's family was 'of critical importance, and should materially contribute to [his] eventual

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13 Ibid [149].

14 Ibid [144].

15 Ibid [151].

16 Ibid [153]–[155].

rehabilitation'.[17]

45 Beyond remorse, there was substantial evidence that the respondent had renounced his extremist beliefs. The judge referred to the evidence of Mr Coffey, who saw the respondent four times for a total of ten and a half hours.

46 The respondent himself gave evidence in which he renounced ISIS and violent jihad. He said that he no longer supported ISIS because of the actions it had committed, as he had become more aware of the innocent lives it has taken. He said that ISIS brought insult to his religion by claiming to be Muslims. He said that he hated ISIS because of its impact on his brother who had been killed in November 2018 in the course of committing a terrorist act in Melbourne that had been inspired by ISIS. His views had also changed as a result of relationships formed in prison, and due to the ongoing support of his family. He now thought that it was impermissible in Islam to kill or hurt innocent people.[18]

47 The judge was satisfied that this renunciation was genuine, and noted that it was significant that the respondent made it publicly. However, the judge added:

> This observed, I agree with the opinion of Mr Coffey, that you presently have a fluidity of beliefs, and that whilst you have undertaken important transformative steps to demonstrate your reformation and rehabilitation, that process is not yet complete. However, I acknowledge you have made significant steps toward rehabilitation that as a result is relevant to the question of specific deterrence, and protection of the community.[19]

The offender's youth

48 The judge observed that the weight of youth as a mitigating factor is diminished in cases where a youthful offender participates in or plans acts of extreme violence. None the less, the judge found that the 'moderating effect' of the respondent's youth remained a relevant factor. He concluded that the respondent's degree of research and preparation showed a level of commitment that was more than mere impulsivity, but that his youth and family support made him more

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17 Ibid [161].

18 Ibid [112], [168]−[169].

19 Ibid [173].

amenable to rehabilitation than a hard core offender of mature years.[20]

Prospects of rehabilitation

49 In considering the respondent's prospects of rehabilitation, the judge took into account his genuine remorse, lack of criminal background and the ongoing support of his family.[21]

50 As noted, the judge also found that the respondent's renunciation was genuine, subject to the caution that his beliefs were fluid and he remained vulnerable to extremist material. Mr Coffey stated that there was the possibility of the respondent viewing extremist material again and his beliefs being re-established. The judge said that 'the passage of time' would test whether the respondent's resolve was permanent.[22] In that regard, the judge also took into account the respondent's expressed wish to take part in a de-radicalisation program.

51 The judge concluded that the respondent's prospects of rehabilitation appeared promising but it was still 'early in the process' and the process was 'not yet complete'.[23]

The impact of the COVID-19 pandemic

52 Finally, the judge accepted that the COVID-19 pandemic would make conditions in custody more onerous, although he was not prepared to act on the basis that any additional burdens would last for the duration of the respondent's sentence.

Appellant's submissions

53 The Director submitted that a head sentence of 10 years' imprisonment was unduly lenient because:

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20 Ibid [174]−[177].

21 Ibid [179].

22 Ibid [180].

23 Ibid [173], [181].

(a) the maximum penalty for the offence was life imprisonment;

(b) the gravity of the offending was to be informed by the nature of the terrorist act the respondent was planning,[24] which was a mass casualty event targeting civilians, in the centre of Melbourne, at a time of significance to the community;

(c) the respondent's culpability was not significantly diminished by the limited extent to which his preparations had progressed;[25] and

(d) youth, rehabilitation, remorse, and renunciation of terrorist ideology were factors to be given comparatively little weight in the sentencing exercise, with general deterrence and denunciation the dominant sentencing considerations.[26]

54 The Director submitted that the respondent's offending must be viewed as a serious example of an offence against s 101.6(1) of the Code. It involved acts in preparation for the mass slaughter of innocent civilians in the centre of Australia's second most populous city. This would have created fear and horror which is difficult to overestimate. Furthermore, the attack was to be carried out in the name of a terrorist group utterly hostile to democratic values. The requirement to take full account of the nature of the planned act was simply not reflected in the sentence imposed.

55 The respondent was well aware of ISIS's aims and methods, having regularly consumed its propaganda. The respondent was old enough to have known that what he was doing was wrong.

56 Other features contributing to the gravity of the offence included: the level of detail in the respondent's plans, which showed that he had undertaken a

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24 *R v Fattal* [2013] VSCA 276, [165] (Buchanan AP, Nettle and Tate JJA) ('*Fattal*'); *R v Lodhi* (2006) 199 FLR 364, 373−4 [52] (Whealy J); [2006] NSWSC 69 ('*Lodhi*').

25 *Fattal* [2013] VSCA 276, [160]−[169], [178] (Buchanan AP, Nettle and Tate JJA).

