APPENDIX TO "*SOME ISSUES ARISING FROM TERRORISM TRIALS AND SENTENCING*" *

SOME SENTENCING DECISIONS

Section 101.1 of the Code – intentionally engage in a terrorist act

1 In *R v Shoma*,[1] the offender pleaded guilty to intentionally engaging in a terrorist act, namely stabbing her victim in the neck with a knife, contrary to s.101.1 *Criminal Code* (Cth) ("**the Code**"). That section provides:-

> **101.1 Terrorist acts**
> (1) A person commits an offence if the person engages in a terrorist act.
> Penalty: Imprisonment for life.

2 The details of the offence were summarised in the paper (at [142]). Taylor J noted that in sentencing the offender, it was a *"regrettable legal milestone"* because *"it is the first time in Australia that a sentence will be imposed for the offence of intentionally engaging in a terrorist act"*.[2]

3 Her Honour found that the offender was radicalised to extremist views in 2013, and upon hearing about Islamic State's caliphate in 2014, attempted to travel to Syria through Turkey in 2015.[3] In September 2014, Sheikh Al-Adnani issued a fatwa ordering adherents of the caliphate to travel to Syria, or if that was not possible, to kill disbelievers including Australians.[4]

4 The offender ultimately succeeded in receiving an offer to study in Melbourne, but it was clear that she had *"absolutely no intention of studying …* [her] *sole purpose for entering this country was to carry out a terrorist act"*.[5] Upon arriving at her first host family, she rehearsed the attack by stabbing a mattress between six to nine times where her hosts would have been lying

---

* Revised on 9 April 2020
[1] *R v Shoma* [2019] VSC 367
[2] *R v Shoma* at [52]
[3] *R v Shoma* at [12]-[17]
[4] *R v Shoma* at [9]
[5] *R v Shoma* at [20]

had they been asleep.[6] That host family asked for her to be removed due to fears for their safety.[7]

5 Taylor J noted that there had been significant planning and preparation, and there was *"nothing opportunistic or impulsive about* [her] *attack"*.[8] Her Honour said:[9]

> … [the] preparation extended well beyond the bringing of the knife. Chillingly, you carried out a practice run in the first house which was opened to you. And your preparation was not limited to practical issues, such as sourcing night vision goggles and researching indicators of deep sleep, but extended to the consumption of propaganda material, knowing it would help keep your resolve and belief buoyant.

6 Her Honour sentenced the offender to 42 years' imprisonment, with a non-parole period of 31 years and six months.

7 In *R v Mohamed, Chaarani & Moukhaiber*,[10] two co-offenders were found guilty of two offences, being attempting to engage in a terrorist act; and engaging in a terrorist act. In short, each co-offender had attempted to set alight a Shia Muslim mosque but failed. Each co-offender then recruited a third co-offender, Moukhaiber and returned to the same mosque several months later to successfully carry out the terrorist act by setting fire to the mosque.[11] No person was injured in the terrorist act. Each of the co-offenders had stridently supported Islamic State, and had committed the offences due to their *"hatred of Shia Muslims … desire to intimidate practitioners of that branch of the faith, and* [their] *desire to advance the cause of IS"*.[12] In fact, each of the co-offenders were arrested in relation to another planned terrorist attack, namely preparing for an attack on Federation Square or some other public location involving the use of weapons and explosives. His Honour did not consider this on sentence.[13]

---

[6] *R v Shoma* at [24]
[7] *R v Shoma* at [25]
[8] *R v Shoma* at [74]
[9] *R v Shoma* at [78]
[10] *R v Mohamed, Chaarani & Moukhaiber* [2019] VSC 498
[11] *R v Mohamed, Chaarani & Moukhaiber* at [3]
[12] *R v Mohamed, Chaarani & Moukhaiber* at [5]-[6]
[13] *R v Mohamed, Chaarani & Moukhaiber* at [42]

8 In considering the nature and circumstances of the offences, Tinney J accepted the general proposition that *"engaging in a terrorist act covers, potentially, a great array of potential offending, from crimes of mass murder at one end to much lesser crimes of property damage at the other"*.[14] However, his Honour did not accept that penalties for terrorism involving property damage *"should always necessarily be lower than those involving an intention to cause death or serious injury"*, but emphasised that what was important were the *"circumstances of an individual crime"*.[15] His Honour continued:[16]

> [83] As I made clear during the plea, I had no hesitation in accepting that the particular crimes of which you have been convicted are much less serious than terrorist crimes involving the planned or achieved causation of death or serious injury. However, that is not to say that the crimes of which you have been found guilty by the jury are not serious examples of the crimes of engaging and attempting to engage in a terrorist act. They clearly are.
>
> [84] Motivated by hatred and intolerance, you, Mohamed and Chaarani, set about seeking to further and advance the most unworthy cause of the terrorist organisation, IS, and to inflict terror upon entirely innocent people, who had in no way harmed you or earned your contempt. To use the words of the Court of Appeal in *MHK*, your conduct was driven by a depraved and evil ideology and mentality.

9 His Honour described the first offence of attempt to be *"a serious crime",*[17] and the second offence to be *"exceedingly serious, involving a very high degree of moral culpability and deserving of condign punishment"*.[18] His Honour said:[19]

> 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.

[14] *R v Mohamed, Chaarani & Moukhaiber* at [81]
[15] *R v Mohamed, Chaarani & Moukhaiber* at [82]
[16] *R v Mohamed, Chaarani & Moukhaiber* at [83]-[84]
[17] *R v Mohamed, Chaarani & Moukhaiber* at [88]
[18] *R v Mohamed, Chaarani & Moukhaiber* at [97]
[19] *R v Mohamed, Chaarani & Moukhaiber* at [206]

10 Tinney J acknowledged that this was the third offence of carrying out a terrorist act successfully prosecuted in Australia (behind *R v Shoma* and *R v Khan (No. 11)*). His Honour accepted that the offending in this case was *"substantially less serious than that in those cases, and other cases where mayhem involving the loss of life was planned"*.[20]

(1) Both Mohammed and Chaarani were sentenced to a total effective term of 22 years, with a non-parole period of 17 years.

(a) For the attempt offence, both co-offenders were sentenced to a term of imprisonment of eight years.

(b) For the completed terrorism offence, both were sentenced to a term of imprisonment of 18 years, to commence four years after the commencement of the attempt offence.[21]

(2) Even though Moukhaiber was not involved in the attempt offence, his Honour considered that his involvement in the successful second offence was such that he was an *"equal participant"* to Mohamed and Chaarani.[22] For this, Moukhaiber was sentenced to a term of imprisonment of 16 years, with a non-parole period of 12 years.[23]

[20] *R v Mohamed, Chaarani & Moukhaiber* at [199]-[200]
[21] *R v Mohamed, Chaarani & Moukhaiber* at [209]-[214]
[22] *R v Mohamed, Chaarani & Moukhaiber* at [92]
[23] *R v Mohamed, Chaarani & Moukhaiber* at [215]-[218]

Section 101.4(1) of the Code – possessing a thing connected with a terrorist act

11 In *R v Pender*,[24] the offender pleaded guilty to two charges, namely that he did intentionally possess a knife in connection with the preparation for a terrorist act, knowing of that connection contrary to s.101.4(1) of the Code which carries a maximum penalty of 15 years' imprisonment; and that he threatened to cause injury to a judicial officer in the Local Court after the Magistrate refused him bail, contrary to s.326(1)(b) *Crimes Act 1900* (NSW).[25] Attention will be directed to the terrorism offence under s.101.4(1) of the Code.

12 Mr Pender was approached by police officers in Surry Hills because he appeared to be drug affected or intoxicated. When approached by the police, an officer saw a knife protruding from the offender's right jumper sleeve. The knife, approximately 22.5 cm long, was wrestled away from the offender. The offender made a number of comments to the officers during the wrestle and following his arrest, including: *"Fuck off, if I still had the knife I'd fucking kill you all"*, *"I am ready to go back to Goulburn Supermax",* and *"*[t]*he proudest thing a man can do is behead a cop"*. He continued to make similar comments when being held at Surry Hills Police station, including saying *"Allahu Akbar"*, and that he was *"better"* than Man Monis – the person responsible for the Lindt Café Siege in 2014. The evidence also showed that he had, prior to his arrest, downloaded a picture of a shahada flag.[26] Harrison J would later characterise this encounter as being unplanned and but for the use of *"violent religious threats"* and the downloading of the shahada flag, the offender would *"in all likelihood not have been charged* [under s.101.4(1)]*"*.[27]

13 At his bail hearing on the afternoon of his arrest, Mr Pender appeared by audiovisual link and audibly made comments such as *"Allahu Akbar"* and *"Long live Abu Bakr Al Baghdadi"*. He had also made throat slitting gestures and further gestures pretending to load a gun and fire it at the Court. He also made the tawhid gesture used by Islamic State supporters (raising his left

[24] *R v Pender* [2019] NSWSC 1814
[25] *R v Pender* at [1]
[26] *R v Pender* at [4]-[13]
[27] *R v Pender* at [56]-[57]

index finger skywards (*only one true God*)) on multiple occasions, as he did at Surry Hills Police Station. He then proceeded to threaten the Magistrate which gave rise to the second charge.[28]

14 The Crown sought to rely on a recorded conversation between the offender and an acquaintance to support a submission that he had a *"genuine and enduring commitment to some form of fundamental Islamic terrorist ideology"*.[29] His Honour rejected the submission principally on the basis that the words said by the offender were not a *"sensible expression of intent by an untroubled mind"*[30] and were of such little weight that it did not assist him in the exercise of his sentencing discretion.[31] The Crown also relied on an ERISP, but his Honour held that he would have excluded it at trial, and would not have regard to it on sentence. His Honour stated that the offender had previously objected to being interviewed, and the offender, being an Indigenous man, did not have a lawyer present at the interview. Further his Honour observed that it was *"entirely apparent that Mr Pender was incapable by reason of his mental illness of consistently making decisions or giving answers that were in his best interests"*.[32]

15 Finally, the Crown relied on a video that the offender posted on Facebook with the caption *"Allahu Akbar"*, depicting him speaking into the camera wearing a black face-covering. In the video, the offender stated, amongst other things, that he was preparing for *"martyrdom, jihad, being a Mujahideen"*, and that the *"war with Muslims has just begun".*[33] He subsequently posted on Facebook that he wished death upon all who opposed Islam.[34] The video and post were published on Facebook nearly two years before his arrest. His Honour stated that, *"particularly having regard to … Mr Pender's long history of mental illness"* that such material could be *"disregarded for sentencing purposes as*

