SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2021 0032

AHMED MOHAMED | Applicant

v

THE QUEEN | Respondent

JUDGES:	MAXWELL P, EMERTON and SIFRIS JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	1 April 2022
DATE OF JUDGMENT:	13 July 2022
MEDIUM NEUTRAL CITATION:	[2022] VSCA 136
JUDGMENT APPEALED FROM:	[2019] VSC 775 (Beale J)

CRIMINAL LAW – Appeal – Sentence – Terrorism offences – Total effective sentence 38 years – Non-parole period 28 years and 6 months – Cumulation on existing sentence – Whether sentence manifestly excessive – Principle of totality – Avoidance of crushing sentence – Public interest in promoting rehabilitation – Reasonable prospects of rehabilitation – Young offender – Denunciation of Islamic State – Family hardship – Crown concession – Failure to take into account relevant consideration – Appeal allowed – Applicant resentenced – Total effective sentence 32 years – Non-parole period 24 years – *DPP v Bowen* [2021] VSCA 355, *Azzopardi v The Queen* (2011) 35 VR 43, *Totaan v The Queen* [2022] NSWCCA 75, *Markovic v The Queen* (2010) 30 VR 589 – *Crimes Act 1994* (Cth) ss 16A(1), 16A(2)(p).

Counsel

Applicant:	Mr D Dann QC with Mr C Parkin
Respondent:	Mr N Robinson QC with Ms K Breckweg

Solicitors

Applicant:	Lawyers Corp
Respondent:	Mr S Bruckard, Commonwealth Solicitor for Public Prosecutions

MAXWELL P
EMERTON JA
SIFRIS JA:

Summary

1 This is a most unusual sentence appeal. As will appear, the applicant was sentenced twice within a matter of months for two separate terrorism offences. On the first occasion, in July 2019, he was sentenced to 22 years' imprisonment. On the second occasion, in November 2019, he was sentenced to 26 years' imprisonment.

2 Those are, plainly, very substantial sentences of imprisonment. Yet the applicant has not sought leave to appeal against either sentence. The only complaint he now brings to this Court concerns the order for cumulation made on the second occasion. The judge ordered that 16 years of the second sentence should be served cumulatively on the first sentence of 22 years, giving a total effective sentence of 38 years.

3 The applicant makes no separate attack on the non-parole period of 28 years and 6 months, as it represented the statutorily-prescribed proportion of the head sentence. The non-parole period would need to be adjusted downwards proportionately should the challenge to the total effective sentence succeed.

4 The question for determination, therefore, is a question of totality. As this Court said recently in *Director of Public Prosecutions v Bowen*:[1]

> The principle of totality is, essentially, a principle of proportionality. Put another way, totality is a particular expression of the foundational sentencing principle that a sentence should be proportionate to the criminal conduct for which it is imposed. In the ordinary case where sentence is to be imposed for multiple offences, the principle of totality requires the court to ask itself whether the proposed total effective sentence is proportionate to the aggregate criminality involved in all of the offending.[2]

5 The applicant also invokes what is said to be a distinct consideration, namely, that the total effective sentence should not be 'crushing'. As will appear, 'crushing' is a term used to capture the notion that a sentence should not be so long as to 'induce a feeling of helplessness in an offender and destroy any reasonable expectation of a useful life after their release from custody'.[3]

6 The preponderance of authority favours the view — with which we respectfully agree — that there is no separate sentencing principle requiring that a 'crushing' sentence be avoided. Rather, it is a particular expression of the fundamental sentencing principle of rehabilitation, which requires that the sentence to be imposed should, so far as possible consistently with the other sentencing purposes to be served, promote the rehabilitation of the offender.

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1 [2021] VSCA 355.

2 Ibid [7] (Maxwell P, Priest, McLeish, T Forrest and Walker JJA) (citations omitted).

3 *Sayed v The Queen* (2012) 220 A Crim R 236, 259 [108] (Bass JA, Martin CJ and Hall J agreeing); [2012] WASCA 17; *Azzopardi v The Queen* (2011) 35 VR 43, 63 [69] (Redlich JA, Coghlan and Macaulay AJA agreeing); [2011] VSCA 372 ('*Azzopardi*').

7 Applying the principle of totality is, almost always, a task of real difficulty. The requirement to ensure proportionality may be stated simply enough but there is no easy method for deciding whether or not a certain term of imprisonment, measured in years, is 'proportionate' to an offender's criminal conduct. The task becomes more difficult again when, as here, the judge must somehow form a view as to the 'aggregate criminality' of quite different offences, committed on different occasions, and then determine what total sentence would be proportionate to that aggregate criminality.

8 The difficulty of the task is underlined by the wide variation in sentences imposed by Australian courts for preparatory terrorism offences of the kind committed by this applicant. In *Director of Public Prosecutions (Cth) v Ali*,[4] this Court reviewed a number of comparable cases before concluding that a sentence of 10 years' imprisonment for a very serious preparatory offence was manifestly inadequate, and should be increased to 16 years. Both that decision, and the sentencing decisions reviewed, would suggest that the sentence of 26 years imposed on the applicant was very severe indeed, notwithstanding his plea of not guilty.[5]

9 For reasons which follow, we have concluded that the head sentence of 38 years infringes the principle of totality. Central to that conclusion is the vital public interest in promoting the applicant's rehabilitation, on which protection of the community depends. As will appear, the judge was satisfied that the applicant had renounced his extremist ideology and had 'reasonable prospects of rehabilitation'. The applicable sentencing objectives can, in our view, be sufficiently served by a lower head sentence (32 years) and non-parole period (24 years).

10 The applicant needs an extension of time within which to seek leave to appeal against the second sentence. The Crown does not oppose the application. An application seeking an extension of time within which to seek leave to appeal against the first sentence was abandoned prior to the hearing. We will therefore grant the extension of time, grant leave to appeal, allow the appeal and resentence the applicant.

11 Following the hearing, the applicant sought leave to add a further ground of appeal, relying on the recent decision of the New South Wales Court of Criminal Appeal in *Totaan v The Queen*.[6] We deal with that application later in these reasons.