26 *DPP (Cth) v MHK* (2017) 52 VR 272, 292 [66], 293−4 [72]−[73] (Warren CJ, Weinberg and Kaye JJA) ('*MHK*'); *Lodhi v The Queen* (2007) 179 A Crim R 470, 490−1 [88]-[92], 493−4 [108]−[109] (Spigelman CJ), 539 [274] (Price J); [2007] NSWCCA 360 ('*Lodhi CA*').

reconnaissance of the site of the proposed attack and considered a range of logistical and practical issues including how to maximise the number of casualties; the fact that the respondent had been contemplating a terrorist attack since 2016 up until his arrest; and the care with which the respondent attempted to ensure that authorities could not detect his online communications.

57 There was said to be little by way of mitigation of the seriousness of the offending or the respondent's culpability. In light of the features of the offending, the fact that the respondent's sentence was the second-lowest sentence recorded for this offence in Australia was said to invite scrutiny.

58 Finally, the Director submitted that the sentence stands out as unduly lenient when regard is had to comparable cases. Particular reference was made to *Abbas*,[27] *MHK*,[28] *Besim*,[29] *Khaja*,[30] and *Baladjam*.[31] The Director submitted that the degree to which the sentence differs from those imposed in comparable cases should drive the court to conclude that there must have been some misapplication of principle.[32]

Respondent's submissions

59 Counsel for the respondent submitted that the sentencing judge was fully alive to the gravity of the offending. He had variously described it as very serious, unequivocally horrifying in its potential savagery, evil, random and despicable.

60 The judge was also said to have been keenly aware of the primacy of general deterrence and denunciation in the sentencing exercise, having made numerous references to that requirement and the fact that youth, rehabilitation and other mitigating factors had to give ground to those considerations.[33] In contrast, it was

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27 *R v Abbas* [2018] VSC 553 ('*Abbas*'); *Abbas v The Queen* [2020] VSCA 80 ('*Abbas (CA)*'); see also *R v Abbas, Chaarani & Mohamed* [2019] VSC 775.

28 (2017) 52 VR 272.

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

30 *R v Khaja [No 5]* [2018] NSWSC 238 ('*Khaja*').

31 *Baladjam v The Queen* (2018) 341 FLR 162; [2018] NSWCCA 54 ('*Baladjam*').

32 *R v Pham* (2015) 256 CLR 550, 559 [28(7)] (French CJ, Keane and Nettle JJ), citing *R v Wong* (2001) 207 CLR 584, 605 [58] (Gaudron, Gummow and Hayne JJ) and *Barbaro v The Queen* (2014) 253 CLR 58, 79 [61] (Gageler J).

33 Reasons [174]−[175], [186]−[187], [189]−[190], [193], [199]−[200].

said that the weight to be given to the plea of guilty was not to be moderated in the same way.

61 In addition, it was submitted that the judge was entitled to have regard to the limited extent of the preparations the respondent had undertaken, and to contrast this with other cases where preparations were so far advanced that the terrorist act was imminent. It was noted that the period of the offending in the indictment was 31 March 2017 and 6 April 2017 (being the dates of the first two meetings with the UCOs), so that evidence of acts done outside that period was relevant only by way of context within which to view the charged acts.

62 The judge had seen and heard the respondent give evidence and had made favourable findings accordingly. The unusually strong evidence of renunciation was relevant to specific deterrence and made for a contrast with cases where it was a purpose of sentencing to incapacitate the offender for the protection of the community.

63 The respondent was said to be entitled to an additional degree of leniency on account of his having made full admissions, going beyond what the prosecution was able to prove.[34]

64 Counsel also submitted that the sentencing judge was entitled to recognise that the respondent's youth and impressionability contributed to his offending and were relevant to his moral culpability. When also taking into consideration his lack of prior criminal history, remorse, renunciation and positive prospects of rehabilitation, there remained a powerful community interest in giving weight to the respondent's youth.

65 With respect to prospects of rehabilitation, the respondent submitted that the judge was careful to moderate the weight that might otherwise be given to his optimistic view of those prospects, but he was nevertheless entitled to have regard to the importance of rehabilitation of a youthful offender with no prior criminal history.

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[34] *R v Doran* [2005] VSCA 271 [15]–[16] (Buchanan JA, with Eames JA and Nettle JA agreeing at [18] and [19]) (generally known as the '*Doran* discount').

66 Counsel further submitted that the death of the respondent's brother while the respondent was in custody was another unique aspect of the case. Not only had this meant that the respondent's initial period in custody was particularly burdensome, but it led to the respondent developing a hatred for and ultimately renouncing ISIS.

67 The respondent also noted that the judge took account of the impact of the COVID-19 pandemic on sentence, which was not the case for any of the comparable cases relied on by the Director. But in any event, it was submitted that a direct numerical comparison of the respondent's sentence with sentences imposed in other cases was unhelpful because:

(a) it runs the risk of elevating the sentences in other cases to the status of precedents or boundaries for future sentences;

(b) consistency in federal sentencing relates to the consistent application of sentencing principles rather than numerical equivalency;[35]

(c) as the judge identified, there is only limited utility in looking to past cases to establish a comparative range of sentences in the respondent's case;[36]

(d) there is even less utility in directly comparing cases where the planning and preparations were more extensive or advanced, or where the offender acted as part of a group of co-offenders;

(e) in many of the cases referred to by the Director, there was an absence of any of the mitigating factors present in this case such as a guilty plea, a finding of remorse, sworn evidence of renunciation and youth.