[28] *R v Pender* at [14]-[19]
[29] *R v Pender* at [19]-[25]
[30] *R v Pender* at [23]
[31] *R v Pender* at [25]
[32] *R v Pender* at [26]-[30]
[33] *R v Pender* at [31]
[34] *R v Pender* at [31]-[32]

no more than historical interest" which only served to confirm the presence of his mental illness.[35]

16 It was uncontroversial that the offender had *"long suffered from serious and enduring mental health problems of one form of another"* and this was *"fundamental"* to the sentencing exercise. Harrison J concluded that the offender's long standing mental illness, namely schizophrenia or schizoaffective disorder, contributed to his offending conduct, and observed:[36]

> [41] The Crown emphasised that Mr Pender's mental health was a matter to be taken into account under s 16A(2)(m), but must be shown "by some evidence" actually to have contributed to the commission of the offence before it can be considered to be relevant to his culpability: *Hammond v R* [2008] NSWCCA 138 at [32]-[34]. Such a connection cannot simply be based upon speculation. That is not to say, however, that behaviour as bizarre as Mr Pender's does not reliably and emphatically inform a conclusion that it was at least to some extent the product of a disordered mind. Auditory hallucinations including commands to kill were reported by Mr Pender at the time of his arrest. He continues to be diagnosed with characteristics such as disinhibition and impulsivity. I accept that Mr Pender was not in a florid psychotic state, but mental illnesses lie on a continuum of varying degrees of seriousness: it would be churlish in the circumstances of this case to conclude that Mr Pender's criminal acts were committed by someone with unfettered powers of self-control, logic and rationality. That applies in my opinion both to his behaviour in the streets of Surry Hills as well as in the Central Local Court.
>
> [42] As Whealy J observed in *R v Sharrouf* [2009] NSWSC 1002 at [61], the presence of substantial and chronic mental illness is relevant to an assessment of objective criminality. The Crown maintained a submission that in the present case there was an absence of an expert opinion about any causal link between Mr Pender's mental illness and its contribution to his offending. If that submission is intended to support a proposition that I can only take mental illness into account when sentencing an offender if a suitably qualified medical specialist has said in terms that the offending was caused by the mental illness, or that it was a contributing factor, then I reject it. There is abundant evidence in this case, to which I have referred in some detail, from which I consider it is legitimate to infer that Mr Pender's mental illness contributed to his offending conduct.

17 The offender expressed remorse for the offence of threatening a judicial officer by way of a letter of apology, but did not do so independently for the possess knife offence.[37] His Honour then went on to consider issues of general and specific deterrence. His Honour stated that given the medical

[35] *R v Pender* at [36]
[36] *R v Pender* at [41]-[42]
[37] *R v Pender* at [43]-[47]

evidence led on sentence, the offender's conduct was *"significantly caused by or associated with his entrenched mental condition"* and *"the significance of general deterrence necessarily recedes"*.[38] However, with respect to specific deterrence, his Honour observed that the offender had a *"substantial criminal history"* commencing when he was 15 years old.[39]

18 A crucial question to be determined was whether the offender had renounced his extremist views. The Crown had submitted that the offender had not established on balance, that he has resiled from such views and that protection of the community was, accordingly, of enhanced importance.[40] His Honour began by extracting portions of the transcript of the offender's cross-examination where he gave evidence about his conversion to Judaism and noting that he gained a *"very distinct impression"* that the offender's adherence to Islam *"has been questionable in the past but is non-existent at present"*. His Honour continued:[41]

> … His plainly offensive and violent religious pronouncements are in my assessment more a function of a state of confused suggestibility than of any genuine or devout adherence to misguided fundamentalism. It is also difficult to separate these things from the ever present spectre of his mental illness. Mr Pender's prospects of rehabilitation and the associated question of the likelihood of him reoffending are in my view more reliably informed by his mental health and his criminal history than the particular circumstances or details of the conduct for which he is to be sentenced.

19 His Honour rejected the Crown's submission, and instead found that the offender's Islamic rhetoric was a *"manifestation of his propensity for violence rather than his violence being an expression of an entrenched or enduring religious fanaticism"*.[42]

20 His Honour considered the objective seriousness of the offence. His Honour cautioned that although the offence charged was serious, the *"seriousness of the charge must not be mistaken for the seriousness of the breach"*.[43] In his Honour's assessment, given the wide scope of activity contemplated by

[38] *R v Pender* at [47]
[39] *R v Pender* at [48]
[40] *R v Pender* at [49]-[51]
[41] *R v Pender* at [54]
[42] *R v Pender* at [55]
[43] *R v Pender* at [57]

s.101.4, the offender's conduct lay towards the lower end of the range of objective seriousness.[44] His Honour made the same finding with respect to the charge of threatening a judicial officer.[45] His Honour concluded that the offender had been *"charged with serious offences but in* [his] *opinion has not committed serious breaches"*.[46]

21 Harrison J stated that he had regard to the object and purpose of terrorism legislation and the maximum penalties involved, and the defining features of terrorism, that is, to use serious violence to intimidate or coerce the community or governments.[47] His Honour also considered a number of backup offences and related charges (including assault, resist officer in execution of his duty and custody of a knife in a public place) and observed that on one view, *"the true nature of* [the offender's] *criminality is provided by the offences listed on the s 166 certificate"*.[48] His Honour continued:[49]

> [64] … It is critically important in performing the difficult task of sentencing, when it is possible and appropriate to do so, to discriminate between individuals who would wish harm upon the Australian community and those whose words and actions are in all probability and to a significant extent the product of a disordered mind.
>
> [65] As I have already indicated, Mr Pender has a long and unfortunate criminal history of convictions for violence and assault, including assaulting police officers in the execution of their duty, stalking and intimidating, including intimidating police, robbery and destroying or damaging property. There are many other offences to which I have not referred. I reiterate that Mr Pender's prospects of reoffending, and hence his prospects of rehabilitation, are in my opinion more accurately and reliably to be assessed by reference to this history than the isolated events of 14 June 2017.

22 For the terrorism offence, his Honour sentenced the offender to serve a term of imprisonment of four years, with a non-parole period of three years. This term was partially accumulated (three months) on the offence of threatening a judicial officer, which was a fixed term of imprisonment of six months.[50]

---

[44] *R v Pender* at [56]-[57]
[45] *R v Pender* at [58]-[59]
[46] *R v Pender* at [60]
[47] *R v Pender* at [63]
[48] *R v Pender* at [64]
[49] *R v Pender* at [64]-[65]
[50] *R v Pender* at [66]

Section 101.4(2) of the Code – possessing things connected with terrorist acts

23 In *R v Alameddine (No. 3)*,[51] the offender pleaded guilty to a Commonwealth offence of intentionally possessing a thing, namely a .38 special calibre Smith & Wesson model British service revolver, that was connected with the preparation for a terrorist act being reckless as to the connection of the thing to the preparation for a terrorist act contrary to s.101.4(2) of the Code. The offender also pleaded guilty to a State offence of supplying the pistol, the subject of the Commonwealth charge, to Raban Alou, without Alou having been authorised to possess it by licence or permit, contrary to s.51(1A) *Firearms Act 1996* (NSW). The firearm supplied to Alou was ultimately used in the terrorist killing of Mr Curtis Cheng. The maximum penalty for the terrorism offence is imprisonment for 10 years, and for the supply pistol offence, imprisonment for 20 years with a standard non-parole period of 10 years. The offender also asked to be taken into account three offences being two offences of possessing a firearm in contravention of a prohibition order, and an offence of possessing a firearm.[52]

24 In the days following 2 October 2015, and now with knowledge that the firearm he had supplied was used as the murder weapon, the offender continued to brazenly deal with firearms, giving rise to the three other firearms offences on the Form 1.[53]

25 The Court concluded that the offender supplied a loaded revolver to Alou in circumstances where he *"had a strong inkling (at least) … that the loaded pistol was to be used very soon thereafter in a violent attack in Sydney committed for terrorist purposes"* and *"in the name of Islamic State"*.[54] His Honour had earlier expressed his satisfaction that the offender had *"at least some sympathy for the fundamentalist religious views of Alou"* and through his

[51] *R v Alameddine (No. 3)* (2018) 333 FLR 81; [2018] NSWSC 681
[52] *R v Alameddine (No. 3)* at [1]-[7]
[53] *R v Alameddine (No. 3)* at [127]-[132]
[54] *R v Alameddine (No. 3)* at [177]-[178]

previous interactions with a particular police officer, had overtly demonstrated his support at that time for Islamic State.[55] His Honour said:[56]

> [179] A combination of sympathy for Alou's cause, and the pragmatic activities and motivations of a firearm supplier, came together for the Offender to supply the revolver to Alou with a solid idea on his part as to what was to be done with it soon after.
>
> [180] I am satisfied beyond reasonable doubt that findings to this effect should be made. These findings go beyond the admission of bare recklessness implicit in the Offender's plea of guilty to the terrorism offence. These findings serve to aggravate the objective gravity of both of the offences contained in the indictment. These were very serious examples of crimes committed under the relevant Commonwealth and State provisions.

26 For the terrorism offence, his Honour adopted Whealy J's observations in *R v Mulahalilovic*.[57] His Honour found that this offence was *"at a very high level of seriousness"*, and said:[58]

> [190] The objective gravity of a s.101.4(2) offence is to be determined by reference not only to the "thing" that was possessed, but also the nature of the terrorist act and the recklessness of the Offender to the connection of the "thing" to the preparation of a terrorist act: *Benbrika v R* (2010) 29 VR 593; [2010] VSCA 281 at 661 [319]. The "thing" in *Benbrika v R* was a compact disk which contained an archive of documents including a section relating to the duty of Muslims to engage in violent jihad.
>
> [191] I accept the Crown submission that the objective gravity of the s.101.4(2) offence here is to be determined primarily by assessing:
>
> > the nature of the thing possessed, the nature of the possession and its connection with preparation of planning;
> >
> > the nature and seriousness of the proposed terrorist act being prepared or planned; and
> >
> > the recklessness of the Offender.
>
> [192] Likewise, I accept the Crown submission that, generally speaking, in assessing the objective seriousness of the offence, the nature of the thing and the nature of the possession will be less important than the connection the thing has with the preparation of the act in question. All other things being equal, the offending will be more serious the closer the connection is between the thing and the preparation and planning.

---

[55] *R v Alameddine (No. 3)* at [174]
[56] *R v Alameddine (No. 3)* at [179]-[180]
[57] *R v Mulahalilovic* [2009] NSWSC 1010 at [42]-[43], [48] and [51]-[53]
[58] *R v Alameddine (No. 3)* at [190]-[194]

> [193] The "thing" in this case was a loaded revolver which was capable of immediate use to kill or injure in a terrorist attack.
>
> [194] I accept the Crown submission that the quality of the "thing" in this case (an unregistered, concealable, loaded revolver), when considered together with the circumstances in which it was provided to Alou, its temporal proximity to the terrorist act and the Offender's admission as to his recklessness and his connection between the "thing" and the preparation for a terrorist act, places this offence at a very high level of seriousness.