Background

12 The applicant was found guilty by a jury of one charge of conspiring to do acts in preparation for, or planning, a terrorist act. Sentencing was deferred pending the outcome of a second trial involving further charges against the applicant for other terrorist offences within the same time period.

13 The second trial also ended in a guilty verdict. The applicant was convicted of one charge of attempting to engage in a terrorist act and one charge of engaging in a terrorist act. He was sentenced for those offences by Tinney J as follows ('first sentence'):[7]

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4 [2020] VSCA 330 ('*Ali*').
5 Ibid [91]–[102].
6 [2022] NSWCCA 75 ('*Totaan*').
7 *R v Mohamed* [2019] VSC 498 ('Reasons for First Sentence').

Charge	Offence	Max penalty	Sentence	Cumulation
1.	Attempt to engage in a terrorist act contrary to ss 11.1(1) and 101.1(1) of the *Criminal Code* (Cth) by virtue of s 11.2A *Criminal Code*	Life	8 years	4 years
2.	Engage in a terrorist act contrary to ss 101.1(1) of the *Criminal Code* by virtue of s 11.2A *Criminal Code*	Life	18 years	Base
Total Effective Sentence:		22 years' imprisonment		
Non-Parole Period:		17 years' imprisonment		
Pre-Sentence Detention Declared:		703 days (20 August 2017 to 24 July 2019)[8]		

14 Beale J subsequently sentenced the applicant to 26 years' imprisonment for the offence of which he had been convicted at the first trial ('second sentence').[9] His Honour directed that 16 years of that sentence be served cumulatively on the sentence imposed by Tinney J, making a total effective sentence of 38 years. Under s 14(1) of the *Sentencing Act 1991*, a new non-parole period of 28 years and 6 months was fixed.

15 As noted earlier, the applicant does not challenge the head sentence imposed on him for the preparatory offence. Instead, his focus is on the order for cumulation of 16 years of that sentence. He contends that the resulting total effective sentence of 38 years infringes the principle of totality and is a crushing sentence.

16 It is therefore necessary to examine the circumstances of both sets of offences, in order to determine whether the total effective sentence is proportionate to the total criminality.

First sentence: circumstances of the offending

17 On 25 November 2016, the applicant and a co-offender set fire to the Imam Ali Islamic Centre (the 'mosque'), a Shia Islamic community prayer and religious centre located in a suburban street in Fawkner. The fire burned a small section of carpet but burned out. This conduct was the subject of charge 1 on the indictment.

18 On 11 December 2016, the applicant and two co-offenders succeeded in setting fire to the mosque, leading to its substantial destruction by fire. This conduct was the subject of charge 2 on the indictment.

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8 The applicant was charged with these matters on 20 August 2017. He had previously been arrested in relation to the other matter on 22 December 2016.

9 *R v Abbas* [2019] VSC 775 ('Reasons for Second Sentence').

19 Both events took place in the early hours of the morning when the mosque was unattended. Each offence was done with the intention of advancing a political, religious or ideological cause, namely Sunni Islam.

Reasons for sentence

20 In careful and considered reasons for sentence, the judge considered the following matters:

- the course of the trial;
- the nature and circumstances of the offences, including the prosecution and defence submissions on the matter;
- the effect of the crime on its victims;
- sentencing purposes; and
- where the case sits in the spectrum of seriousness.

21 In respect of the first of these matters, the judge noted that the applicant denied involvement in either offence.[10] He made it clear to the jury that the central issue in his trial was the identity of the offenders.[11] The applicant denied that he was one of them.[12]

22 The judge then set out the nature and circumstances of the offences. His Honour made clear that while he accepted that the particular crimes were less serious than those involving the planned or achieved causation of death or serious injury, they were clearly serious examples of a crime of engaging and attempting to engage in a terrorist act.[13]

23 His Honour said he was satisfied that it was not the intention of the offenders that the fire would spread beyond the confines of the mosque.[14] However, the judge considered that the potential for that to occur was real and numerous fire fighters were put in harm's way trying to control the huge fire.[15]

24 The judge concluded his analysis of the offending as follows:

> As I mentioned earlier, [defence counsel] made the submission on your behalf, Mohamed [the applicant], that the destruction of the mosque in this case was something which targeted a discrete minority, and that as a result, the same kind of reverberations would not flow from this crime as from one aimed at the community as a whole. It was submitted that the message from this crime would not, to the same extent, be sheeted home to the community as a whole, causing the community at large to feel a sense of danger or terror. For that reason, it was submitted, the crime was less serious. That was not a submission in which, as I perceived it, counsel for the other accused joined. The prosecutor took issue with it. As he put it, the law is there to protect all, and 'an affront upon our society by attacking a group of believers is an affront upon us all'.

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10 Reasons for First Sentence [50].
11 Ibid.
12 Ibid.
13 Ibid [83].
14 Ibid [94].
15 Ibid.

> I agree with the prosecutor. Shia Muslims living peacefully in our community, whether a minority or not, are an integral part of that community. An attack upon them was an attack upon the community. It was an attack which would cause a great sense of discomfort to all fair minded members of our community.
>
> All things considered, the terrorist crime carried out by the three of you which led to the destruction of the mosque was an exceedingly serious offence, involving a very high degree of moral culpability, and deserving of condign punishment.[16]

25 The judge drew a distinction between a terrorist act involving the destruction of property and an act involving the killing and maiming of innocent people. The distinction is properly drawn.[17] Although the killing of innocent people is self-evidently more serious than the destruction of property, all acts of terrorism are by their very nature extremely serious.

26 The judge rejected a submission on behalf of the applicant that an act of terrorism against a particular group or section of the community, in this case the Shia Muslim community by the attempted destruction and ultimately the destruction of its mosque, was not as serious as the equivalent terrorist act against the broader community. A ground of appeal directed to this point was abandoned.