Consideration

68 Section 101.6(1) of the Code provides that a person commits an offence if the person does any act in preparation for, or planning, a terrorist act. The offence is committed even if the terrorist act does not occur, and if the preparation or planning

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35 *Lieu v The Queen* [2016] VSCA 277, [46] (Beach and Kaye JJA); *MHK* (2017) 52 VR 272, 292−4 [69]−[72] (Warren CJ, Weinberg and Kaye JJA).

36 *MHK* (2017) 52 VR 272, 284 [41].

is done without a specific target or for more than one terrorist act: s 101.6(2).

69 A 'terrorist act' is an action or threat of action (other than advocacy, protest, dissent or industrial action not intended to cause serious physical harm or death, to endanger the life of another person, or to create a serious risk to the health or safety of the public or a section of the public), where the action either causes serious physical harm or death to a person or serious damage to property, endangers another person's life, creates a serious risk to the health or safety of the public or a section of the public, or seriously interferes with, disrupts or destroys an electronic system (including an information, telecommunications, financial or transport system or a system for essential government services or an essential public utility). The action must be done, or the threat made, with the intention of advancing a political, religious or ideological cause, and with the intention of either coercing, or influencing by intimidation, an Australian or foreign government, or intimidating the public or a section of the public: s 100.1.

70 As noted, the maximum penalty for the offence is life imprisonment. It can be seen that the offence embraces acts done in preparation for, and planning of, a very wide range of actions. The potential ambit of the offence is multiplied when regard is had to the indefinite nature of the preparatory or planning acts that may constitute the physical element of the offence.

71 These twin features can be viewed as two axes of seriousness for sentencing purposes. The first, focusing on the action in contemplation, includes both threats and other actions targeted at property, electronic systems, public health or safety and the physical well-being and lives of other persons. The second, concentrating on the acts actually done, encompasses a myriad of activities including conversations, research, acquisition of equipment, strategic planning, recruitment of fellow offenders and everything done in preparation or planning short of the terrorist act itself.

72 Plainly, a case far advanced along both these axes is of the most serious kind contemplated by the section. The more difficult cases are those where the evidence along one axis points firmly to the seriousness of the matter but the evidence on the other is at the lower end of the range. In particular, one case might involve planning

in its infancy of the most heinous terrorist act. Another may involve advanced planning of an act which, while still a terrorist act as defined, may properly be regarded as of lesser gravity.[37]

73 The cases make it clear that the fact that little has been done by way of preparation for or planning a terrorist act is not a basis for putting to one side the gravity of that act.[38] The purpose of the creation of the offence under s 101.6 is to prevent conduct which increases the prospect of a terrorist act occurring, to punish and denounce those who contemplate doing such acts, and to incapacitate those who prepare for or plan them so that the community may be protected from the consequent danger.[39] By adopting a broad scope, the legislation enables the interception and prevention of terrorist acts at a very early stage so as to frustrate their commission.[40] This purpose and scope means that the identification of the seriousness of the contemplated terrorist act is always a sentencing consideration of fundamental importance.

74 Consistently with the identified statutory purpose, principles of general deterrence and protection of the community are also given substantial weight.[41] Conversely, mitigating personal factors such as prospects of rehabilitation will often be given substantially less weight than might be the case with other offences.[42]

75 Other things being equal, the preparatory act is more serious if the planned terrorist act involves:

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37 The destruction of an unoccupied building might be an example.

38 *Lodhi (CA)* (2007) 179 A Crim R 470, 531 [229] (Price J), cited with approval in *Fattal* [2013] VSCA 276, [168] (Buchanan AP, Nettle and Tate JJA).

39 *R v Elomar* (2010) 264 ALR 739, 779 [79] (Whealy J); [2010] NSWSC 10 ('*Elomar*'); *Fattal* [2013] VSCA 276, [173] (Buchanan AP, Nettle and Tate JJA).

40 *Fattal* [2013] VSCA 276, [178] (Buchanan AP, Nettle and Tate JJA); *MHK* (2017) 52 VR 272, 286 [48] (Warren CJ, Weinberg and Kaye JJA).

41 *MHK* (2017) 52 VR 272, 287–9 [51], [54] (Warren CJ, Weinberg and Kaye JJA); *Abbas (CA)* [2020] VSCA 80, [61], [62] (Priest, Kaye and T Forrest JJA); *Baladjam* (2018) 341 FLR 162, 204 [263]; (Bathurst CJ); [2018] NSWCCA 304.