27 In assessing the objective seriousness of the supply pistol offence, his Honour had regard to the maximum penalty and applicable standard non-parole period;[59] the number of firearms (here a single pistol); the fact that the pistol was loaded and available for immediate criminal use[60] and anticipated use of that firearm.[61] His Honour said:[62]

> [212] The Offender supplied the revolver in this case in circumstances where he anticipated that it would be used to cause death or serious injury to one or more members of the public. If the Offender had refused to supply the revolver to Alou, then the terrorist attack could not have taken place as it did on that day. Alou had no other available source for a firearm apart from the Offender.
>
> [213] This was an exceptionally grave s.51(1A) offence. It lies in the most serious range of offending for this class of offence.

28 His Honour also took into account the Form 1 offences, which in accordance with authority, required the imposition of a longer sentence, and in this case a *"significant additional component"*.[63]

29 In determining the appropriate sentence, his Honour drew together all the objective and subjective factors and other relevant sentencing principles. For the Commonwealth terrorism offence, the offender was sentenced to a term of imprisonment of seven years and two months, with a non-parole period of five years and three months. His Honour allowed a period of three years and six months' accumulation as between the offences, and imposed a term of imprisonment of 14 years and two months for the supply pistol offence, with a non-parole period of 10 years. The total effective sentence comprised a head

[59] *R v Alameddine (No. 3)* at [203]-[209]
[60] *R v Alameddine (No. 3)* at [209]-[211]
[61] *R v Alameddine (No. 3)* at [212]
[62] *R v Alameddine (No. 3)* at [212]-[213]
[63] *R v Alameddine (No. 3)* at [215]-[224]

sentence of 17 years and eight months, with a non-parole period of 13 years and six months.[64]

[64] *R v Alameddine (No. 3)* at [332]-[341]

Sections 11.5(1) and 101.6(1) of the Code – conspiracy to do acts in preparation for a terrorist act(s)

30 In *R v Al-Kutobi; R v Kiad*,[65] the offenders pleaded guilty to an offence of conspiring with each other to do acts in preparation for, or planning, a terrorist act, in contravention of ss.11.5(1) and 101.6(1) of the Code. The offenders pleaded guilty five days before the trial was to commence, and a four-day disputed facts hearing was held before his Honour heard submissions on sentence.[66]

31 The conspiracy had as its object, the detonation of an improvised explosive device to damage or destroy a building, and using a bladed weapon (either a machete or a hunting knife, or both) to attack a person.[67] The offenders however, denied that they had conspired to use a bladed weapon to attack a member of the public.[68] The offenders agreed that one or both of them carried out a series of overt acts in pursuit of the conspiracy, done with the intention of advancing the cause of Islamic State. There were fourteen acts relied on by the Crown, including, inter alia, taking an oath of allegiance to the leader of Islamic State; conducting reconnaissance and selecting a Shia prayer hall for the purpose of damaging or destroying it; liaising with and receiving instructions and guidance from an Islamic State recruiter; accessing written instructions on how to create an explosive device; making a list of ingredients to make an explosive device; obtaining such ingredients for the construction of that device; locating and obtaining a machete; creating an Islamic State flag; and creating notes which included the words *"we are here to cut your heads"*.[69]

[65] *R v Al-Kutobi; R v Kiad* [2016] NSWSC 1760
[66] *R v Al-Kutobi; R v Kiad* at [1]-[6]
[67] *R v Al-Kutobi; R v Kiad* at [17]
[68] *R v Al-Kutobi; R v Kiad* at [18]-[20]
[69] *R v Al-Kutobi; R v Kiad* at [24]

32 From the seized evidence, the Crown were able to construct a *"comprehensive chronology"* which charted the offenders' radicalisation,[70] and during the disputed facts hearing, oral evidence was given by various witnesses of their radicalisation.[71]

33 In the mid-afternoon of 10 February 2015, the offenders attended a store in Smithfield and purchased a hunting knife, and carefully examined a machete.[72] It was contended by Mr Al-Kutobi that the knife was purchased for the purpose of fishing. The store owner gave evidence of a conversation where the offender had said to him he was to use the knife for deer hunting, and rejected a suggestion that fishing had been mentioned.[73] His Honour did not accept the offender's account, and rather, was satisfied beyond reasonable doubt that the offenders conducted research and purchased the hunting knife for the purpose of inflicting harm on a member of the public as part of their conspiracy.[74]

34 The next area of dispute was whether the offenders had intended to carry out an operation later that evening using that weapon as part of the conspiracy. The Crown contended that the conspiracy was continuing up to the point of their arrest and interception by the Joint Counter Terrorism Team.[75] Minutes before the Joint Counter Terrorism Team arrived at the offenders' residence, Mr Al-Kutobi was recorded holding the knife purchased earlier that day, kneeling in front of an Islamic State flag and stating *"we will execute the first operation for the soldiers of the Caliphate in Australia, God willing"*. Further Mr Kiad had sent a message to the recruiter stating *"… the operation God willing is at 8 o'clock …"*[76] Mr Al-Kutobi contended that the evidence revealed that instead, the pair were attempting to appease and mollify the Islamic State

[70] *R v Al-Kutobi; R v Kiad* at [34]
[71] *R v Al-Kutobi; R v Kiad* at [35]-[45]
[72] *R v Al-Kutobi; R v Kiad* at [89] and [116]
[73] *R v Al-Kutobi; R v Kiad* at [115]-[118]
[74] *R v Al-Kutobi; R v Kiad* at [119]-[124]
[75] *R v Al-Kutobi; R v Kiad* at [125]
[76] *R v Al-Kutobi; R v Kiad* at [94]-[98]

recruiter with whom they had been in contact, so as to gain his assistance in acquiring tickets to the Middle East, by first travelling through Turkey.[77]

35 Garling J held that there was *"an air of unreality or implausibility about the story which Mr Al-Kutobi advanced"* and observed that it was not corroborated by any direct evidence by Mr Kiad.[78] After undertaking a forensic analysis of the evidence, his Honour did not accept his evidence, and was satisfied beyond reasonable doubt that the conspiracy was *"on-going at the time of their arrest"* and *"the attack would have occurred within a few hours but for the offenders' arrest"*. His Honour was satisfied that the offenders were preparing or planning to kill or cause serious harm to an unidentified individual using the hunting knife or machete purchased earlier that day.[79]

36 After making the relevant findings of fact, his Honour turned to the objective seriousness of the offending. His Honour found that the objective seriousness fell *"above the mid-range for offences of this kind"*.[80] In assessing the objective seriousness of the offence, his Honour said:[81]

> [149] In assessing the objective seriousness of the offending, I am to focus on the agreement, including the particular conduct, and the intentions, of the offenders. I have found that the offenders were not only preparing or planning to use an IED to damage property, but were also preparing or planning to use a bladed weapon, be it a machete or hunting knife or both, to kill or cause serious physical harm to a person. It is pertinent to observe at this point that the law always regards conduct undertaken with an intention to take or cause harm to human life as more heinous than conduct which intends only to cause damage, including significant damage, to property.
>
> [150] The offenders engaged in a wide variety of acts of preparation and planning for the terrorist acts the subject of their conspiracy …
>
> [151] In total, the acts undertaken in preparation and planning were substantial. They were intended to, and did, put the offenders in a position to fulfil their conspiracy, namely to cause damage to property and to cause serious physical injury or death to an individual pursuant to, and in furtherance of, the cause of Islamic State.

[77] *R v Al-Kutobi; R v Kiad* at [128]-[135]
[78] *R v Al-Kutobi; R v Kiad* at [136]
[79] *R v Al-Kutobi; R v Kiad* at [146]-[147]
[80] *R v Al-Kutobi; R v Kiad* at [154]
[81] *R v Al-Kutobi; R v Kiad* at [149]-[153]

> [152] When the offenders were arrested, their agreement was in the course of being implemented, and their preparation and planning had reached a late stage …
>
> [153] The only thing constraining the offenders from carrying out the acts for which they had been preparing and planning was their own faintheartedness in their intended attack on the Shi'ite prayer hall, and the timely intervention of the police to prevent their attacking an individual. While their faintheartedness seems to have prevailed when they visited the Shi'ite Prayer Hall on 8 February 2015, it would not necessarily have prevailed again. Having regard to the propaganda video being played on the television in their residence at the time of their arrest, as well as the advanced stage of the planning and preparation, I am unable to conclude that any further attempts by the offenders to carry out a terrorist act would have failed through such faintheartedness.

37 After having regard to the offenders' subjective cases, the statutory factors under s.16A *Crimes Act 1914* (Cth) ("**Crimes Act**"), the maximum penalty of life imprisonment and their respective roles in the conspiracy ("[t]*here is simply nothing which differentiates* [their] *roles*")[82] both Mr Al-Kutobi and Mr Kiad were sentenced to terms of imprisonment of 20 years, with non-parole periods of 15 years.[83]

38 In *R v Azari (No. 12)*,[84] the offender was found guilty after a trial, that he did an act in preparation for, or planning, a terrorist act or acts, by participating in a telephone conversation with Mohammad Ali Baryalei, a senior Australian figure in Islamic State, in which he had discussed a plan for a terrorist attack in Australia.[85]

39 It was part of the Crown case that the offender had become involved with a number of other men who shared extreme religious and political views, and who had expressed support for Islamic State and other militant Islamist groups. This group referred to themselves using the word "*shura",* the Arabic word for consultative council or body, and included Hamdi Alqudsi, Milad Atai, and others. The *shura* showed its support for Islamic State by meeting regularly, travelling to the Middle East to fight with Islamic State or other

[82] *R v Al-Kutobi; R v Kiad* at [204]
[83] *R v Al-Kutobi; R v Kiad* at [204]-[207]
[84] *R v Azari (No. 12)* [2019] NSWSC 314
[85] *R v Azari (No. 12)* at [3]

militant groups, collecting funds to make them available to join Islamic State, and liaising with Mr Baryalei in Syria.[86]

40 It came to be the case that after Alqudsi was arrested, the offender assumed the role of communicating with Mr Baryalei on behalf of the *shura* and reporting back to Alqudsi.[87] The pertinent call with Baryalei occurred on 15 September 2014, and took place in a mixture of languages (English, Arabic and Dari). In that call, Baryalei told the offender that he needed "*someone that has a heart …"* and the offender replied that another person had been previously recruited to "*do this work"* but had been raided. Now that the other person had been arrested, "*for this reason now here"* having to find other people willing to "*do this work"*. Her Honour accepted that this was a reference to Agim Kruezi (discussed below at [91] – [97]).[88]

