EDITORIAL NOTE: SOME NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

**IN THE DISTRICT COURT**
**AT AUCKLAND**

**CRI-2016-004-001669**
**[2016] NZDC 11454**

**THE QUEEN**

v

**IMRAN PATEL**

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| Hearing: | 23 June 2016 |
| Appearances: | D Johnson and H Steele for the Crown<br>A Holland for the Defendant |
| Judgment: | 23 June 2016 |

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**NOTES OF JUDGE R J COLLINS ON SENTENCING**

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[1] Mr Patel, you stay seated in the meantime and when I get to the end, I will ask you to stand then. You have heard the summary of facts read today and that is the factual basis on which I sentence you for the four charges that you face. One of possession of objectionable material, two of distribution of objectionable material and a representative charge of making objectionable material.

[2] It is common or traditional now in sentencing to isolate a lead sentence, to identify a starting point for that and then uplift that starting point for other offending, aggravating factors in relation to the offending and then make allowance for personal mitigating factors. Here, the offending is interrelated and it is not a simple task to take one of the four offences and say that that discretely stands on its own, so the approach that I have taken has been a little bit more complex than that.

[3] As I say, you have heard the summary of facts read and that was read for the benefit of those in the courtroom so that people here know what it is that you are being sentenced for. The essence of your criminality is firstly to have possession of 62 objectionable video files on your laptop plus other objectionable image files. I regard the number of those objectionable files, being 62, to be significant. That is, on anyone's view a large number of such files to have. Secondly then, you have copied either effectively all or many of those files onto six other devices and I find it inescapable, well I cannot avoid the Crown's submission that you have done that, to be in a potential position or to be in the position to distribute those files to others.

[4] In addition to that combination of possession of 62 files and the copying onto six devices, in combination you have on two occasions sent text messages to 52 people providing a link to the objectionable material and on another occasion you have directly handed over to Mr Wati a DVD with a number of video files which were objectionable on it.

[5] All counsel are agreed is that there is no previous case where someone has been sentenced for possession of objectionable material where the objectionable nature of the material is extreme violence. So this sentencing proceeds really on a first principles basis and that is simply by the application of the purposes and principles of sentencing as set out in the Sentencing Act 2002.

[6] The Act requires that I denounce your conduct, hold you accountable and impose a sentence which will operate to deter you and others but I have also to have regard to your rehabilitation and you have already heard from me today how I regard rehabilitation in this case. It is not to alter any religious or political beliefs that you have. Rehabilitation in your case is to be focussed on you avoiding possession of material such as this which depicts extreme violence and grotesque cruelty.

[7] Can I say this, Mr Patel, the violence depicted in these videos and the images may be in places some distance from New Zealand but as one of many District Court Judges sitting in New Zealand, we deal with on a daily basis the huge harm that violence causes in the lives of New Zealanders. So the glorification and the celebration of violence at such a grotesque end is a matter of serious concern to the

Courts and must rightly be the subject of deterrence. I will come to in a moment, what I see as the aggravating factors of your particular offending.

[8] I have received a pre-sentence report which I have read. The report assesses you to be a high risk of re-offending and harm to the community. I am not sure if I necessarily share that view. I accept from the way that you have written to me that you are an intelligent man and I will come to in a moment, the matters which are the principles I have applied to in this sentencing but the report recommends a term of imprisonment and as I say makes that assessment of your risk of re-offending and harm to the community.

[9] As I say, it has been agreed that the possession, making of objectionable material and the distribution of that has not been the subject of a prosecution in this way, that is where extreme violence has been the basis for making the material objectionable. That has not happened before. Previous cases relate almost exclusively to sexual material and mostly child pornography. So this is a case of first principles where I have been required to determine the appropriate sentencing approach.

[10] So in light of that, the basis on which sentencing proceeds is as I indicated at the sentencing indication and that is firstly and most obviously the mandatory application of the Sentencing Act and the principles and purposes of sentencing and the statutory aggravating and mitigating factors.

[11] Three of the charges here carry maximum penalties of 14 years. Section 8(c) and 8(d) of the Sentencing Act cover the situation for a case seen as a part of the most serious cases of its type or case seen to be near the most serious case of its type. The sentencing indication given to you does not place your case in that category.

[12] Secondly, as I have attempted to stress, sentencing in respect of your case is in respect of the Films, Videos and Publication Classification Act 1993 charges and the sentences are for the offences charged. You are not being sentenced for any beliefs that you may have. The offences charged are in relation to objectionable publications. The likelihood of you performing a violent terrorist act or the risk that

you may pose of doing such an act, forms no part of the assessment of the appropriate sentence. Therefore the offending cannot be aggravated by the likelihood that you yourself may carry out an act of extreme violence but by the same reasoning, nor is it mitigated by any lack of likelihood that you may involve yourself in an act in the same way as the perpetrators of the violence in the publications have acted.