42 *MHK* (2017) 52 VR 272, 289 [55], 292 [66]−[67], 294 [73] (Warren CJ, Weinberg and Kaye JJA), citing *Lodhi (CA)* (2007) 179 A Crim R 470, 539 [274] (Price J); *Abbas (CA)* [2020] VSCA 80, [62] (Priest, Kaye and T Forrest JJA); *Baladjam* (2018) 341 FLR 162, 204 [263] (Bathurst CJ); [2018] NSWCCA 304; *Alou v The Queen* (2019) 101 NSWLR 319, 342 [131] (Bathurst CJ).

- the killing of persons, rather than the causing of property damage;[43]
- deliberate killing, rather than the risk or possibility of people being killed; and
- the killing of many people, rather than only one or a few.[44]

76 The preparatory act itself may be assessed by reference to factors including:

- the degree of planning, research, complexity and sophistication involved;
- the offender's level of commitment to carry out the terrorist act;
- the period of time involved in planning or preparation;
- the depth and extent of radicalisation of the offender as demonstrated by the possession of extremist material and communication of such views to others;
- the extent to which the offender has indoctrinated or recruited others, or attempted to do so;[45] and
- the nature and extent of the equipment or materials which the offender has assembled for use in the terrorist act.[46]

77 The offence is said to be 'no less serious' merely because of matters such as:

- the ineffective nature of the preparatory conduct;
- a 'general lack of viability and sophistication';
- a 'degree of impracticability'; and

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43 *R v Roche* (2005) 188 FLR 336, 359 [119] (McKechnie J, Murray ACJ agreeing at 338 [1]); [2005] WASCA 4, cited in *Lodhi (CA)* (2007) 179 A Crim R 470, 533 [243] (Price J). See also *Lodhi (CA)* (2007) 179 A Crim R 470, 490 [86] (Spigelman CJ), citing *R v Sakr* (1987) 31 A Crim R 444, 451 (Crockett J, Murray and Hampel JJ agreeing at 452).

44 *Besim* [2017] VSCA 158, [44] (Warren CJ, Weinberg and Kaye JJA).

45 *R v Kahar* [2016] EWCA Crim 568 [19] (Lord Thomas CJ); *Elomar* (2010) 264 ALR 739, 775 [62] (Whealy J); *Benbrika v The Queen* (2010) 204 A Crim R 457, 586 [564] (Maxwell P, Nettle and Weinberg JJA); [2010] VSCA 281; *R v Khalid* [2017] NSWSC 1365, [25] (Bellew J) ('*Khalid*'); *R v Alou [No 4]* [2018] NSWSC 221, [171] (Johnson J); *R v Abbas, Chaarani & Mohamed* [2019] VSC 775, [85] (Beale J).

46 *Lodhi (CA)* (2007) 179 A Crim R 470, 533 [243] (Price J).

- ineptitude, clumsiness or 'amateurish conduct'.[47]

78 While features such as ineffectuality or incompetence will not reduce the objective seriousness of the preparatory offence as measured by reference to the proposed terrorist act, there are various features the *presence* of which will make the preparatory conduct more serious. What these factors have in common, we think, is that they increase the *dangerousness* of the preparatory conduct, that is, how close the offender came to actually carrying out the terrorist act. This is measured along the second axis mentioned earlier.

79 This idea was captured by Spigelman CJ in *Lodhi*, when he said that the sentencing court was concerned with 'the possibility of perfection of the very crime for the preparation of which [the offender] has been found guilty'. The higher the likelihood that it would have been perfected, the more serious the offending. As Spigelman CJ put it:

> With respect to the crime of preparation for terrorist acts the Court is not simply concerned with future criminal conduct of a recidivist character. It is concerned with the possibility of perfection of the very crime for the preparation of which the offender has been found guilty.
>
> Accordingly, the issue is not merely one of punishing an offender for something s/he may do in the future. It is the recognition that the protection of society requires the offender to be prevented from perpetrating the offences which s/he was preparing to commit. Giving the element of protection of society substantial weight, particularly in a context where personal deterrence and rehabilitation are, given the nature of the offence and the findings of fact, entitled to little weight, is consistent with the principle of proportionately laid down in *Veen (No 2)*.[48]

80 The most obvious feature of this kind is captured by the concept of 'proximity', meaning how detailed the planning was and how far the preparatory conduct had advanced towards the bringing about of the intended terrorist act.

81 Thus, in *Elomar*, Whealy J considered that the offending in that case involved

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47 *Fattal* [2013] VSCA 276, [166], [178], [180] (Buchanan AP, Nettle and Tate JJA).

48 *Lodhi (CA)* (2007) 179 A Crim R 470, 493–4 [108]–[109] (Spigelman CJ, with Barr J agreeing at 527−8 [211]−[214]), cited with approval in *Fattal* [2013] VSCA 276, [169] (Buchanan AP, Nettle and Tate JJA).