41 In an exchange, Baryalei said to the offender "*I want you- to do this work, but I want this work to be continuous… I don't want you to get arrested, but want to do continuously and every month terminate fix, six, seven people, every month, every month, and we will make videos and videos and videos like this …"*. The offender noted that the people willing to do the "*work"* were under extreme surveillance, that he himself was under surveillance, and the "*Australian terror level has gone up … Gone very high"*, which meant that the plan had to be "*postpone*[ed]". The offender had suggested to Baryalei that someone could be recruited to commit the acts of murder, such as a "*religious ignorant person or a minor not under surveillance*" with the offender then being able to obtain a video and transmitting it back to Islamic State for the purpose of propaganda.[89]

42 The conversation then continued, and Baryalei stated that the commission of domestic terror acts against random Australians were justified, to which the offender replied: "*I swear by Allah, it is not wrong …".*[90] Baryalei then gave a direction, purportedly from senior Islamic State members, that the offender

[86] *R v Azari (No. 12)* at [17]
[87] *R v Azari (No. 12)* at [20]-[25]
[88] *R v Azari (No. 12)* at [68]-[72]
[89] *R v Azari (No. 12)* at [73]-[80]
[90] *R v Azari (No. 12)* at [81]-[82]

remain in Australia to commit domestic acts of terror, rather than travelling to join Islamic State. The offender replied: "*Allah willing, brother, I have no problem with that. Praise be to Allah".*[91]

43 In considering the nature and circumstances of the offence, N. Adams J said:[92]

> [120] The offender is to be sentenced on the basis that he intended by participating in the telephone conversation with Baryalei to be doing an act in preparation for, or planning, a terrorist act or acts. He is not be sentenced on the basis that he had formed any agreement to commit any terrorist acts. He did not have the authority to bind the other men in the shura. The Crown case was not one of conspiracy or joint criminal enterprise. When the offender told Baryalei during the telephone conversation that he knew boys of heart who were "very much with him in religion" and would do what was being suggested by Baryalei, the offender could not in fact speak for the other members of the shura and bind them in any way at that time. Nor is the offender to be sentenced in relation to his meeting with Kruezi and any discussion about obtaining a weapon. He is to be sentenced solely on the basis that he participated in the 15 September 2014 telephone conversation.
>
> [121] There was no evidence of the offender doing anything after the telephone call besides passing on the contents of the call to some other members of the shura …
>
> [122] The offender was a conduit between Baryalei and the members of the shura. At that time Baryalei was the most senior Australian Islamic State member in Syria. As for the contents of the telephone call itself, it included discussion of the role that the offender and other trusted members of the shura would play in a series of public executions and the reasons why such murders were justified. Critical parts of the conversation between the offender and Baryalei were spoken in Dari, to make detection by the authorities of what was being discussed more difficult.
>
> [123] Most acts of terrorism which police have intercepted have involved so-called "*lone wolves*". Such offenders were usually radicalised online, with no direct contact with any actual members of Islamic State. By contrast, because I am satisfied that the offender was in direct contact with Islamic State, his role with the terrorist organisation as an intermediary is relevant to the court's assessment of the nature and seriousness of his offending.
>
> [124] There was no significant planning of the offence beyond what was discussed in the telephone call and the offender was arrested only days later in the early hours of 18 September 2014. The fact that the planning was at such an early stage does not necessarily mitigate the seriousness of the offence …

[91] *R v Azari (No. 12)* at [86]-[87]
[92] *R v Azari (No. 12)* at [120]-[124]

44 Her Honour also found that the offender held "*radical, Salafist Islamist and anti-Western ideological beliefs … and was supportive of Islamic State and other Islamist groups"*, and the depth and extent of radicalisation was a relevant factor in assessing the objective gravity of the offending.[93]

45 Her Honour concluded that the offence fell "*below the mid range of objective gravity for an offence under s 101.6(1)*". Her Honour said:[94]

> [129] … Although the offender's actions in preparing for or planning a terrorist act or acts were confined to the telephone call, the offender made a number of suggestions during that call as to how the acts could be carried out. Significantly, the offender indicated to Baryalei during that call that he was willing to agree with any order from the "Commander" of Islamic State even if it included being asked to commit the killings discussed in the telephone call.

46 For this offence, her Honour sentenced the offender to a term of imprisonment of 12 years. In accordance with s.19AG Crimes Act, and including the funding offences to which he had pleaded guilty (discussed below), the offender was sentenced to a total effective term of 18 years' imprisonment, with a non-parole period of 13 years and six months.[95]

47 As noted earlier, two of the co-offenders in *R v Mohamed, Chaarani and Moukhaiber* were arrested in relation to another planned terrorist attack.[96] Following a lengthy trial before Beale J and a jury, the offenders, Hamza Abbas, Abdullah Chaarani and Ahmed Mohamed were convicted of conspiring with one another (and a further offender, Ibrahim Abbas, Hamza Abbas' brother who had been previously sentenced by Tinney J),[97] to do an act or acts in preparation for or planning a terrorist attack, in contravention of ss.11.5(1) and 101.6(1) of the Code.

---

[93] *R v Azari (No. 12)* at [126]-[127]
[94] *R v Azari (No. 12)* at [129]
[95] *R v Azari (No. 12)* at [204]-[208]
[96] *R v Mohamed, Chaarani and Moukhaiber* at [42]
[97] *R v Abbas* [2018] VSC 553. In circumstances where Beale J considered the issue of parity when sentencing these offenders, and had regard to the sentence of Ibrahim Abbas: *R v Abbas* [2018] VSC 553 (Tinney J), it is not necessary to separately analyse *R v Abbas* in any great detail as a stand-alone illustration of sentencing for offences of this kind. Ibrahim Abbas was refused leave to appeal against sentence: *Abbas v R* [2020] VSCA 80.

48 In *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed*,[98] the terrorist act was to involve the detonation of an improvised explosive device(s) ("**IED**") and/or the use of bladed weapons and/or the use of a firearm(s) in or around the city of Melbourne, in an area in which people were likely to congregate.[99]

49 His Honour carefully discerned the various preparatory acts taken by the offenders towards committing the particularised act of terrorism. His Honour described the "*more significant of those preparatory acts"* under four headings as follows:-

(1) Improvised explosive devices. His Honour found that Chaarani and Mohamed had accessed instructions for making IEDs and accessed videos related to the ignition and building of an IED.[100] His Honour found that Abbas and Mohamed were involved in the acquisition of materials for making IEDs, including purchasing material from Bunnings and Chemist Warehouse.[101] His Honour also found that Chaarani and Mohamed were involved in the attempts to make IEDs, with one of those attempts being successful.[102] Finally, all of the offenders were involved in the testing of the IEDs at a remote location.[103]

(2) Firearms. His Honour found that Chaarani, and to a lesser extent, Abbas, had been encouraged by Mohamed to take steps towards obtaining a firearms licence.[104] This included registering their interest with the relevant government department to obtain a firearm, downloading the relevant application forms, viewing advertisements for

[98] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* [2019] VSC 775
[99] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [1]-[2] and [4]
[100] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [8]-[12]
[101] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [13]-[16]
[102] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [17]-[23]
[103] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [24]-[27]
[104] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [28]-[29]

the sale of firearms and inquiring with the police about registering for a firearms course.[105]

(3) Bladed weapons. His Honour found that Chaarani had made various inquiries on eBay for a purchase of a hunting knife and sheath. On his arrest, that same hunting knife was seized from his premises. His Honour also found that Chaarani along with Ibrahim, had purchased two machetes from Boating Camping Fishing. When Ibrahim dropped Chaarani at home, he retained one of the machetes.[106]

(4) Reconnaissance. His Honour found that in late December 2016, Mohamed, Chaarani and Ibrahim met and travelled to the Melbourne CBD, spending time conducting reconnaissance of Federation Square, Flinders Street Station and St Paul's Cathedral. His Honour noted that CCTV footage captured Ibrahim making a "*chopping motion"* to the neck of his co-offenders, demonstrating "*how easy it is to kill someone with a blade".*[107]

50 Beale J considered the respective roles of the co-offenders in the conspiracy.

(1) Abbas. His Honour found that he had joined the conspiracy in early December 2016, *"comparatively late in the piece"*, having been recruited by his brother, Ibrahim. He was involved in the conspiracy for three weeks, a "*not insignificant period of time"* but was not as active as his co-conspirators. However, he was present to the testing of an IED, accompanied his co-conspirators to Chemist Warehouse to purchase ingredients for an IED, and followed them to Federation Square to conduct reconnaissance for a possible attack.[108]

(2) Chaarani. His Honour found that he was an *"active player"* over the entire two months of the conspiracy. His role was "*more significant"* than Abbas' role because of the number of acts he took in preparation,

[105] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [30]-[34]
[106] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [35]-[37]
[107] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [38]-[40]
[108] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [42]

including producing IEDs, testing IEDs, obtaining firearms licences, acquiring bladed weapons and conducting reconnaissance. His Honour said that Chaarani was not a subordinate of Chaarani.[109]

(3) Mohamed. His Honour found that, like Chaarani, he was an "*active player"* over the entire duration of the conspiracy. He had purchased ingredients and materials for the manufacture of an IED, he tested IEDs, encouraged his co-conspirator to move forward with a firearms licence application, and conducted reconnaissance. His Honour rejected a submission that his role in the conspiracy fell below that of Ibrahim, instead finding that he was not a subordinate of Ibrahim, and his role was equal to that of Ibrahim and Chaarani (even though he was "*outwardly more nervous than Ibrahim as the contemplated terrorist attack drew near".*[110] Similarly, Tinney J had found that Ibrahim was "*more-or-less equal participants"* with Chaarani and Mohamed.[111]

51 Notwithstanding the lesser role of Abbas in the conspiracy when compared to Chaarani and Mohamed, his Honour found that the offending conduct of each co-conspirator was "*an upper range example of the offence"*[112] because the preparatory acts were done in contemplation of mass slaughter; that slaughter was to occur in the heart of the Melbourne CBD to "*maximize terror"*, a public place, at a time of "*particular significance to many Australians – Christmastime* [sic]".[113] I note that Tinney J had reached the same conclusion with respect to the offending conduct of Ibrahim Abbas.[114]

52 His Honour, in noting general sentencing principles, considered the live issue of parity, in circumstances where Ibrahim Abbas had been sentenced earlier by Tinney J to 24 years' imprisonment with a non-parole period of 20 years. Ibrahim had admitted to recruiting his brother, which Tinney J had described