27 The suggested distinction is self-evidently perverse. In a multi-cultural liberal democracy, governed by the rule of law and civil society, the notion that an attack on one group does not affect or instil fear in others to the same extent is unsustainable. The critical feature of an act of terrorism is the use of extreme violence in order to intimidate and create fear in the community in order to pursue a political, religious or ideological cause. This, by its very nature, affects everyone.

28 The judge also considered the effect of the crimes on its victims. While no victim impact statements had been filed and no material had been placed before the Court pointing to effect of the crime on any victims, the judge accepted that the crime clearly had victims.[18] His Honour said that the members of the mosque would have undoubtedly been traumatised.[19] His Honour also took into account the 'obvious fact' that this was a crime against the broader community as well.[20] The judge said, '[t]he brazen destruction of a place of worship, no matter whether someone else's place of worship or not, carried out for the evil reasons at the heart of this crime, would have troubled the broader community as well'.[21]

29 The judge noted that he was required to protect the community from the prospect of future offending by the applicant.[22] The sentences would therefore involve lengthy non-

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16 Ibid [95]–[97].
17 Ibid [83], [87].
18 Ibid [178].
19 Ibid.
20 Ibid.
21 Ibid.
22 Ibid [192].

parole periods, during which time the offenders would be incapacitated from committing terrorist offences against the wider community.[23]

30 As to the relative seriousness of the offences, the judge said:

> Having considered all of the objective circumstances of the offending which has brought you before this Court, I am driven to the conclusion that your crimes, whilst clearly very serious, were in the mid-range of seriousness of such offences. There is no real indication of remorse or regret in any of you, other than regret for the situation in which you find yourselves. There are few mitigating circumstances. Your offending is deserving of, and can only be met by, very lengthy terms of imprisonment.[24]

31 In concluding his reasons, the judge said:

> The objective circumstances of the intended crime at the heart of the conduct of each of you are very serious. You harboured extreme and unacceptable views about many things, and in particular, where this case is concerned, about the place of Shia Muslims in the world, and in this peaceful society of which you were members. Intending to advance the extreme ideology which was important to you, and in order to intimidate a group of people whom you detested for no legitimate reason at all, you carried out this callous, cowardly, vindictive and shameful attack upon the Imam Ali Islamic Centre. This, of course, as I made clear earlier, was far more than an attack upon a mere building. It was an attack upon a branch of your faith. It was an attack upon people entitled in our society to freely practise their religious beliefs, without interference. It was an attack upon society as a whole.
>
> The sentences I will shortly pass upon each of you are designed to protect the community, to appropriately punish you for your offending, to clearly denounce your conduct, to deter you from any like offending in future, and to send a very clear message to like-minded people in this community who would contemplate planning for and carrying out a terrorist attack that if caught, they will be subject to very strong punishment.[25]

Second sentence: circumstances of the offending[26]

32 From late October 2016 until their apprehension in December 2016, the applicant and three co-offenders (Abdullah Chaarani ('Chaarani'), Hamza Abbas ('Abbas') and Ibrahim Abbas ('Ibrahim'))[27] engaged in a number of preparatory acts towards committing a terrorist act. The preparatory acts, described in more detail below, included:

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23 Ibid.
24 Ibid [202].
25 Ibid [206]–[207].
26 This summary is adopted from the Reasons, [5]–[40].
27 The applicant was jointly tried with Chaarani and Abbas. Ibrahim pleaded guilty at the first reasonable opportunity and was sentenced to 24 years' imprisonment with a non-parole period of 20 years. He gave evidence at the applicant, Chaarani and Abbas' trial.

(a) purchasing chemical, explosive substances and mechanical and electrical components for use in the manufacture of improvised explosive devices (IEDs);

(b) taking steps towards manufacturing and testing IEDs;

(c) purchasing bladed weapons;

(d) taking steps to gain access to firearms; and

(e) conducting reconnaissance of potential target areas of Federation Square, Flinders Street Train Station and Saint Paul's Cathedral.

IEDs

33 First, the applicant and a co-offender, Chaarani, accessed instructions for making IEDs. They took photographs of bomb-making instructions published in an online terrorist magazine called Inspire. The Inspire article was titled 'Make a bomb in the kitchen of your Mom'. The instructions specified a number of materials and components for an IED, including an inflammable substance (such as match heads, cartridge gunpowder or fireworks powder), a decoration lamp, iron pipe, a 9-volt battery, electrical wire and shrapnel (such as steel pellets or small nails). The applicant stored those instructions on his phone.

34 The applicant accessed YouTube videos depicting the ignition of party sparklers. He also sent a link to the video 'How to build a 5000 sparklers bomb' to a WhatsApp Group including Chaarani. He also accessed a video released by ISIS titled 'You must fight them, O Muwahid'. The video contained instructions on how to make an IED using the highly explosive substance triacetone triperoxide ('TATP'), one of the ingredients of which is hydrogen peroxide.

35 Second, the applicant was involved in the acquisition of materials for making IEDs. On 21 November 2016, he and the co-offender Ibrahim purchased 300 Red Ramset cartridges (which contain gunpowder and are used in nail guns), 2 pipe pieces, 1 pipe end and 1 pipe plug. On 2 December 2016, in company with Abbas and Ibrahim, he purchased a bottle of hydrogen peroxide which, as mentioned above, is used in the production of TATP. On 22 December 2016, the applicant purchased another 700 Red Ramset cartridges.

36 Third, the applicant was involved in attempting to make IEDs. On 23 October 2016, he asked Chaarani if he had any screws or nails, which he wanted for shrapnel as suggested in the Inspire article. He and Chaarani spent many hours together attempting to construct an IED.

37 On 21 November 2016, he and Ibrahim attempted to make an IED with tools including a drill which he sourced from Chaarani. On 2 December 2016, as previously mentioned, the applicant purchased hydrogen peroxide.

38 On 4 December 2016, the applicant spoke to Chaarani about a failed attempt to make TATP, saying:

> [Y]ou know, the — the yesterday thing at my house? ... It's — it's — there's nothing, there's no difference, bro, it's — it's the same thing. There's no improvement, nothing ... I was so happy this that. I'm opening the fridge, I'm like, far, same thing. Disappointed, bro. Very disappointed.