'significantly higher criminality' than the offending in *Lodhi*.[49] He reached this view because (as the reasoning was summarised in *Fattal)*:

> The conspiracy was relatively well advanced and its outcome had a clear and logical inevitability such that the outcome could not be described as remote.[50]

82 Whealy J noted that the criminal enterprise had been carried out in a manner reflecting 'considerable premeditation, determination and commitment' and that, but for the intervention of the authorities, the planned events would have taken place 'sooner rather than later'. This Court in *MHK* also emphasised 'diligent and methodical' planning and preparation over a period of time.[51]

83 Another obvious 'dangerousness' factor is whether the offender's intention to carry out the terrorist act subsisted at the date of arrest. Presumably, a preparatory step directed at a very serious terrorist act would still be regarded as very serious even if, by the time of the arrest, the offender had decided not to go ahead. But the preparatory offence should be viewed as much more serious — because much more dangerous — if the Court is satisfied that, as at the date of arrest, the offender still intended to go ahead and would have done so but for the intervention of the authorities.

84 Applying these considerations to the present case, it cannot be doubted that the terrorist act for which the respondent planned and prepared was of the most terrible kind. He intended to inflict mass casualties on random members of the public, gathered together at a time of annual civic celebration. An additional sinister element, involving the taking of hostages, was calculated to subject a smaller group of victims to a more intimately terrifying encounter. The whole plan was designed with the objective of instilling widespread fear in the community, and to inspire others by the respondent's example. If the planned events had come to fruition, they would have left an indelible stain on the civic and national consciousness.

85 The gravity of the acts, and the respondent's preparedness to commit them,

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49 *Elomar* (2010) 264 ALR 759, 792 [130].

50 [2013] VSCA 276, [172] (Buchanan AP, Nettle and Tate JJA) (citations omitted).

51 (2017) 52 VR 272, 291 [63] (Warren CJ, Weinberg and Kaye JJA).

which subsisted until his arrest, goes to both the objective gravity of the offending and the respondent's moral culpability. Both were of the highest level. As in *MHK*, the respondent's mentality was one of 'total callousness'. He was 'devoid of any sense of conscience about the tragedy and suffering he was planning to inflict'. He spoke of his plan with enthusiasm.

86 The case can be distinguished from others where the planning or preparation was more advanced, but the truth of the matter is that, at the time of the charged acts, the respondent had little left to do in that regard other than acquire the funds and then proceed with the purchase of the weapon and ammunition he thought he had arranged with the UCOs, then wait for the date when he planned to act. This was not a case where components were yet to be assembled into an explosive device or co-offenders needed to be recruited.[52] The respondent had contemplated where and when to launch his attack so as to have maximum impact, including working out where he could achieve an elevated position above the crowd.

87 It may be that some of what he said to the UCOs at the second meeting, in particular, did not reflect prior planning or preparation but only spontaneous responses to matters raised with him, but he said that he had given consideration to the religious implications of killing women and children and that he had thought in detail about how to hold the hostages. Moreover, the evidence of his conduct after the second meeting shows that the charged acts were not carried out in isolation and were not aberrant behaviour on the respondent's part. The evidence amply supported the finding of the sentencing judge that it was likely that the respondent would have carried out the attack if he had not been arrested. Indeed, that finding was not challenged before us.

88 The Director did not submit that the sentencing judge had fallen into any specific error. As counsel for the respondent rightly submitted, the judge's sentencing remarks displayed exemplary care and attention to detail. However, the Director submitted that the sentence was so low as to bespeak error of principle. As

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[52] Cf *Lodhi* (2006) 199 FLR 364, 369 [31], where Whealy J found the planning was 'at a very preliminary stage' and (at 373 [51]) 'a good deal more work and preparation would have been necessary to advance the construction of a physically assembled bomb'.

the ground of manifest inadequacy requires, it was contended that the sentence was wholly outside the range of sentencing options available to the judge.[53]

89 Counsel for the respondent drew attention to a number of unusual or unique features of the case. It was submitted that pleas of guilty are less common in terrorism matters than is the case for other offences. Emphasis was placed on the respondent's genuine remorse and his public renunciation of terrorism and ISIS, based in part on the death of his brother. This distinctive feature of the case was said to strengthen the weight that could be given to the respondent's renunciation and, along with his solid family support, to enhance his prospects of rehabilitation.

90 These are all important matters. They tend towards a significant reduction in the sentence that would otherwise have been appropriate. At the same time, however, the authorities are clear that, just as youth is of diminished significance in cases of extreme violence, so mitigating factors personal to the offender may be given reduced weight in sentencing for terrorist offences, given the protective purpose of the legislature in creating those offences. It must also be acknowledged that there was a qualification attached by the judge to his findings regarding rehabilitation, reflecting Mr Coffey's own caution derived from the fact that the respondent was not exposed to terrorist propaganda while in prison and could in future again fall under its influence.

91 Taking these and other relevant matters into account, we have reached the conclusion that a sentence of 10 years' imprisonment, in circumstances where the maximum is life imprisonment, was, on the facts of this case, outside the range reasonably open to the judge. We are confirmed in that conclusion by taking account of sentences in comparable cases. As the Director submitted, a significant departure from such sentences may point towards an error of principle. We refer to the following cases.