[109] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [43] and [45]
[110] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [44]-[45]
[111] *R v Abbas* at [151]; Ibrahim Abbas was refused leave to appeal against senence: *Abbas v R* [2020] VSCA 80.
[112] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [47] and [51]
[113] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [48]-[50]
[114] *R v Abbas* at [155]-[156]

as a "*significant aggravating feature"*[115] but noted a number of features in mitigation. Ibrahim had "*modest*[ly]" cooperated with authorities, made some admissions in a recorded interview with police, pleaded guilty at the earliest reasonable opportunity (although his Honour was not satisfied that such a plea reflected his remorse), had no criminal antecedents, and was only 22 years old (although, consistent with authority, his youth was of reduced significance because of the nature of the crime).[116]

53 His Honour went on to highlight the differences between Ibrahim and his co-conspirators. His Honour found that although neither Chaarani or Mohamed pleaded guilty, they had effectively *"admitted* [their] *guilt in the course of that testimony"* and had given evidence at their plea hearing "*publicly renouncing IS and violent jihad"*. His Honour said that by doing so, both had "*forfeited* [their] *right of appeal against conviction"* and this supported findings in their favour, on balance, that both are "*genuinely on the path of de-radicalisation"*.[117] Tinney J did not make such a finding with respect to Ibrahim;[118] nor did Beale J make such a finding with Abbas.[119]

54 However, his Honour held that both Chaarani and Mohamed ought receive "*a sentence higher than that imposed on Ibrahim"*[120] and that Abbas should receive a *"lesser sentence than* [his] *co-conspirators, including Ibrahim"* given his "*much lesser role in the conspiracy"* with his conduct being of "*limited significance"*.[121] With respect to Abbas, his Honour observed that there was "*strength in numbers"*, in that he had "*increased the chances of the terrorist act occurring"*[122] and rejected a submission that he was "*almost coerced into the conspiracy"*.[123]

---

[115] *R v Abbas* at [152]-[153]
[116] *R v Abbas* at [136]-[149]
[117] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [60], [145] and [180] cf *R v Mohamed, Chaarani & Moukhaiber* at [138]-[140]
[118] *R v Abbas* at [145]
[119] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [109]
[120] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [62]
[121] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [63]
[122] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [64]
[123] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [65]-[70]

55 For Chaarani and Mohamed, his Honour turned to consider the issue of totality, given their previous convictions and sentence for other terror-related offences as described in the paper (see at [92]-[98]). His Honour, in short, accepted that there "*should be substantial concurrency"* but "*there must necessarily be substantial cumulation too"*.[124] His Honour held that the present offences were "*much more serious"* than those of which they were previously convicted.[125]

56 His Honour had regard to comparative cases, terrorism sentencing principles, the individual circumstances of each co-conspirator, the relevant provisions of the Crimes Act and sentenced the offenders as follows:

(1) Abbas: 22 years' imprisonment with a non-parole period of 16 years and six months.[126]

(2) Chaarani and Mohamed: 26 years' imprisonment, with 16 years of that term to be cumulative on their sentences imposed by Tinney J, giving rise to a total effective sentence of 38 years, with a non-parole period of 28 years and six months.[127]

57 In *Rv HG*,[128] the offender was convicted by a jury of an offence of committing acts in preparation for, or planning, a terrorist act or acts. The jury could not reach a verdict with respect of an alleged co-offender.[129] After being convicted, the offender gave oral evidence and was cross-examined by the Crown. In short, the offender did not accept the verdict of the jury and continued to "*advance innocent explanations for various circumstances and events upon which the Crown had relied at the trial"*.[130]

---

[124] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [79]
[125] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [80]
[126] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [197]-[198]
[127] *The Queen v Abbas; The Queen v Chaarani; The Queen v Mohamed* at [200]-[203]
[128] *R v HG* [2018] NSWSC 1849
[129] *R v HG* at [1]
[130] *R v HG* at [4]

58 Bellew J found that the evidence "*overwhelmingly support*[ed] *the conclusion that at the time of his offending, the offender held radical and extreme views*", and consistent with the jury's verdict, not a "*reflection of his interest in world affairs"*.[131]

59 On 6 October 2016, the offender and a co-offender attended the Bankstown Gun Shop and purchased two fix-blade knives. The offender told the attendant that he wanted to go "*pig hunting*", and this was the narrative advanced by him at trial. His Honour found that the reference to "*pig hunting"* was to police.[132] On 11 October 2016, the offender searched online for the opening hours of the Bankstown Gun Shop.[133] In early 12 October 2016, the offender left his house in the company of the co-offender. Both were carrying a backpack. The offender was later found to have deliberately left behind his mobile phone, and had previously conducted a search as to whether his G-Shock watch could be tracked.[134]

60 The offender and co-offender returned to the Bankstown Gun Shop and purchased two M-9 bayonet knives, each of which had a fixed blade with a partially serrated edge, and a knife sharpener. The offender then secreted the knives into his backpack.[135] The offender and co-offender then went to a prayer hall in Bankstown. It was at this prayer hall that the offender was arrested.[136] At the time of his arrest, police found the M-9 knives, several items of dark clothing, a camouflage-patterned cap and two sets of neck gaiters. The police also recovered a note written in partly in Arabic and partly in English. The English translation of the Arabic script stated:[137]

> "I advise you of piety towards God and walking in the path of God's messenger and to pledge allegiance to the Caliph because he who dies without allegiance will die pre Islamic death."

[131] *R v HG* at [31]
[132] *R v HG* at [32]-[33]
[133] *R v HG* at [34]
[134] *R v HG* at [35]-[36]
[135] *R v HG* at [37]
[136] *R v HG* at [38]-[39]
[137] *R v HG* at [41]

61 The police returned to the prayer hall and located the offender's G-Shock watch, and his Honour was satisfied that the offender had left it behind so that he could not be located.[138]

62 Police identified an Islamic State magazine, *Rumiyah*, which had been downloaded to the offender's phone on 8 September 2016. Of significance, the article instructed "*those in Australia in particular"* to "*strik*[e] *the kuffar in their homelands"* and to "*[k]ill them on the streets of Brunswick, Broadmeadows, Bankstown and Bondi … Stab them, shoot them, poison them and run them down with your vehicles …"*.[139] His Honour remarked that *"the exhortation to 'kill them on the streets of … Bankstown' which appeared in the article is of obvious significance"*.[140] His Honour later pointed out that the offender was arrested in an area near the Bankstown Court House and Bankstown Police Station, a location where the offender conceded he knew people who he regarded as "*evil"* would be present in the immediate vicinity.[141]

63 A second issue of *Rumiyah* had been downloaded and later deleted by the offender. That issue included an article about "*Just Terror Tactics"*, and a sub-heading "*Knife Attacks"* which explained why knives were a "*good option for an attack"*. It went to explain that a sharp, strong knife should be chosen by an attacker. The knife should also be easy to conceal, and a "*good combat"* knife would be a fixed blade, serrated or partially serrated knife. The article then turned to selecting targets, suggesting that a "*lone victim",* as opposed to a very large gathering, would be a suitable target. Finally, it concluded by instructing attackers to "*leave some kind of evidence or insignia identifying the motive and allegiance to the Khalifah, even if it is something as simple as a note pinned or attached to the victim's body"* so that the attack would not be dismissed as a "*random act of violence that plague*[d] *the West*".[142] His Honour remarked that "*in the context of the offending, this article is*

[138] *R v HG* at [45]
[139] *R v HG* at [46]
[140] *R v HG* at [47]
[141] *R v HG* at [68]
[142] *R v HG* at [52]

significant",[143] and went on to outline the similarities between the knives purchased by the offender and note which was found in his possession on his arrest.[144]

64 His Honour said:[145]

> The offender sought to pass off the obvious and unequivocal correlation between the contents of the article and his conduct as nothing more than a coincidence. He expressly denied that he had engaged in doing acts in preparation for a terrorist act, and maintained that the entirety of his actions were motivated by an interest in hunting and camping.

65 Ultimately his Honour found that the offender, at the time of his arrest, was "*ready, willing and able to carry out a terrorist act*".[146] His Honour continued:[147]

> … Not only was he in possession of the necessary weapons, he also had items which could be used to hide his face, as well as a written pledge which, according to the article in Rumiyah, was to be pinned to the victim of an attack. I am satisfied that at the time of the offender's arrest, the perpetration of a terrorist act involving the infliction of harm with the use of a knife was imminent.

66 His Honour concluded that the offending fell "*at or about the mid-range of objective seriousness"*.[148] In reaching this conclusion, his Honour had regard to the depth and extent of the offender's radicalisation,[149] the substantial planning involved (including researching instructions, purchasing and concealing weapons, and using a disguise);[150] and the imminence of the attack.[151] His Honour did, on the other hand, accept that the offending was "*simplistic, in the sense that it was generally unsophisticated"* and acceded to a submission that the offender's actions "*may have been less than that posed*

[143] *R v HG* at [53]
[144] *R v HG* at [54]-[63]
[145] *R v HG* at [63]
[146] *R v HG* at [68]
[147] *R v HG* at [68]
[148] *R v HG* at [82]
[149] *R v HG* at [77]
[150] *R v HG* at [78]
[151] *R v HG* at [79]

in other cases". However this was not to detract from the seriousness of the offending – it had a "*real capacity to inflict significant and immediate harm*".[152]

67 After considering the offender's subjective circumstances, and s.16A Crimes Act, his Honour imposed a sentence of 16 years' imprisonment with a non-parole period of 12 years.[153]

68 In *R v Bayda; R v Namoa (No. 8)*,[154] the offenders were found guilty by a jury of conspiring with each other to do acts in preparation for a terrorist act or acts.[155] The offenders had been married in an Islamic ceremony, and were both fanatical supporters of Islam.[156] At the outset, Fagan J said that their offending conduct was of a "*relatively low order of seriousness and there are significant mitigating circumstances with respect to each of them justifying determinate sentences of moderate duration*".[157] In describing the offences, his Honour said:[158]

> The jury's verdict shows they were satisfied on this evidence that on New Year's Eve 2015 Bayda in company with some other young males was intending to prepare for a violent attack against non-Muslims and that on 30 and 31 December Namoa knew of the proposed attack, agreed with Bayda that he should carry it out and strongly encouraged him. The evidence before the jury would not have enabled them to conclude precisely what type of attack Bayda contemplated or to determine his reasons for not proceeding with it. Evidence given by Bayda on sentence, summarised below, has satisfied me that he and his associates intended to carry out a street robbery on non-Muslims. They did not proceed with the plan because one or more of them called it off.

