IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA68/2021
[2021] NZCA 456

BETWEEN	PREETAM PRAKASH MAID Appellant
AND	THE QUEEN Respondent

Hearing: 15 June 2021

Court: Clifford, Thomas and Muir JJ

Counsel: L A Andersen QC for the Appellant
J A Eng and R D Smith for the Respondent

Judgment: 10 September 2021 at 10.30 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is allowed.

C The sentence of three years' imprisonment is quashed and substituted for a sentence of 17 months' imprisonment.

D Leave is reserved to apply to the District Court to commute the balance of the custodial sentence to one of home detention.

REASONS OF THE COURT

(Given by Muir J)

Introduction

[1] Mr Maid appeals his conviction under s 11(1A) of the Aviation Crimes Act 1972 (the Act) for taking an imitation improvised explosive device (IIED) into the "security enhanced area" (SEA) at Dunedin International Airport (DIA). He does so on the basis that the jury's verdict was unreasonable. He also submits that there was a miscarriage of justice on account of:

(a) omission of a material issue in the Judge's question trail;

(b) failure by the Judge to make it sufficiently clear in his summing up that proof Mr Maid had placed the IIED in the location it was ultimately found was not proof that he had transported it through the SEA; and

(c) omission by the Judge in his summing up of a defence circumstance relevant to the quality of the Crown's circumstantial case.

[2] He also appeals the sentence of three years' imprisonment imposed by Judge Crosbie in the District Court at Dunedin as manifestly excessive.[1]

Background

[3] Mr Maid was an Aviation Security (AVSEC) Officer employed at DIA. His duties included screening passengers' personal belongings, screening baggage for the hold stow area of aircraft and conducting perimeter checks of the airport for security purposes. He also had a role training other AVSEC staff in screening for restricted items (including IIEDs) and held a quality assurance position which involved him carrying out covert testing of the airport's security systems from time to time as directed.

[4] An external perimeter boundary divides DIA between what is called "airside" and "landside". Landside is the area of the airport the public have access to. Airside, which includes the airport runway and surrounding area bordered by perimeter fences, is a secure area. Within that secure area are further areas, including

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1 *R v Maid* [2021] NZDC 1547 [Sentencing notes].

the "baggage make up area" where stowed baggage is screened and readied for loading onto aircraft, which are categorised as "security enhanced areas". SEAs require specific prior security authorisation to enter. Entry is controlled by security swipe access via doors and gates. SEAs exist by declaration of the Director of Civil Aviation and may only be entered by certain officials and AVSEC staff.

[5] On 17 March 2019 (two days after the Christchurch Mosque attacks), Mr Maid was rostered to work from 10.00 am until 7.30 pm.

[6] The Crown's case at trial was that during the course of the day Mr Maid obtained from the AVSEC office (which is located in an annex at the opposite end of the terminal from the baggage make up area) keys for the dangerous goods storeroom; that in the course of two trips to the storeroom he obtained a number of items, including wire, an energiser battery pack, a cellphone, a butane cannister, a soda stream cylinder and green bubble wrap and that he then assembled an IIED using sellotape he obtained from the AVSEC office.

[7] On the Crown case, he then wrote a cryptic note in the format:

A Alpha

B Birds

C Crash

D Dunedin

E Emergency

F Fools

[8] He placed the IIED in a black "Voyager" laptop satchel with the note inserted in the satchel handle. He then put the satchel in a black "Flylite" backpack to carry it through public and secure parts of the airport. The Crown said he used the Flylite backpack instead of his usual "Adidas" backpack because it was more capacious, had been issued to him as part of his quality assurance role and that in the event he was intercepted, he would therefore have a ready explanation for carrying around an IIED.