92 In *Lodhi*, the offender sought information about the availability of materials capable of being used to make explosives, and obtained maps of electricity supply systems. He intended to bomb those systems to 'advance the cause of violent

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[53] *MHK* (2017) 52 VR 272, 286 [46] (Warren CJ, Weinberg and Kaye JJA), citing *DPP v Karazisis*

jihad'.[54] The identity of the bomber and the precise area to be bombed had not been worked out, with the trial judge finding that the planning was 'at a very preliminary stage'[55] and noting that he was unable to be satisfied whether Lodhi had a definite intention to use an explosive to kill innocent people. The offender was aged 33 at the time of the offending and pleaded not guilty. The trial judge found that there was no evidence Lodhi had renounced his fundamentalist beliefs and he showed no remorse or contrition. In mitigation, Lodhi had no prior convictions and had a strongly supportive family background. On the preparation or planning offence, he was sentenced to 20 years' imprisonment after a trial, and this sentence was upheld on appeal.

93 The offender in *MHK* was aged 17 at the time of the offending. Having fallen under the influence of ISIS propaganda, he planned to build an explosive device and detonate it in the Melbourne CBD or a train or police station. He corresponded with a person in the United Kingdom about computer encryption and bomb-making, and received links to enable access to bomb-making manuals. The offender had partly made several pipe bombs, and five boxes of screws to be used as shrapnel were found in his bedroom. He had purchased a pressure cooker and assembled the means to turn it into a bomb. The sentencing judge found that the offender's arrest was all that prevented the plan being realised. The sentencing judge noted the offender's plea of guilty but was not satisfied he had fully come to grips with his actions and felt remorse. He had no criminal record and his prospects of rehabilitation were good, but there was 'more work to be done' in that regard.[56] The offender had cooperated with law enforcement and gave evidence renouncing and denouncing ISIS. This Court resentenced him to a term of 11 years' imprisonment. Although the Court observed that the mitigating effect of youth was to be appropriately moderated, it is evident that the offender's youth was still significant in the sentencing exercise.[57]

(2010) 31 VR 634, 662−3 [127] (Ashley, Redlich and Weinberg JJA).

54 *Lodhi* (2006) 199 FLR 364, 367 [17] (Whealy J).

55 Ibid 369 [31].

56 *R v MHK* [2016] VSC 742, [64] (Lasry J).

57 *MHK* (2017) 52 VR 272, 289 [56]–[57] (Warren CJ, Weinberg and Kaye JJA).

94 There were three co-offenders in *Fattal*, all charged with conspiracy to do acts in preparation for or planning of a terrorist act.[58] Fattal went to Holsworthy army barracks and walked around the boundary and entrance to ascertain its suitability as a target for a terrorist attack. His co-offenders sought religious permission for such an attack. The plan was for six people, not necessarily including the offenders, to enter the barracks and shoot as many people as possible before being killed as martyrs. The sentencing judge found that ultimately, the conspiracy 'did not advance to any significant degree'[59] and noted the relatively limited duration of the conspiracy, concluding that it was not inevitable that the co-offenders would commit the terrorist attack being planned. The offenders all pleaded not guilty. None had departed from their extremist views or displayed any remorse. They were aged between 25 and 32 at the time of the offending. None had prior convictions of any significance. In relation to Fattal, the sentencing judge took into account his cognitive impairment. Each was sentenced to 18 years' imprisonment, which was upheld on appeal.[60]

95 The offender in *Besim* was aged 18 at the time of offending and had no prior convictions. He communicated with a person in the United Kingdom and told him he was committed to killing a police officer. He identified Anzac Day as a suitable occasion and accessed websites about the Anzac Day march, road closures and public transport. He planned to crash a car into a police officer then behead the officer with a knife. Police found a pledge of allegiance to ISIS and a suicide note on his phone. There was a Rambo knife and a locking tactical knife in his car, as well as an ISIS flag, a knuckleduster and a disguised Taser. He was arrested a week before Anzac Day. The sentencing judge found that the plan was advanced, with Besim having 'done virtually all of the preparation and planning required for the murder', and being 'only a week from attempting it',[61] while acknowledging the possibility

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58 In *R v Kruezi* [2020] QCA 222, [47] ('*Kruezi*') McMurdo and Mullins JJA observed that the offence of conspiracy to commit an offence under s 101.6 of the Code is objectively more serious than the commission of an offence under s 101.6 by a single offender, citing *Elomar* (2010) 264 ALR 759, 775–6 [64] (Whealy J) and *Abbas (CA)* [2020] VSCA 80, [60] (Priest, Kaye and T Forrest JJA).

59 *R v Fattal* [2011] VSC 681 [87] (King J).

60 *Fattal* [2013] VSCA 276, [165] (Buchanan AP, Nettle and Tate JJA).