39 The applicant and Chaarani admitted in testimony at their plea hearing that they successfully made a working IED.

40 Fourth, the applicant, Chaarani, Abbas and Ibrahim, were involved in testing IEDs.

41 On 21 November 2016, the applicant, Chaarani and Ibrahim, drove to Clonbinane in Ibrahim's car. This was the first of three trips that they made to that remote spot late at night. At their plea hearing, the applicant and Chaarani admitted that the purpose of the visits was to test the IEDs.

42 Chaarani, encouraged by the applicant, took steps towards obtaining a firearms licence. On 8 December 2016, the applicant and Chaarani messaged each other about steps Chaarani was taking to get a firearms licence. The applicant was impatient with Chaarani's progress. Chaarani registered his interest with the relevant government department in relation to hunting pest animals on Crown land as a precursor to getting a firearms licence.

43 On 14 December 2016, the applicant viewed an advertisement on Facebook for the sale of five Adler brand lever-action shotguns. On the same day, Abbas undertook a number of Google searches regarding obtaining a firearms licence and downloaded the Victorian Firearms Application Form for Category A and B firearms.

44 On 20 December 2016, Chaarani rang Sunbury Police Station and enquired about registering for a firearms course.

Bladed weapons

45 On 4 November 2016, Chaarani received an email from eBay in relation to a Muela Mirage brand hunting knife and leather sheath. The email indicated that Chaarani had recently viewed the item and enquired whether he would like to look further at that knife and suggested other knives which might be of interest to him. A Muela Mirage hunting knife was seized from Chaarani's premises after his arrest.

46 On 21 December 2016, Chaarani and Ibrahim attended 'Boating Camping Fishing' in Coburg where Chaarani purchased two Gerber machetes which he said he wanted for hunting. When Ibrahim dropped him at home, he retained one of the machetes.

Reconnaissance

47 On 20 December 2016, the applicant told Chaarani that 'we need to go to — to the city for a drive ... after we finish training, do you reckon? ... there'll be no traffic then.' Chaarani, said 'Yeah, all right'. The applicant said 'Bro, this is more important than anything else ... if you've got any plans, cancel because, by Allah, this is very important, very, very important. We're running out of time.' Chaarani, replied, 'Oh okay, okay, no worries.'

48 The four men met up at the Hume Islamic Youth Centre ('HIYC') at approximately 6.30pm. They spent some time walking and talking together outside HIYC then travelled together in Chaarani's car to the CBD where they all got out of the car and spent time reconnoitring Federation Square, Flinders Street Station and St Paul's Cathedral. At one point, CCTV captured Ibrahim making a chopping motion to the neck of one of them. By Ibrahim's own admission, he was demonstrating how easy it is to kill someone with a blade.

Reasons for Sentence

49 First, in relation to the objective seriousness of the offences, the judge said:

> The offence of which you have each been convicted carries a maximum penalty of life imprisonment.
>
> Yours is an upper range example of the offence for several reasons.
>
> First, the preparatory acts referred to above were done in contemplation of mass slaughter.
>
> Second, that mass slaughter was to occur in the heart of the city of Melbourne to maximize terror.
>
> Third, that mass slaughter in a very public place was to occur at a time of particular significance to many Australians — Christmastime.[28]

50 Because he was sentencing for conspiracy, the judge said he bore in mind what this Court said in *Director of Public Prosecutions v Fabriczy*:[29]

> The extent of the offender's participation in the combination, established by reference to his or her individual acts and declarations, will inform but not determine the conclusion as to the offender's degree of criminality. The individual offender is to be punished for involvement in the conspiracy and not just for the acts that he or she performed. The sentencing judge therefore needs to assess, for the purpose of sentencing the individual conspirator, the 'content and duration and reality' of the conspiracy, and what is actually done in transaction of it, as well as the role of the offender before the court.[30]

51 As to mitigation, the judge noted that, although the applicant did not get the benefit of a significant discount for an early guilty plea, he did get the benefit of having given evidence at the plea hearing publicly renouncing Islamic State (IS) and violent jihad.[31] Furthermore, the judge said, the applicant would get the benefit of having admitted guilt in the course of that testimony and of having — by doing so — forfeited his right of appeal against conviction.[32]

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28 Reasons for Second Sentence, [46]–[50].

29 (2010) 30 VR 632; [2010] VSCA 334.

30 Ibid 638 [17] (Maxwell P, Neave and Redlich JJA) (citations omitted).

31 Reasons for Second Sentence, [60].

32 Ibid.

52 The judge considered that these two developments supported a finding that the applicant was genuinely on the path of de-radicalisation.[33] In his Honour's view, that finding did not entitle the applicant to the same discount as he would have received if he had pleaded guilty at the earliest reasonable opportunity, but it was nevertheless deserving of a significant discount.[34]

53 The judge summarised the applicant's mitigating circumstances as follows:

> First, at your plea hearing you gave evidence renouncing IS and violent jihad. Second, in your testimony you admitted your guilt of the current offence, effectively abandoning any appeal against your conviction. Third, you are genuinely on the path of de-radicalisation. Fourth, you are remorseful for your offence. Fifth, you have used your time in prison productively. Sixth, your prior convictions are few and of limited significance. Seventh, you have reasonable prospects of rehabilitation.[35]

54 Turning to the principle of totality, the judge noted this was relevant to the applicant because he was currently undergoing a sentence for other matters.[36] As his Honour noted, defence counsel had submitted on the plea that the key sentencing issue was the degree to which concurrency was ordered with the first sentence. Counsel had called in aid the principle of totality and the need to avoid a crushing sentence.[37]