69 His Honour accepted that the conspiracy was that three young men would set out to commit a robbery in company with violence, but no robbery in fact took place.[159] Bayda had given evidence, which was accepted, that he and his friends were "*inspired by jihadist propaganda to plan a street attack upon non-Muslims"*.[160] His Honour found that there was never any attack planned that

---

[152] *R v HG* at [80]
[153] *R v HG* at [111]
[154] *R v Bayda; R v Namoa (No. 8)* [2019] NSWSC 24
[155] *R v Bayda; R v Namoa (No. 8)* at [1]-[2]
[156] *R v Bayda; R v Namoa (No. 8)* at [3]-[4]
[157] *R v Bayda; R v Namoa (No. 8)* at [5]
[158] *R v Bayda; R v Namoa (No. 8)* at [18]
[159] *R v Bayda; R v Namoa (No. 8)* at [35]
[160] *R v Bayda; R v Namoa (No. 8)* at [36]

would likely lead to his death, but rather, he exaggerated to Namoa the nature of what he was planning. His Honour formed the view that Namoa "*could well have been taken in by false boasting from Bayda that he was on a suicide mission"*.[161] On the night of supposed robbery, Bayda was carrying a tactical brand knife, later seized at Namoa's house. Bayda later purchased another knife with a folding blade, and gave this to Namoa for safekeeping.[162]

70 At the sentencing hearing, Bayda gave evidence that he had converted to Christianity, having abandoned his belief in Allah.[163] His Honour said:[164]

> [82] … Because of his remand in custody there has been no opportunity for Bayda to demonstrate genuine Christian philosophy or belief. However it is not necessary that he should convert to another religion in order to renounce the fanaticism which was inherent in the offence of which he has been convicted.
>
> [83] Bayda gave evidence that has abandoned Islam altogether because he has ceased to believe in Allah's command of violence and he does not consider the religion as a whole can be separated from that concept.

71 His Honour accepted his evidence, stating that there was "*no reason to doubt that Bayda holds these views sincerely"*.[165] Bayda had also given evidence, which was also accepted, about being punished by others in the High Risk Management Unit for being an apostate.[166]

72 With respect to Namoa, his Honour noted that she was previously a committed Islamic fanatic, up to the point where she had refused to answer questions put to her by the Australian Crime Commission about her apparent involvement in terrorism. She was subsequently convicted on 31 counts of refusing or failing to answer a question at that hearing. She served a term of imprisonment for these offences as she was being held on remand for the conspiracy charge.[167] Namoa had written letters in prison which showed a lack of insight into her offending, and demonstrated her "*immaturity, lack of*

---

[161] *R v Bayda; R v Namoa (No. 8)* at [38]
[162] *R v Bayda; R v Namoa (No. 8)* at [40]
[163] *R v Bayda; R v Namoa (No. 8)* at [81]-[82]
[164] *R v Bayda; R v Namoa (No. 8)* at [82]-[83]
[165] *R v Bayda; R v Namoa (No. 8)* at [84]
[166] *R v Bayda; R v Namoa (No. 8)* at [85]-[87]
[167] *R v Bayda; R v Namoa (No. 8)* at [91]

critical judgment and immersion in jihadist thinking".[168] She continued to write such letters until late 2016.[169]

73 During her trial, she wore a hijab, but two days after the jury returned their verdicts, told correctional staff that she had renounced Islam and reverted to Christianity. In evidence, she stated that she had received advice from staff that she ought to continue wearing the hijab in order to conceal from other inmates that she was no longer an adherent of Islam.[170]

74 Namoa wrote a letter to the Court explaining that her fanaticism was a product of "*teenage immaturity"*, and that her jihadism was a "*rather disgusting ideology …"*[171] His Honour stated that he did not need to determine "*what degree of sincerity Namoa has reverted to Christianity"*, but was satisfied that she "*no longer accepts the command of Allah for Islamic domination by violence"*.[172] His Honour made the following remarks about Namoa's belief in jihadism:[173]

> [102] Namoa's evidence that her belief in jihadism was a childish phase from which she has matured is supported by surrounding circumstances. She has not studied Islamic scriptures with sufficient thoroughness or understanding to have acquired from them a deeply embedded intellectual belief in a duty of religious warfare. I find that she was drawn into acceptance of salafi jihadism at a superficial and emotional level, as a doctrine that gave her a sense of belonging to something, a sense of purpose and a channel for expression of aggressive feelings.
>
> [103] Namoa at 18 was highly susceptible to militant Islamic brainwashing. Educational difficulties and concomitant frustration and anger during school years necessarily led to a degree of isolation, probably compounded by her lack of involvement in the workforce since leaving school at 16 …
>
> [104] [Having regard to all the evidence] Any 18-year-old can be seduced by an ideology. The jihadists' propaganda would be highly persuasive for anyone susceptible to divine dogma, given the impressive scriptural scholarship offered in support. Most would balk at a doctrine of purported instruction from a deity to kill people who do not share one's religious beliefs. Namoa lacked the intellectual strength to bring reason and humanity to prevail against this outrageous concept.

[168] *R v Bayda; R v Namoa (No. 8)* at [94]
[169] *R v Bayda; R v Namoa (No. 8)* at [95]
[170] *R v Bayda; R v Namoa (No. 8)* at [97]
[171] *R v Bayda; R v Namoa (No. 8)* at [99]-[100]
[172] *R v Bayda; R v Namoa (No. 8)* at [101]
[173] *R v Bayda; R v Namoa (No. 8)* at [102]-[104]

75 The foregoing analysis was important because his Honour found that the objective seriousness of the offences was "*reduced"* by the "*relative superficiality of the offenders' ideological conviction"* in that no attack was carried out when the opportunity arose, and no preparations were later made for a more substantial attack;[174] and that their denunciation of jihadist ideology meant there was no significant need for incapacitation.[175]

76 His Honour referred to the inherent degree of seriousness of terrorism offences before turning to features of the offending that "*greatly reduce*[d] *its objective gravity."* His Honour noted the limited scale of the attack, that the conspiracy had no defined objective (and was not developing in intensity or planning), the short duration of the conspiracy, and the abandonment of the original plan, with a "*replacement … conceived in only the vaguest terms"*.[176] Overall, his Honour concluded that this conspiracy was "*at the lower end of the wide range of possible gravity of an offence of this type"*.[177]

77 After taking into account the offenders' subjective circumstances, and again noting that they had since "*develop*[ed] *reason and humanity in place of blind, submitting belief",*[178] his Honour sentenced Bayda to a term of imprisonment of four years, with a non-parole period of three years, and Namoa to a term of three years and nine months, with a non-parole period of two years and 10 months.[179]

[174] *R v Bayda; R v Namoa (No. 8)* at [114]
[175] *R v Bayda; R v Namoa (No. 8)* at [115]
[176] *R v Bayda; R v Namoa (No. 8)* at [109]-[112]
[177] *R v Bayda; R v Namoa (No. 8)* at [113]
[178] *R v Bayda; R v Namoa (No. 8)* at [121]
[179] *R v Bayda; R v Namoa (No. 8)* at [128]

Section 101.5(1) of the Code – making a document connected with the preparation of a terrorist act

78 In *Said v R*,[180] the offender, a co-conspirator with IM, appealed his sentence on the same basis as in *IM v R*.[181] The offender in *Said v R* however, was charged with an offence of making a document connected with the preparation for a terrorist act, and he knew of that connection, contrary to s.101.5(1) of the Code. The offence carried a maximum penalty of imprisonment for 15 years.[182] In short, the documents were located in the bedroom of Mr Sulayman Khalid (another co-conspirator), and they "*demonstrated an active and real consideration of the type of terrorist act contemplated and its targets"*, namely the AFP building and the Lithgow Jail.[183]

79 The Crown in *Said v R*, as in *IM v R*, conceded that error had been established.[184] Accordingly, the Court had to re-sentence the offender. Hoeben CJ at CL (with whom White JA agreed) assessed the objective seriousness of the offending as being "*high"*. In doing so, his Honour accepted a submission from the Crown that the documents went further than being planning documents, but rather "*operated as an exhortation to the group to engage in a major terrorist activity"*. His Honour continued:[185]

> … As the Crown submitted in this Court, the threat posed by these documents was not only their function as planning documents but how they operated as an exhortation to the group to engage in a major terrorist activity. Looked at in that way, the fact that the documents were only disseminated to the Khalid group does not necessarily reduce the seriousness of the offending. The applicant was in effect urging his colleagues as a group to carry out a major attack and not be content with a single attack. The limited dissemination of the material in the documents added to the seriousness of the offending in that there was a greater likelihood of them being acted upon by a small group. This is to be contrasted with the unlikelihood of them being acted on if they had been widely published.

[180] *Said v R* [2019] NSWCCA 239
[181] *IM v R* (2019) 100 NSWR 110; [2019] NSWCCA 107
[182] *Said v R* at [1]
[183] *Said v R* at [7]-[11]
[184] *Said v R* at [53]-[55]
[185] *Said v R* at [82]

80 Hamill J expressly disagreed with Hoeben CJ at CL's assessment of objective seriousness, and would have found that the offence fell "*well below the most serious offending caught by s.101.5"*.[186]

81 Hoeben CJ at CL (with whom White JA agreed) resentenced the offender to imprisonment for nine years, with a non-parole period of six years and nine months.[187] Hamill J, taking into account his own objective seriousness finding, and giving greater weight to the offender's subjective factors,[188] would have resentenced the offender to imprisonment for six years and eight months, with a non-parole period of five years.[189]

[186] *Said v R* at [95] cf. White JA at [87]
[187] *Said v R* at [85]
[188] *Said v R* at [95]
[189] *Said v R* at [98]

Section 102.6(1) of the Code – funding terrorist organisations

82 In *R v Azari (No. 12),*[190] the offender pleaded guilty to a charge that he attempted to make USD $9,000 available, directly or indirectly to Islamic State, knowing that it was a terrorist organisation. This was an offence contrary to ss.11.1 and 102.6(1) of the Code and carried a maximum penalty of 25 years' imprisonment. In addition, the offender asked for two further funding offences to be taken into account with respect to the primary funding offence. The offender admitted to arranging for a total of $6,000 to be transferred to Pakistan intending for it to be made available, directly or indirectly, to Islamic State.[191] It is unnecessary to set out the nature of the offences in full,[192] but in her assessment of the objective seriousness of the offences as being "*below the mid rage* [sic]*"*, N. Adams J noted:[193]

> [130] The offender accepted in his evidence at trial that he attempted to provide funds to a terrorist organisation knowing they would be used to fund fighters on the ground and that this was wrong because it was going to people who were fighting and not helping the Syrian people. Although the amounts were not large, as Baryalei noted in a number of calls, they were much needed.
>
> [131] The offender went to great efforts to transfer the funds as the facts show. In addition, the offender approached the young man M2 who was previously not involved with Islamic extremism and recruited him. Al-Talebi gave M2 extremist literature in the presence of the offender. The recruitment of M2 is relevant to the assessment of the objective seriousness.