61 *R v Besim* [2016] VSC 537, [125] (Croucher J).

that he might have 'pulled out'.[62] Besim pleaded guilty and was found to have good prospects of rehabilitation but had not renounced violent jihad. The sentencing judge took into account his youth and immaturity and lack of prior convictions. This Court resentenced Besim to 14 years' imprisonment.[63]

96 In *Abbas*, four co-conspirators had purchased materials to make an explosive device and had tried to make a bomb. They had conducted reconnaissance of Federation Square with a view to detonating explosives or using bladed weapons or firearms there with the intention of causing maximum death, damage and fear. They had detonated or attempted to detonate explosive devices in rural Victoria, and had also purchased two machetes. The level of preparation was described by the sentencing judge as 'well advanced'[64] and the planned attack was 'imminent'.[65] Abbas was aged 22 at the time and driven by 'violent and extreme teachings'.[66] It was a significant aggravating feature that he had recruited his brother into the conspiracy. Although he pleaded guilty, the judge found little evidence of remorse or contrition. The judge said his prospects of rehabilitation 'remain[ed] to be seen'.[67] He was sentenced to 24 years' imprisonment and this sentence was upheld on appeal (where the sentence was described as 'quite moderate').[68]

97 *Khaja* concerned reconnaissance of an army barracks and court buildings as potential targets for a shooting and suicide attack involving up to 50 deaths. The planning was found to be at an advanced stage. Again, the sentencing judge did not regard the plea of guilty, made very late, as evidencing remorse or contrition. The judge regarded the offender's denunciation of ISIS as disingenuous and was not satisfied that his support for ISIS had changed or had any foreseeable prospect of

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62 Ibid [127].

63 *Besim* [2017] VSCA 158, [120]–[121] (Warren CJ, Weinberg and Kaye JJA).

64 *Abbas* [2018] VSC 553, [100] (Tinney J).

65 Ibid [102].

66 Ibid [101].

67 Ibid [150].

68 *Abbas (CA)* [2020] VSCA 80, [68] (Priest, Kaye and T Forrest JJA).

doing so.[69] The offender was aged 18 when he offended and had no criminal record. He was sentenced to 19 years' imprisonment and there was no appeal.

98 In *Baladjam*, the offender made enquiries about, and acquired, quantities of firearm ammunition, and enquired about and obtained chemicals, in preparation for unspecified terrorist acts. The sentencing judge found that the offender's actions were underpinned by the mindset that 'Muslims are obligated to pursue a violent form of jihad'.[70] Whealy J was ultimately not satisfied beyond reasonable doubt that the offender intended to use ammunition or chemicals to bring about loss of human life. Baladjam pleaded guilty at a late stage and gave assistance to authorities. He was aged 28 when he offended. The sentencing judge found some reason to cautiously accept that he had retreated from his extremist position. A sentence of 18 year and 8 months' imprisonment was upheld on appeal.

99 In the recent case of *Kruezi*, the Queensland Court of Appeal upheld a sentence of 19 years' imprisonment imposed on an offender who had acquired a rifle and obtained or attempted to obtain a jerry can of petrol, corks and glass bottles with which to make petrol bombs to kill law enforcement officers or random members of the public in a public place. No specific target had been selected. Police found an ISIS flag and extremist literature in the offender's possession. The sentencing judge found that the planning was 'well underway'[71] but not imminent, and the attack was only prevented by the offender being arrested. The offender pleaded guilty but was found to remain a serious risk to the public and to have shown no remorse or contrition. The Court of Appeal noted the similarity of the offending to that in *Besim*, but distinguished the age of the offenders (Kruezi being aged 25 when sentenced).

100 In *Elomar*, five co-offenders had intended at least to cause serious damage to property, without any precise act or target in contemplation, but envisioned the possibility of serious injury or death being caused as a result of the use of explosives or firearms. 10,000 rounds of ammunition had been purchased, and 12 licensed

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69 *Khaja* [2018] NSWSC 238, [81]–[82] (Fagan J).

70 Quoted in *Baladjam* (2018) 341 FLR 162, 172 [43] (Bathurst CJ).

71 Quoted in *Kruezi* [2020] QCA 222, [61(3)] (Williams J).

firearms were found at Elomar's home, along with instructions for manufacturing explosives. He and another offender purchased laboratory equipment and chemicals to manufacture explosive devices. Extremist and fundamentalist literature was found in the homes of the five co-offenders. The sentencing judge concluded that arrangements were 'relatively well advanced' and would have been put into effect 'sooner rather than later' were it not for the intervention of the authorities.[72] All pleaded not guilty. The youngest of the offenders was 20 and the eldest 39 at the relevant period of offending. They were sentenced to terms of imprisonment ranging from 23 to 28 years and the sentences were upheld on appeal. None were found to have expressed remorse or contrition, or to have prospects of rehabilitation.