[13] The media and everyone else need to appreciate that you do not face a terrorism charge. However the assessment of the offending is to rightly take into account any support that you may be seen to give to what makes the materials objectionable. That is, the support that you give to extreme violence and grotesque cruelty and it is concerning in that regard, that when communicating with 52 others and distributing to them a link to the execution of people you used the expression, translated that is, that, "Retaliation is sweet."

[14] The next point is that the fact that there are parts of the publications which are unobjectionable is effectively irrelevant and sentencing must be determined by that which is objectionable and I confirm that that was the approach that I indicated at the sentencing indication and reaffirm today.

[15] The next principle is that accessibility is not a relevant factor. It is not mitigating for you that others may possess such material. Once a publication is objectionable, that forms the basis of its criminality. In a global, digital world it is not a mitigating factor to say it is widely available.

[16] The next and most importantly for today, despite Mr Holland's strenuous arguments in this regard, I am not dissuaded from the view that I took when giving the sentencing indication. Assistance is to be found by reference to child pornography cases but direct parallels or application of those cases is not possible. However because violence or cruelty must be extreme to be objectionable, an attempt to create a spectrum of extreme violence is no part of this sentence. The reason I say that is that in child pornography cases, the Courts have created a spectrum because the nature of the pornography does not have to be extreme to become objectionable. Any sort of pornography involving children is objectionable

from the outset. But in terms of violence, extreme is extreme and I am not embarking on any further definition or categorisation of degrees of extreme.

[17] However I do accept the broad thrust of the prosecution's submission, that where we are dealing with the callous execution of people and extreme cruelty to real people, in a real situation and where the makers of the publication want people to believe that what is happening is real, meaningful guidance can be taken from the gravest end of child pornography cases. Possession of publications where those publications celebrate the torture and execution of victims who are powerless to resist, which celebrates what makes them objectionable and celebrates the fear such publications are designed to engender, then offending in relation to such publications must be met with deterrent sentences. And your text message of 18 October is capable of no other interpretation than the celebration of revenge where the revenge takes the form of execution.

[18] Much of the submissions and the written material provided to me on your behalf focuses on the question of rehabilitation. Importantly in this case and it will be reflected in the discount for your guilty pleas, is that you have accepted responsibility for your offending and in doing that you have accepted that the publications are objectionable. Had the matter gone to a Judge alone trial or indeed if it had gone to jury trial, these publications would have had to have been classified by the classifications office and then that classification becomes binding as a matter of law. That situation is avoided where you enter a guilty plea, accepting the objectionable nature of them. It is not difficult to understand why you have taken that course when we have heard the description of them which has been read as a part of the summary of facts.

[19] I turn to the matters which give your offending the seriousness that I say it has. The first is the number of people that you sent, by text, the link to objectionable publications. Mr Holland has described that as a small group of known friends or associates. I regard that number of 52 as being a significant aggravating factor.

[20] Secondly, following a warning from your telecommunication company you persisted and sent a second text with another link. The link in that to a video

showing the beheading of a person with a knife must be nothing other than a truly grotesque visual image. Secondly, the copying on six occasions of this material and to be held on devices which were in a position to be readily distributed to others. And secondly, the sheer volume of the material which you had possession of and had copied.

[21] So against that background and against the guidance such as it is, that I take from child pornography cases, I come to the starting point for the offending here. They are different in the sense that it involves a different type of objectionable material. There are also differences in the cases here and much of what Mr Holland has submitted to me can be distinguished. However they do provide something on which to have regard to.

[22] Importantly, cases such as *Stewart* and others were decided prior to the increase in the maximum penalties for possession, for distribution and making of objectionable material. In my view, the starting point here having regard to all the matters that I have discussed is for, in combination, the making, that is the compilation of the six devices, whether they be DVD or USB devices, the making of those on six occasions, coupled with the distribution to Mr Wati. The starting point for that is one of four years' imprisonment and then the uplift for the possession of all 62 videos and the distribution by way of text messages to 52 people is of one year and that takes me to five years' imprisonment.

[23] I am prepared to recognise your rehabilitation prospects and your remorse by giving full affect to your guilty plea by giving the maximum available there of 25 percent, but for those other two factors which I have referred to, in my view, it would be difficult to sustain the full discount for guilty plea. So applying that 25 percent discount for guilty plea, I reach an end point of three years nine months' imprisonment.

[24] The Crown, in the Crown's written submissions has said that this is an appropriate case for a minimum period of imprisonment. I decline to impose a higher period of imprisonment, a minimum period of imprisonment over and above that which applies normally in the Parole Act. The risk that you present to the

community will be an assessment to be made by the Parole Board in due course and in my view at this stage there are insufficient grounds to impose a higher period or a higher minimum term of imprisonment.

[25] Mr Patel if you would stand please. On the two charges of making objectionable publications and on the charge of distribution of objectionable publications, you are sentenced to three years nine months' imprisonment and on the charge of possession of objectionable publications, you are sentenced to a concurrent term of imprisonment of 18 months. All terms of imprisonment are concurrent. The total term of imprisonment is three years nine months. Thank you, stand down.

R J Collins
District Court Judge