55 In relation to totality, the judge referred to this Court's statement in *R v Mangelen*[38] as follows:

> Historically, the principle of totality had been applied in circumstances where an offender fell to be sentenced for multiple offences to ensure that the aggregation of the sentences was a just and appropriate measure of the offender's criminality. The ambit of the principle was extended to apply where the offences upon which the offender must be sentenced overlap with or will be cumulative upon an existing custodial sentence. In both of these situations, the principle requires the court to consider the total criminality involved in all of the offences for which the offender is to be sentenced and the offences for which the offender is currently serving a sentence.
>
> The court must evaluate the overall criminality involved in all of the offences so as to ensure that there is an appropriate relativity between the totality of the criminality and the totality of the effective length of the sentences to be and which have been imposed. If the total sentence is an unjust or inappropriate measure of the total criminality involved, the sentence which the offender is required to serve will be moderated so that the aggregate of sentences imposed by reason of cumulation is not greater than any sentence required to fulfil the totality principle. The principle is to be applied to both the fixing of the head

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33 Ibid.
34 Ibid [61].
35 Ibid [180].
36 Ibid [72].
37 Ibid [76].
38 (2009) 23 VR 692; [2009] VSCA 63.

sentence and the non-parole period.[39]

56 The judge also referred to the following statement by Nettle JA in *R v Beck*[40] regarding 'crushing sentences':

> [T]he notion of a crushing sentence ... is generally conceived of as one that is imposed in such a way that it would provoke a feeling of helplessness in the applicant if and when he is released or as connoting the destruction of any reasonable expectation of useful life after release.[41]

57 The judge then said:

> I accept that there should be substantial concurrency to give effect to those two principles but, as I indicated in discussion, there must necessarily be substantial cumulation too. Neither defence counsel nor the prosecutor took issue with that approach.
>
> In the course of discussion, I indicated that the current offence was a much more serious offence than the terrorist offences for which Tinney J sentenced you, Chaarani and Mohamed. Nothing I said in the course of the plea hearing should be interpreted as belittling the seriousness of the matters dealt with by Tinney J, but here what was contemplated was a terrorist act involving mass slaughter (rather than property damage) and, consequently, the gravity of the conspiracy must be seen in that light.[42]

58 Moving to sentencing principles directed specifically to terrorist offences, his Honour set out the following passage from this Court's decision in *Director of Public Prosecutions (Cth) v MHK*:[43]

> [I]t is important to bear in mind that the statutory offence created by s 101.6 of the *Criminal Code* was designed to ensure that persons, who plan to commit dangerous acts of terror in our community, be intercepted early, well before they are able to perpetrate such acts and thereby cause the appalling casualties that invariably result from acts of terror. It is for that reason that an assessment of the criminal culpability of a person, convicted of such an offence, is not measured purely by the steps and actions taken by the offender towards the commission of the act of terror, but, in addition, by a proper understanding and appreciation of the nature and extent of the terrorist act that was in contemplation, and to which those steps were directed.

59 His Honour continued: 'In my opinion, these remarks are equally applicable to a conspiracy to do acts in preparation for or planning a terrorist act.'[44]

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39 Ibid 697 [28] (Redlich JA, Ashley JA agreeing at [1]) (citations omitted).
40 [2005] VSCA 11.
41 Ibid [19] (Vincent JA agreeing at [27], Cummins AJA agreeing at [28]).
42 Reasons for Second Sentence, [79]–[80].
43 (2017) 52 VR 272, 286 [48] (Warren CJ, Weinberg and Kaye JJA); [2017] VSCA 157 (citations omitted).
44 Reasons for Second Sentence, [84].

60 The judge concluded his reasons by noting that s 16A(1) of the *Crimes Act 1994* (Cth) ('*Crimes Act*') required him to impose a sentence that was of a severity appropriate in all the circumstances of the offence.[45] He further noted that s 16A(2) stipulates a non-exhaustive list of mandatory sentencing considerations in respect of federal offences, relevantly:

> (a) the nature and circumstances of the offence;
>
> (e) any injury, loss or damage resulting from the offence;
>
> (f) the degree to which the person has shown contrition for the offence:
>
> (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
>
> (ii) in any other manner;
>
> (j) the deterrent effect that any sentence or order under consideration may have on the person;
>
> (ja) the deterrent effect that any sentence or order under consideration may have on other persons;
>
> (k) the need to ensure that the person is adequately punished for the offence;
>
> (m) the character, antecedents, age, means and physical or mental condition of the person;
>
> (n) the prospect of rehabilitation of the person;
>
> (p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.[46]

61 In respect of these considerations, the judge said:

> I have already considered (a), the nature and circumstances of the offence, at length.
>
> In relation to (e), the community as a whole is the victim of your offending which, although it was preparatory in nature, still constitutes an assault on fundamental values of our society including respect for each person's dignity regardless of creed.
>
> In relation to (f), contrition and reparation, I consider that you, … Mohamed, have shown contrition and made some reparation for your offence by giving evidence and publicly renouncing IS and violent jihad.
>
> In relation to (j), specific deterrence, the imposition of a sentence which strongly deters you from further offending is an important sentencing consideration given the horrifying nature of the terrorist act that you contemplated.

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45 Ibid [181].

46 Ibid [182].

> In relation to (ja) general deterrence, the sentence I impose must act as a strong deterrent to other would-be terrorists.
>
> In relation to (k), adequate punishment, suffice to say at this stage that you each fall to be sentenced for an upper range example of the offence in question, which carries a maximum sentence of life imprisonment.
>
> As regards (n), prospects of rehabilitation, … you … Mohamed, I am prepared to make the same finding [that prospects of rehabilitation are reasonable] mainly because of your unchallenged evidence publicly renouncing IS and your admission of your guilt, effectively forfeiting your right of appeal against conviction.
>
> As regards (p), family hardship, your incarceration for many years will necessarily impact heavily on your family, but such hardship must be out of the ordinary before it could justify a reduction in your sentences. Understandably, no such submission was made by your counsel.[47]

62 The judge concluded:

> As previously mentioned, when discussing sentencing principles in relation to terrorism offences, the sentences I impose must emphasise just punishment, denunciation, general and specific deterrence and protection of the community.
>
> Subjective considerations such as youth, previous good character and prospects of rehabilitation are of reduced significance given the gravity of your offending.[48]

Analysis

63 As noted earlier, the question of totality directs attention to the aggregate criminality involved in the offences in question. So far as the conspiracy offence is concerned, some guidance is provided by this Court's decision concerning one of the applicant's co-conspirators, Ibrahim Abbas, who was sentenced to 24 years' imprisonment for his participation in the conspiracy. Unlike the applicant, Ibrahim had pleaded guilty at the earliest opportunity. At the same time, he had shown no remorse and there was no sign of renunciation of his extreme beliefs. The judge found that it was a significant aggravating factor in Ibrahim's case that he had recruited his brother.