83 Her Honour, after considering s.16A Crimes Act, and taking into account the two further funding offences, sentenced the offender to a term of imprisonment of eight years.[194]

84 In *R v Atai (No. 2)*,[195] the offender also pleaded guilty to two offences of intentionally collecting funds for or on behalf of Islamic State, knowing that it was a terrorist organisation, contrary to s.102.6(1) of the Code. Each offence was punishable by imprisonment for 25 years.[196] The first funding offence

---

[190] *R v Azari (No. 12)* [2019] NSWSC 314
[191] *R v Azari (No. 12)* at [2]-[4]
[192] *R v Azari (No. 12)* at [28]-[61]
[193] *R v Azari (No. 12)* at [130]-[131]
[194] *R v Azari (No. 12)* at [208]
[195] *R v Atai (No. 2)* [2018] NSWSC 1797
[196] *R v Atai (No. 2)* at [2](b)-(c)

was that the offender gave Farhad Mohammad (the 15 year old who murdered Curtis Cheng) $1,000.00 in cash to give to Shadi Mohammad, Farhad's radicalised older sister, to assist in funding her travel to Syria.[197] With respect to the objective gravity of this offence, Johnson J said:[198]

> [246] Factors which bear upon the objective gravity of offences under s.102.6(1) include the amount of funds involved, the identity of the terrorist organisation and the conduct of an offender surrounding the commission of the offence. With respect to Count 2, the terrorist organisation was Islamic State, a terrorist organisation of the worst type.
>
> …
>
> [250] In all the circumstances, Count 2 is an offence of substantial objective gravity.

85 His Honour observed that although the sum was "*not great"*, it allowed Shadi to travel to support Islamic State, and he had played a "*significant organisational role"*.[199] His Honour held that this was a "*significant offence on its own"*, but noted that there was some overlap with the principal terrorism offence, as the offender's "*knowledge of Shadi's travel arrangements was a factor which bore upon the timing of the commission of a terrorist act"*, and this could not be double counted against him.[200]

86 The sentence nominated for this offence was a term of imprisonment of 10 years and six months.[201]

87 The second funding offence involved the offender having a discussion about how to facilitate the movement $5,000.00 from Australia to Islamic State. The offender later had a discussion with an undercover operative where he indicated that a person was prepared to travel to Syria, and that the offender was willing to assist her. Later, arrangements were made for the undercover operative to deliver $5,000.00 in cash, with the operative to collect the offender from his home and then to deliver the money to the woman at her home. The woman had claimed that money had been previously sent to Syria

[197] *R v Atai (No. 2)* at [101]
[198] *R v Atai (No. 2)* at [246] and [250]
[199] *R v Atai (No. 2)* at [247]-[248]
[200] *R v Atai (No. 2)* at [249]
[201] *R v Atai (No. 2)* at [410]-[413]

via Lebanon. The operative, as arranged, delivered $5,000.00 in cash to the woman.[202] However, because of the undercover operation, there was "*no real prospect that funds would actually reach Islamic State …"*.[203]

88 His Honour noted that this offence was committed against the background of the offender's commission of a previous funding offence, and the principal terrorism offence (concerning the killing of Curtis Cheng). This demonstrated the "*depth of his commitment to the criminal cause of Islamic State … magnify*[ing] *the offender's criminality in Count 3"*.[204] The fact that the funds, although destined for Islamic State, did not reach them, did not assist the offender. His Honour said:[205]

> The fact that there was no prospect in Count 3 that the funds would actually reach Islamic State, so that actual harm would not be caused, does not provide real assistance to the Offender on sentence. There is a broad analogy with sentencing for drug supply offences where the drugs will not reach the public because the drugs are supplied to an undercover operative: *R v Achurch* (2011) 216 A Crim R 152; [2011] NSWCCA 186 at 166-168 [87]-[100]. Although the fact that funds did not actually reach Islamic State is a factor to be taken into account on sentence, a primary consideration remains that the Offender intended to make funds available to Islamic State and that it was no act of his that resulted in this not happening: *R v Achurch* at 168 [97].

89 His Honour found that the offender had a "*significant organisational role"* and had demonstrated an intimate knowledge of Islamic State (through a contact), and these were "*important features bearing on the objective gravity"* of this offence. The Court held that this offence was one of "*substantial objective gravity"*.[206]

90 The sentence nominated for this offence was a term of imprisonment of nine years.[207]

---

[202] *R v Atai (No. 2)* at [209]-[210]
[203] *R v Atai (No. 2)* at [251]
[204] *R v Atai (No. 2)* at [252]
[205] *R v Atai (No. 2)* at [253]
[206] *R v Atai (No. 2)* at [254]-[255]
[207] *R v Atai (No. 2)* at [410]-[413]

Foreign incursion and recruitment offences

91 In *R v Kruezi*,[208] the offender pleaded guilty to two charges, being an offence of preparing for incursions into a foreign state, contrary to s.7(1)(a) *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (since repealed, and replaced by offences now contained in Division 119 of the Code) and an offence of committing acts in preparation for or planning a terrorist act contrary to s.101.6(1) of the Code. The maximum penalty for the foreign incursion offence is 10 years' imprisonment.[209]

92 On 9 March 2014, the offender attended Brisbane International Airport in preparation to enter Syria, with the intention to engage in hostile activity. The offender obtained funding from like-minded individuals and had intended to travel to Syria to support the overthrow of the Assad regime through armed hostilities, including supporting Jabhat al-Nusra.[210]

93 After being turned back by customs officers at Brisbane Airport, the offender then turned his attention to committing an act of terrorism in Australia. The offender also switched his allegiance from Jabhat al-Nusra to Islamic State. Between 28 August and 10 September 2014, the offender acquired a rifle in Sydney, and transported it from Sydney to Logan, and obtained or attempted to obtain 10 L of petrol and various other materials to make Molotov cocktails. Other material was also uncovered, including a bow and arrow, and an Islamic State flag. The offender had been communicating with undercover operative, and by purchasing the materials on 10 September 2014, the Joint Counter Terrorism Taskforce were forced to intervene to prevent an imminent attack.[211]

94 With respect to the foreign incursion offence, Atkinson J held:[212]

[208] *R v Kruezi* (Supreme Court of Queensland, Atkinson J, 31 July 2018)
[209] *R v Kruezi* at p 2
[210] *R v Kruezi* at pp 2-10
[211] *R v Kruezi* at pp 2 and 10-21
[212] *R v Kruezi* at pp 25-26

> … the *Crimes (Foreign Incursions and Recruitment) Act* provided a significant legislative scheme to promote and protect Australia's international interests, and as the prosecution submits, the security and social cohesion of the nation by providing criminal sanctions for Australian citizens or residents who undertook activities in Australia or elsewhere that had the potential to interfere with or harm foreign countries of governments through the use of force, violence or armed hostilities.
>
> One of the ways in which it did that was prohibiting Australian citizens and those ordinarily resident in Australia from engaging in hostile activities in a foreign state, and providing criminal sanctions for those that engaged in preparatory activity in Australia. The creation and punishment of those offences is important for both international and national security. However, it is important to keep in mind that this offence is not a terrorism offence, and does not contain any element, as the prosecution correctly submits, that this was committed in furtherance of terrorism …

95 The defence had submitted, with respect to the terrorism offence, that the evidence did not support a finding that the offender planned to kill random innocent people. Her Honour rejected this submission:[213]

> … It may well be that you intended to kill innocent law enforcement officers rather than random members of the public in a public place, but that does not, in my view, lessen the criminality of your behaviour. The offending was interrupted through police taking action at a stage when an attack, if it was not imminent, was at least planned to the point where you had obtained weapons to carry out a brutal attack. There seems little doubt, from what was found in your possession when you were arrested, that you intended to carry out a terror attack … [although] the precise details at the time, place and target of the attack were yet to crystallise.

96 Her Honour ultimately accepted a submission that the terrorist offence was "*very high*". His Honour said about the offences:[214]

> … you appeared determined and committed to carry out an attack. Immediately after you had been prevented from leaving Australia to travel to Syria, you began equipping yourself with weapons such as bows, arrows and knives … Your anger and intent evolved and escalated over the following months to a point where you were readying yourself to carry out a terrorist attack …
>
> The Prosecution submits that the objective seriousness of the offence is very high. Your weapons and plan, as the Defence submits, were relatively unsophisticated, but that does not mean that your plans were not brutal or that they would not be successful …

[213] *R v Kruezi* at p 28
[214] *R v Kruezi* at pp 29 and 41-42

> Your criminal offending was very serious, indeed. You attempted to go to Syria and were only prevented by vigilant law enforcement. You armed yourself with serious weapons in preparation for a terrorist attack in Australia. I see no evidence that your views or motivation has changed. You remain a serious risk to the public. The sentence imposed on you must not only punish you but, most importantly, protect the community and deter you and others who might be tempted to behave like you.
>
> Your acts, Mr Kruezi, may have been motivated by your sincerely-held religious beliefs, but they showed no respect for the rights or lives or others. You did acts preparatory to engaging in brutal and savage acts which would have caused death and destruction to their immediate victims and were designed to cause fear and intimidation to the whole community …

97 After considering s.16A Crimes Act, the principle of totality, and other sentences for terrorism-related offences, Atkinson J imposed a term of imprisonment of 17 years and four months, with a non-parole period of 13 years for the terrorism offence. For the foreign incursion offence, her Honour imposed a sentence of three years and six months to be served concurrently with the terrorism offence.[215]

98 In *R v Biber* [2018] NSWCCA 271,[216] the Court of Criminal Appeal held when assessing the objective seriousness of a foreign incursion offence under s.6(1)(a) *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth):[217]

> In assessing the objective seriousness of an offence under s 6(1)(a) where the relevant intent is to engage "in armed hostilities in a foreign State" it may be accepted, as the Crown submits, that it is necessary first to consider the nature and circumstances of the hostile activity intended to be undertaken, the means, methods and scope of any intended participation in those activities, the particular target or objective, if any, of the intended activities, and the apparent capabilities of the offender to achieve the intended objective, as well as the intended duration of the offender's participation in the hostile activity. It is then necessary to assess the seriousness of that conduct by reference to where it sits in a range of proscribed conduct for which 20 years imprisonment is the maximum penalty.