101 Finally, the co-offenders in *Khalid* had considered orally and in writing various forms of terrorist acts, considered targets, obtained firearms, and engaged in meetings, training and planning. The terrorist acts were unresolved but included killing police officers and attacks upon government buildings. The appellate court concluded that 'the planning and preparation was not at a preliminary stage'.[73] A sentence of 20 years' imprisonment was imposed on Khalid on appeal. He had pleaded guilty but there was no other evidence of his having accepted responsibility or as to his rehabilitation. He was aged 20 at the time of the offence. A co-offender who was aged 14 ('IM') was sentenced on appeal to 10 years' and 9 months. He too had pleaded guilty but his prospects of rehabilitation were more favourable than not, even though he had not been prepared to give evidence renouncing ISIS.

102 These decisions provide useful guidance when looked at comparatively in the light of the criteria of offence seriousness set out above: the nature of the contemplated terrorist act; the nature and extent of the preparatory conduct; the degree to which the planning/preparation had advanced towards its objective; and whether the terrorist act was likely to have occurred had the offender not been arrested. That comparison reveals, first, that the sentence in the present case is lower, in most cases by a considerable margin, than any of those considered above, notwithstanding the high level of objective gravity and moral culpability to which

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72 *Elomar* (2010) 264 ALR 759, 777 [68] (Whealy J).

73 *Khalid v The Queen* [2020] NSWCCA 73, [84] (Bathurst CJ).

we have referred.

103 The Director informed us that the only lower sentence imposed for this offence was in *R v Bayda & Namoa* where two 18 year olds had planned violent street attacks or robberies against non-Muslims on New Year's Eve.[74] The offenders had instructions for stabbing a person and making a bomb on their phones, and possessed knives and an ISIS flag. Sentences of 4 years and 3 years and 9 months were imposed. Although they pleaded not guilty, the offenders had renounced violent jihadist ideology. The sentencing judge regarded each of them as demonstrably immature and one had a history of mental health problems. He described the extent of preparations as 'very limited'.[75] The facts of this case reveal it to be markedly less serious than those considered above.

104 Secondly, the offending in *Abbas* had quite some similarity to the present case, involving an intended mass casualty event at a crowded public place, albeit that planning was more advanced in that case than here. The other key distinguishing factor is the present respondent's remorse and renunciation and his prospects of rehabilitation. Even so, both Abbas and the respondent pleaded guilty and there is a striking discrepancy between the present sentence of 10 years and that of 24 years (described by this Court as moderate) in *Abbas*. That discrepancy is magnified by the fact that *Abbas* was a conspiracy charge.[76]

105 Thirdly, the young offenders in *MHK* and *Besim* were each sentenced to longer periods of imprisonment than the present respondent. The offender in *MHK* had renounced and denounced ISIS. His preparation was more advanced than that of the respondent, but at 17 years of age his youth was a significant factor. In *Besim*, the intended terrorist act — involving as it did a plan to kill one person and not the mass murder of civilians — while utterly appalling, was on a much lesser scale than that of the respondent. He had not renounced violent jihad, but at 18 years of age when he offended, his sentence of 14 years' imprisonment sits in stark contrast to the 10 year sentence in this case. It cannot be escaped that the benefit of youth in the

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74 [2019] NSWSC 24.

75 Ibid [111] (Fagan J).

76 See n 58 above.

present case must be less than in these two cases, albeit that the difference in age is only two or three years.

106 Finally, consistently with other sentences in the order of 20 years imposed after guilty pleas, the offender in *Khaja* received a sentence of 19 years after conducting reconnaissance for a terrorist act intended to kill up to 50 people. He was then 18 years old, but on the other hand displayed no remorse. Again, the difference with the present case is striking.

107 When all these matters are taken together, we are compelled to the conclusion that the sentence imposed was outside the permissible range and the appeal must be allowed. We have already remarked on the objective gravity of the offending, measured especially by reference to the terrorist act in contemplation, and the respondent's moral culpability. In our view, the sentence imposed fails sufficiently to denounce the offending or to serve as a general deterrent of this kind of conduct. Without exhaustively listing the mitigating features which the judge canvassed, in terms with which we agree, it goes without saying that the respondent's renunciation of ISIS and his positive prospects of rehabilitation are important considerations in reducing what would otherwise have been a significantly higher sentence.

108 We consider that the respondent should be resentenced to a term of 16 years' imprisonment, with a non-parole period of 12 years.[77]

109 Section 6AAA of the *Sentencing Act 1991*, to the extent that it applies to Commonwealth offences (which we need not decide), requires the Court to state the sentence and non-parole period it would have imposed but for the plea of guilty. We assume for that purpose that the respondent had pleaded not guilty but that all other sentencing considerations, including the evidence of his renunciation and denunciation of terrorism, remained applicable. On that somewhat artificial basis, if not for the respondent's plea of guilty, we would have sentenced him to a term of 20 years' imprisonment with a non-parole period of 15 years.

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[77] Section 19AG of the *Crimes Act 1914* (Cth) requires the Court to fix a non-parole period of at least 75 per cent of the sentence.