64 Ibrahim's challenge to the sentence of 24 years failed. In *Abbas v The Queen*,[49] the Court said:

> 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. …

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47 Ibid [183]–[190].

48 Ibid [191]–[192].

49 [2020] VSCA 80.

> 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 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.[50]

65 The totality enquiry does not, of course, end with an assessment of the aggregate criminality involved in the offending. The total effective sentence will only satisfy the requirement of proportionality if it is a 'just and appropriate measure of the total criminality involved'.[51] That point was made clearly in *Azzopardi v The Queen*, where this Court said:

> The rationale underlying the principle is that a 'just measure' of an offender's total criminality is a sentence which satisfies all sentencing objectives applicable to the entirety of that criminal conduct. Only implicitly in all of the statements of the principle of totality in its application is the proposition that a sentencing judge undertaking the adjustment of the sentence does so in order to ensure that the final sentence is no more than is necessary to satisfy the various objectives of sentencing. Considerations of mercy may further influence the sentencing judge to increase any downward adjustment.
>
> …
>
> All of the individual sentences including the largest, usually the base sentence, must reflect all relevant sentencing objectives where the preferred method of adjustment of sentences is followed. Punitive sentencing objectives such as denunciation, deterrence, retribution and community protection as well as matters in mitigation will then ordinarily be satisfied by relatively modest orders for cumulation on the base sentence. An aggregate sentence must be arrived at that is sufficient punishment, but no more than is necessary to satisfy those sentencing objectives. It will then be proportionate to the offender's overall criminality.[52]

66 In the present case, there are other sentencing objectives of great significance. Foremost amongst them, in our view, is the need to maximise the applicant's prospects of rehabilitation. When attention is directed to rehabilitation, the sentencing court is not — as is sometimes misleadingly suggested — giving priority to the private interests of the offender. Rather, the court is concerned with the community's interest in minimising the risk of further offending following the completion of the sentence. Self-evidently, that objective — of reducing the risk of reoffending — is of particular importance in a case like the present, where the offender has committed offences of such seriousness.

67 The judge's findings about the applicant's prospects of rehabilitation were, therefore, of great importance. As noted earlier, the applicant took the unusual course of giving evidence at his own plea hearing, renouncing Islamic State and violent jihad. In the

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50 Ibid [67]–[68] (Priest, Kaye and T Forrest JJA) (citations omitted).

51 *Postiglione v The Queen* (1997) 189 CLR 295, 307–8 (McHugh J); [1997] HCA 26.

52 (2011) 35 VR 43 61–2 [61]–[62], [66] (Redlich JA); [2011] VSCA 372, [61].

course of giving evidence, he admitted his guilt of the offences of which he had been convicted, thus abandoning any possibility of appeal against conviction. Crucially, his Honour found that the applicant was 'genuinely on the path of de-radicalisation', was remorseful, had used his time in prison productively and had 'reasonable prospects of rehabilitation'.[53]

68 In order to record the applicant's 'very public renunciation of IS', the judge set out parts of what the applicant had said in evidence, as follows:

> You testified about your disappointment and sense of betrayal when you did not receive any support from IS after being imprisoned, that you felt like they 'turned their back' on you.
>
> You said this about IS:
>
>> Now, I hate them ... Anyone that follows them is only going to go to gaol or get killed, and there's no martyrdom through ISIS. All the scholars, the Islamic scholars and the — and the Islamic religion everywhere is against them, and this is for a good reason, and I'm against them too.
>
> As regards non-Muslims, you said this:
>
>> Well, … as God says in the Quran, um, God does not prevent you from being just and fair and kind to the people that did not kick you out of your homes. In Australia, I — I have a home. This is my country. Like, um, so there's no reason at all, from the basis of the Quran, that I should fight or kill or whatever. So this is how I've changed now.
>
> The prosecution did not challenge your claims about de-radicalisation when cross-examining you or in submissions. But they emphasised, and I accept, that de-radicalisation is a gradual process, especially where the person concerned, like you and Chaarani, has demonstrated a longstanding enthusiasm for IS and violent jihad and was prepared to participate very actively in the kind of conspiracy of which you were convicted.[54]

69 Given that the applicant's motivation to commit both sets of offences rested entirely on his beliefs about IS, his renunciation of those beliefs is self-evidently of great importance. Accepting the genuineness of the applicant's renunciation, as the judge did, means that the risk of him reoffending is very greatly reduced. He has not otherwise shown a disposition to engage in serious criminal conduct.

70 It follows, as senior counsel for the applicant correctly submitted, that considerations of community protection and specific deterrence — ordinarily considerations of great significance in cases such as this — are of very much less importance than they would otherwise be. On the judge's findings, the applicant is not a person who needs to be 'incapacitated' in order to protect the community.[55] His sentence is directed principally to just punishment, denunciation and general deterrence.

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53 Reasons for Second Sentence, [180].

54 Ibid [172]–[175].

55 As to the link between community protection and incapacitation, see *Elomar v The Queen* [2014] NSWCCA 303, [703]–[704] (Bathurst CJ, Hoeben CJ at CL, Simpson J).

71 We turn, finally, to the related question of whether the total effective sentence of 38 years is ‘crushing’. At the request of the Court, both parties filed very helpful supplementary submissions on how the need to avoid a ‘crushing’ sentence should be understood as fitting within the framework of sentencing principles and, in particular, on how it relates to the sentencing purpose of rehabilitation.