[215] *R v Kruezi* at p 42
[216] *R v Biber* [2018] NSWCCA 271
[217] *R v Biber* at [22]

99 In *R v Biber*, the offender pleaded guilty to entering the Syrian Arab Republic with the intention of engaging in a hostile activity in that state. The offender travelled to Turkey and then into Syria in 2013, and joined a group of insurgents who opposed President Bashar al-Assad's regime.[218]

100 In *R v Elmir (No. 3)*,[219] the offender pleaded guilty to an offence against s.119.4(1) of the Code, in that he committed acts in the Republic of Turkey in preparation for incursion into a foreign country, the Syrian Arab Republic, for the purpose of engaging in hostile activities, being reckless as to the fact that the conduct was preparatory to the commission of an offence under s.119.1 of the Code. The offender had travelled to Turkey with the intention of crossing into Syria; stayed in an Islamic State safe house in Turkey; sought the assistance of others to help him cross the border and to help him make contact with persons connected to Islamic State, as well as obtaining military equipment.[220] One of the people from whom the offender sought help was EB, who later pleaded guilty to, amongst other things, giving/receiving services to promote this subject offence.[221] A more fulsome overview is contained in the judgment.[222]

101 Davies J referred to *R v Biber*[223] and found that the objective seriousness of the offence fell "*slightly below the mid-range of offending*".[224] His Honour summarised the offending and observed that:[225]

> [43] In short, the acts committed in preparation for incursion into a foreign country involved travelling to Turkey, living at the IS house, acquiring the military equipment, making the contacts to get entry into Syria, and seeking EB's help on two occasions to have money sent to him to further his objectives. This took place over a two month period, so that any mitigation by reason of the impulsiveness of leaving his family in Dubai and travelling to Turkey is small. It is not without significance that he had the falling out with the people at the IS safe house because, to that time, there was nothing to suggest that he would not have pressed ahead with his intention to enter Syria with them or with their assistance. Even after that time, his intentions

[218] *R v Biber* at [9]-[14]
[219] *R v Elmir (No. 3)* [2019] NSWSC 1040
[220] *R v Elmir (No. 3)* at [1]-[2] and [5]
[221] *R v Elmir (No. 3)* at [7]-[9]. See: *R v EB* [2018] NSWSC 201
[222] *R v Elmir (No. 3)* at [6]-[24]
[223] *R v Biber* at [22]
[224] *R v Elmir (No. 3)* at [44]
[225] *R v Elmir (No. 3)* at [43]

> were only brought to an end because he was arrested by the Turkish police and put into immigration detention.

102 After taking into account relevant factors under s.16A Crimes Act the offender's subjective case and the objective seriousness of the offending, Davies J sentenced the offender to imprisonment for five years and five months, with a non-parole period of four years and one month.[226]

[226] *R v Elmir (No. 3)* at [92]

Sections 119.1 and 119.4 of the Code – preparations for incursions into foreign countries for purpose of engaging in hostile activities

103 In *R v Cerantonio & Ors*,[227] Croucher J was called upon to sentence the "*tinnie terrorists"* – a group of six men who had attempted to sail from Queensland to the Philippines with the intention to encourage or join with others there in conduct aimed at overthrowing the regional government in the southern Philippines. One of the co-offenders, Mr Kaya, pulled out of the plan and remained in Victoria. Each of the six pleaded guilty to the offence, which carried a maximum penalty of imprisonment for life.[228] By all accounts, this venture was doomed to fail, with there being "*many indicators of the utter ineptitude of the group and the silliness of their plan."*[229]

104 Croucher J considered the rationale for criminalising the offenders' behaviour, and endorsed[230] what Lasry J said in *R v Mohamed*:[231]

> [74] … it is perhaps reasonable that some might wonder why the Australian Federal Police ('the AFP') bothered to intercept the accused before they headed off on what, on any view, was to be a voyage that rivalled that of the *SS Minnow* for its chances of failure. It is obvious that the accused did not like or want to be in Australia … So, apart from doing the decent thing, as the AFP did, by saving them from the fate that their own breathtaking stupidity was nigh on certain to cause, why otherwise expend vast public resources on following, arresting, charging, prosecuting and sentencing them? Why not just let them go?
>
> [75] I think the principled answer is found, at least in part, in the judgment of Lasry J in *R v Mohamed*. In his reasons for sentence, his Honour opined that the 'clear purpose' of the previous foreign incursion provisions was:
>
> > to ensure that Australia discharged its international obligation to make criminal the activities of [anyone] who proposed to engage in hostile activities in a foreign state and/or assist foreign fighters to do so. … Like contemporary terrorism offences, the [relevant legislation] made criminal not only the specific act of engaging in hostile activities in a foreign state but, separately, acts which are performed in preparation with that intention.

105 His Honour concluded that Mr Cerantonio bore "*much greater moral culpability than his co-accused"*, and continued:[232]

---

[227] *R v Cerantonio & Ors* [2019] VSC 284
[228] *R v Cerantonio & Ors* at [1]-[3]; and [78]
[229] *R v Cerantonio & Ors* at [66]
[230] *R v Cerantonio & Ors* at [74]-[75]
[231] *R v Mohamed* [2016] VSC 581

> [88] … While those co-accused were all grown men with their own pre-existing extremist ideas held with varying degrees of conviction, Mr Cerantonio appears to have done all he could to confirm or even enhance those views and, in some cases, to persuade those who might have been vulnerable, and who seemed to be questioning the wisdom or righteousness of the plan to his perverse way of thinking. In my view, those who hold themselves out as leaders of groups such as this one and as preachers of such putrid ideas, and who, in doing so, corruptly influence — or attempt to influence — the thoughts and behaviour of others, deserve, all else being equal, substantially greater punishment than the subordinates who follow those leaders like lobotomised sheep. Mr Cerantonio is a man of obvious intelligence and ability. In my view, his moral culpability is all the greater because he attempted to use his considerable gifts for evil, not good.

106 His Honour however, pointed out that the "*poorly planned"* venture, and their "*lack of serious boating experience"* meant that the offenders would not have *"made it very far past the breakers off the far north of Queensland"*. Croucher J remarked: "*if perchance they got out to sea and did not drown or become victims of piracy, it seems inevitable that they would have become very hungry very quickly. At that point, if they had any idea how to do so, I reckon they would have turned the boat around and headed home"*.[233]

107 His Honour also noted that there was no "*formed plan*" as to how others were to be encouraged to overthrow the government, nor was it suggested that Cerantonio himself was to be a part of any violence.[234] His Honour concluded however that the offence remained "*very serious"*, and although a "*long way from being in the worst category of offences of this type, his particular offence is substantially more serious than the offences committed by his co-accused*".[235]

108 Croucher J found that the co-offenders were subordinate and they "*would not have been involved … but for the charismatic and persuasive Mr Cerantonio"*.[236] Nevertheless their offending involved sustained acts in preparation[237] and was motivated by adherence to similar if not the same,

---

[232] *R v Cerantonio & Ors* at [88]
[233] *R v Cerantonio & Ors* at [91]
[234] *R v Cerantonio & Ors* at [92]-[94]
[235] *R v Cerantonio & Ors* at [95]
[236] *R v Cerantonio & Ors* at [102]
[237] *R v Cerantonio & Ors* at [97]

extremist ideology.[238] His Honour concluded that their offending was "*towards the lower end of the spectrum of gravity for such an offence"*.[239]

109 After taking into account each offenders' subjective circumstances, and the nature of the offending, his Honour imposed the heaviest sentence on Mr Cerantonio, being seven years' imprisonment, with a non-parole period of five years and three months;[240] with his co-offenders receiving terms of between three years and eight months' imprisonment with a non-period of two years and nine months, to four years' imprisonment with non-parole periods of three years.[241]

110 Mr Kaya was not released on parole and served his full head sentence of imprisonment for three years and eight months which expired on 23 January 2020. On 22 January 2020, Anastassiou J made an interim control order under s.104.4 of the Code requiring Mr Kaya to comply with a range of conditions as part of that order.[242]

111 In *R v Betka*,[243] the offender pleaded guilty to an offence of engaging in hostile activity in a foreign country contrary to s.119.1(2) of the Code and asked to be taken into account on sentence an offence of entering Al-Raqqa province in Syria, being reckless to the fact that it was a declared area under s.119.2(1) of the Code.

112 Harrison J found that the s.119.1(2) offence was *"at the very lowest end of objective seriousness for offences of this kind"*.[244] Harrison J assessed the offender's moral culpability for this offence in the following way:[245]

> In assessing Mr Betka's moral culpability it is relevant that he travelled to Syria and joined the Islamic State with a less than fully informed understanding and knowledge of its objectives and the methods by which it sought to achieve them. Any belief that he may have held in the rightness of

[238] *R v Cerantonio & Ors* at [99]
[239] *R v Cerantonio & Ors* at [101] and [110]
[240] *R v Cerantonio & Ors* at [332]-[333]
[241] *R v Cerantonio & Ors* at [7]-[9]
[242] *Booth v Kaya* [2020] FCA 25
[243] *R v Betka* [2020] NSWSC 77
[244] *R v Betka* at [36]
[245] *R v Betka* at [37]

> the cause does not of itself affect his moral culpability. However, the fact his primary motivation was the amelioration or prevention of the depredations being visited upon the Syrian population by the Assad regime mitigates that culpability: see, for example, *R v Lelikan* [2019] NSWCCA 316 at [127]-[129], [131] per Bathurst CJ; at [154] per Bell P; at [157] per Davies J.

113 In assessing the offender's prospects of rehabilitation, Harrison J said:[246]

> There is also no suggestion or evidence to found the proposition that Mr Betka had ever supported, encouraged or considered, let alone engaged in, any terrorist activity in Australia. He has never been the subject of surveillance by authorities inspired by any suspicion or suggestion of that kind. Moreover, Mr Betka's mobile telephone was analysed by the authorities and its contents became part of the brief of evidence. There is nothing on Mr Betka's phone such as a book, recording, article or other material that could reasonably suggest or demonstrate any ongoing support for Islamic State or that Mr Betka poses any threat to the Australian community. I have already referred to the fact that Mr Betka's life in Australia from the time of his return to Australia until his arrest was relevantly law-abiding. His money laundering conviction is an obvious exception to that. There were no illegal or prohibited pro-jihadist posts or images on his phone and nothing that could reasonably suggest that Mr Betka held a radicalised pro-Islamic State view of the world. That would appear also to have been the view of the Australian Federal Police who did not charge Mr Betka with the present offences, involving activities in Syria but not in Australia, until more than two years after he returned home.

114 Taking into account all relevant factors and allowing a 15% discount for the utilitarian value of the offender's plea of guilty, and taking into account the s.119.2(1) offence, Harrison J sentenced the offender to imprisonment for three years and eight months commencing on 19 June 2018 with a non-parole period of two years and nine months expiring on 18 March 2021. [247]

[246] *R v Betka* at [70]
[247] *R v Betka* at [81]