72 It was common ground that rehabilitation is precisely what is at issue here. Thus, the Director submitted that:

> The effect of a (typically, very long) crushing sentence is to increase the severity of the sentence on the offender and to destroy or substantially erode, rather than promote, what prospects of rehabilitation they may have or to result in them having no meaningful life after the conclusion of the sentence.[56]

73 Our attention was drawn to significant South Australian authorities on the point. In *R v Cramp*,[57] Kourakis J said:

> Where there are reasonable prospects of rehabilitation, and the requirements of punishment and deterrence otherwise allow, care should be taken not to impose a sentence which leaves the offender in a state of despair in which he abandons any inclination to reform. Where there are prospects of rehabilitation, a sentence that destroys any real capacity for the offender to reform should not be imposed unless the protection of the community demands it.[58]

74 More recently, in *Snodgrass v The Queen*,[59] the South Australian Full Court spoke of the need to avoid a sentence that might have a ‘crushing effect upon the defendant’s motivation to rehabilitate and expectations for his or her life experience following the expiry of the sentence.’[60]

75 The point is of particular significance in the sentencing of a young offender. Thus, in *R v Poynton [No 4]*,[61] Schmidt J said:

> It must also be taken into account that particularly for young people … extremely long total sentences may also be ‘crushing’, in the sense of inducing a feeling of hopelessness or destroying any expectation of a useful life after release. That can both increase the severity of a sentence and destroy such prospects as there may be of an offender’s rehabilitation and reform.[62]

76 It follows, in our view, that there is no separate sentencing principle prohibiting the imposition of a ‘crushing’ sentence. Rather, the question arises as part of the sentencing court’s necessary consideration of how best to promote the offender’s rehabilitation. The objective of rehabilitation is central to the sentencing process, albeit that it is often

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56 *R v MAK* (2006) 167 A Crim R 159, 164 [17] (Spigelman CJ, Whealy and Howie JJ); [2006] NSWCCA 381; *R v Cramp* (2010) 106 SASR 304, 318 [51] (Kourakis J); [2010] SASC 51.
57 (2010) 106 SASR 304; [2010] SASC 51.
58 Ibid [51] (citations omitted); see also *Lane v The Queen* [2020] SASCFC 82, [42].
59 [2021] SASCFC 20.
60 Ibid [73] (Hughes J, Peek and Doyle JJ agreeing).
61 [2018] NSWSC 1693.
62 Ibid [87].

in tension with other sentencing objectives which must also be served by the sentence imposed.

77 In a case like the present, the need to avoid a crushing sentence is a very significant part of the totality analysis. Their inter-relationship was explained in *Director of Public Prosecutions v Alsop*,[63] where this Court said:

> The totality principle has two limbs. First, a sentencing judge must ensure that the aggregation of the sentences appropriate for each offence are a just and appropriate measure of the total criminality involved. Second, the overall sentence should not be 'crushing' in the sense that it would destroy any reasonable expectation of a useful life after release. The critical question then is whether after allowing for mitigating circumstances the total sentence, including the parole sentences, reflects what is appropriate for the overall criminality of the convicted person.

78 In our view, the total effective sentence of 38 years would almost inevitably 'induce a feeling of hopelessness' in this applicant. The prospect of a prison sentence stretching decades into the future must inevitably affect his incentive for rehabilitation. That is, on any view, a powerful consideration.

79 That factor would not, of course, justify appellate intervention if a sentence of that length were otherwise necessary to serve the relevant sentencing objectives. But, for the reasons we have given, that is not this case. The judge's findings about the applicant's de-radicalisation and progress towards rehabilitation are very significant, as we explained earlier.

80 It follows, with respect to the sentencing judge, that it was not reasonably open to conclude that 16 years of the second sentence had to be cumulated on the original 22 years. In our view, a substantially shorter period of cumulation will be sufficient to meet the sentencing purposes of just punishment, denunciation and general deterrence while, at the same time, promoting the public interest in the applicant's rehabilitation.

Family hardship

81 Plea submissions frequently draw attention to the impact which an offender's incarceration is likely to have on the offender's family and dependants. Such considerations are generally referred to under the heading of 'family hardship'.

82 In *Markovic v The Queen*,[64] a five member bench of this Court reviewed the position at common law with respect to family hardship as a sentencing consideration. The Court reaffirmed the established position at common law, that family hardship could only be regarded as a mitigating factor in exceptional circumstances.

83 When a person is being sentenced for a Commonwealth offence, the relevant provision is s 16A(2)(p) of the *Crimes Act*, which requires the sentencing court to consider 'the probable effect of any sentence on the offender's family or dependants'. Until the recent decision in *Totaan*, courts in all Australian jurisdictions had treated s 16A(2)(p) as

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63 [2010] VSCA 325.

64 (2010) 30 VR 589; [2010] VSCA 105 ('*Markovic*').

subject to the same qualification as applies at common law, namely, that family hardship was only relevant if the circumstances were exceptional.

84 In *Totaan,* the New South Wales Court of Criminal Appeal held that this approach was plainly wrong and should not be followed. Bell P (with whom the other members of the Court agreed) pointed out that there was 'simply no textual support' in s 16A(2)(p) for the 'exceptional circumstances' qualification.

85 At the time of sentence in the present matter, the accepted national position prevailed. As noted earlier, the judge when dealing with s 16A(2)(p) said — in relation to all three co-offenders:

> Your incarceration for many years will necessarily impact heavily on your family but such hardship must be out of the ordinary before it could justify a reduction in your sentences. Understandably, no such submission was made by your counsel.[65]

86 The decision in *Totaan* was handed down after the conclusion of argument in the present appeal. The applicant's representatives then sought leave to add an additional ground of appeal, in the following terms:

> The sentencing discretion has miscarried in circumstances where the proceeding was conducted on the basis that family hardship could not be taken into account absent the demonstration of exceptional circumstances.

87 In a submission filed in support of the application to add the additional ground, counsel for the applicant argued that the addition of the ground would necessitate inviting the Court to reconsider the decision in *Markovic*. To enable this to be done, it was said, the bench of three constituted to hear the present sentence appeal should be expanded to a bench of five.

88 As the Commonwealth Director correctly points out, however, the Court in *Markovic* was not called on to consider the question of family hardship under s 16A(2)(p). As noted earlier, the question which arose for decision concerned the established position at common law. The particular issue was whether, if the circumstances of family hardship were not judged exceptional, a sentencing court could nevertheless be called on to exercise — on that ground — what was sought to be characterised as a 'residual discretion of mercy'. The Court concluded that there was no such residual discretion.

89 As to the position under the Commonwealth Act, the Court in *Markovic* simply recorded that there was a 'uniform national position' to the effect that the 'exceptional circumstances' test applied under the statute as at common law. The Court had previously applied that test for reasons of comity and national consistency.[66] In *Markovic*, counsel for the relevant applicant had conceded on the plea that the exceptional circumstances test applied under the statute. His grounds of appeal did not address that question. Nor, accordingly, was it necessary for the Court to do so.

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65 Reasons, [190].

66 See, eg, *R v Matthews* (1996) 130 FLR 230, 233 (Phillips CJ, Southwell and Hampel JJA); *R v Carmody* (1998) 100 A Crim R 41, 45 and 46 (Winneke P, Tadgell and Callaway JJA).

90 Self-evidently, the decision in *Totaan* requires this Court to revisit the question of family hardship under the Commonwealth Act. For the reasons we have given, however, the Court in doing so will not be reconsidering the correctness of the decision in *Markovic*. Rather, as correctly submitted by the Commonwealth Director, this Court's consideration will be governed by the principle of uniform interpretation laid down by the High Court in *Australian Securities Commission v Marlborough Gold Mines Ltd,* as follows:

> [U]niformity of decision in the interpretation of uniform national legislation… is a sufficiently important consideration to require that an intermediate appellate court… should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.[67]

91 Significantly, the Commonwealth Director accepts that this Court should follow *Totaan*. Her submission is that:

> [T]here is nothing in the interpretation of s 16A(2)(p) by the court in *Totaan* that would convince the Victorian Court of Appeal that the decision is 'plainly wrong'. There is nothing in the text of s 16A(2)(p) that requires family hardship to be exceptional before being taken into account. As held in *Totaan*, s 16A(2)(p) should be applied according to its terms.

92 It follows, the Director concedes, that the sentencing judge was (unwittingly) in error in that he failed to take into account a relevant consideration, namely, the 'hardship that the Applicant's family would experience following [his] imprisonment'. The Director further accepts that, in resentencing, 'some, albeit minimal weight' should be given to the probable hardship his family will experience.

93 We are content to act on those concessions. As already indicated, we had separately concluded — for reasons of totality — that this appeal must succeed and that the applicant must be resentenced. Since on a resentencing the Court must take into account up to date information about the offender, we had invited the applicant to file such additional material as he wished to rely on, bearing on the question of family hardship. We now turn to consider that evidence.

The evidence on family hardship

94 In the particular circumstances of this case, family hardship is an issue of minor significance. It is striking that there was no reference at all in the defence plea submission to the impact of his incarceration on his family. Attached to the submission was a statement from the applicant which made reference to family members, and to his son, but the references appeared under the following headings: 'What I have suffered since my imprisonment' and 'What I will probably suffer during my incarceration'.

95 There was nothing in the material to suggest that the applicant's son, who lives with and is cared for by his ex-wife, would suffer any particular hardship, beyond the obvious distress of being separated from his father for many years. We recognise, of course, that in preparing the plea submissions the applicant's representatives would have been

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[67] (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); [1993] HCA 15.

conscious of the constraints of the 'exceptional circumstances' test, as then understood to be applicable. It can safely be assumed, however, that if there were any matters of a compelling kind falling into that category, they would have been drawn to the judge's attention.

96 That assumption appears to be borne out by the affidavit material filed in response to the Court's recent invitation. The applicant's representatives have filed two affidavits, one from his ex-wife ('S') and the other from his mother ('M'). In her affidavit, S confirms that she divorced the applicant when their son was 6 months old. She had been visiting the applicant in custody, bringing her son, but found it 'an extremely daunting experience'.

97 Ultimately, S decided that it was necessary for her to divorce the applicant 'because I found it so difficult visiting him in prison so often'. Subsequently, she says, she was involved in a car accident, in which she sustained injuries to her hand, and her mental health deteriorated. On one occasion, she attempted suicide. She and the applicant 'have recently started talking again' and 'we are trying to mend our relationship'. Since reconnecting with him, she has been 'feeling much better'. The affidavit makes no mention of any adverse impact on their son.

98 In her affidavit, M states that she and her mother (the applicant's grandmother) both caught COVID-19 in October 2021. Her mother died in hospital and, since returning home, M has had no assistance from anyone and has had to manage on her own. Her mental health has been declining but she has been doing her best to help S look after the grandson. She describes herself as 'extremely lonely and sad' and says that the applicant and his son are 'the only things I have left in this world'.

99 Impacts of this kind on an offender's family are the inevitable corollary of the offender's having been found guilty of a serious crime and sentenced to a term of imprisonment. Sometimes, of course, the implications of incarceration for family members are so significant that they must weigh heavily in the sentencing calculus. But, as this affidavit material reveals, the present case is not in that category.

100 Nevertheless, in arriving at our resentencing decision, we have taken into account — consistently with the Director's concession — all of the matters placed before this Court in relation to the implications for the applicant's family.

Conclusion

101 For the reasons we have given, we will grant the extension of time, grant leave to appeal, allow the appeal, set aside the order for cumulation and, in its place, order that 10 years of the second sentence be served cumulatively on the first sentence.

102 That will result in a total effective sentence of 32 years. The non-parole period must also be set aside and a new non-parole period of 24 years' imprisonment will be fixed.