[9] The Crown said that at 3.48 pm Mr Maid went from an area of the airport the public have access to, through a set of doors into the baggage make up SEA carrying the Flylite backpack. This was captured on CCTV. It said he then deposited the backpack, entered (via swipe access card) the so called "HSB Search Room" and from there the "HSB Control Room"[2] where he uplifted keys to the AVSEC patrol vehicle and put them in his pocket. It says that he then collected the backpack, left the building via an external door and placed the backpack in the AVSEC patrol vehicle which was located in an airside carpark. The Crown said that he undertook various roster checks throughout the day to ensure that no other staff would be using the vehicle.

[10] At 6.05 pm Mr Maid commenced his regular mobile check of the perimeter gates between airside and landside using the patrol vehicle. He travelled via Centre Road to Gate A. At that location he radioed his superior to report foreign object debris near the 03 runway Localiser Hut (the Hut).[3]

[11] On completion of his checks he then drove onto the apron area of the tarmac where he sought permission from Air Traffic Control to drive (airside) to the Hut. Permission was granted at 6.31 pm. The Crown case was that he then drove to the Hut, parked the patrol vehicle in a way that blocked any view from the Control Tower, removed the satchel containing the IIED and placed it at the entrance of the Hut. He then moved his vehicle approximately 50 metres, took a photograph and notified his supervisor and air traffic control.

[12] Air Fire Rescue was advised and arrived to assist Mr Maid. The combined Threat Assessment Team then classified the satchel as a suspicious package. DIA was subsequently closed. The New Zealand Defence Force and a Bomb Disposal Unit were then dispatched from Christchurch. A mobile x-ray of the package indicated what appeared to be an authentic IED and the bag was neutralised. DIA remained closed until the following morning.

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2 Both within the SEA.

3 A localiser is part of the navigational equipment situated at an airport.

[13] Within half an hour of completing his shift Mr Maid had contacted five different media outlets to ensure they were aware of the incident.

[14] On the Crown case Mr Maid's scheme was intended to highlight security failings which he had earlier repeatedly raised at the airport. The Crown also suggested an associated financial benefit to Mr Maid in terms of the longer hours of work that may result from additional screening.

The conviction appeal

The unusual Aviation Crimes Act regime

[15] As indicated, the charge against Mr Maid was brought under s 11(1A) of the Act which was inserted as of 26 September 2007.[4] It provides:

> (1A) Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 5 years, who, without lawful authority or reasonable excuse, takes, or attempts to take, into a sterile area or a security enhanced area an item or substance specified in subsection (1).

[16] Section 11(1) creates an offence (again punishable by up to five years' imprisonment) of the taking or attempting to take on board any aircraft any firearm, any other dangerous or offensive weapon or instrument of any kind whatsoever, ammunition, any explosive substance or device, or an "imitation" of any such items.

[17] Surprisingly, it is not an offence under the Act to take any of the items identified (whether real or imitation) through any part of an airport building or the surrounding security area that is not a SEA. Nor, is it an offence under the Act to deposit an IIED at an airside location that is not within an SEA. It is common ground in this case that the Hut was not within a SEA. Mr Maid could not therefore be convicted of an offence under the Act unless, in the course of his efforts to deposit the IIED at the Hut, he transited through a SEA with the device.

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4 Aviation Crimes Amendment Act 2007, s 5(3).

The appellant's case

[18] For the purposes of the appeal Mr Andersen QC accepts that the Crown made out a sufficient circumstantial case that Mr Maid constructed the IIED and transported it in an AVSEC vehicle to the Hut, where he deposited it for the purposes of creating a security incident. In particular, although noting Mr Maid's continuing denial of any involvement, he submits that the expert handwriting evidence, in addition to the other circumstantial evidence, was sufficient to sustain the conclusion that Mr Maid was the person responsible. However, he emphasises that assembly of the device and its deposit at the Hut were not themselves offences under the Act and were therefore only circumstantial threads in the Crown case under s 11(1A).

[19] In respect of that case, he submits that there was no evidence that the black Flylite backpack — which CCTV footage evidenced Mr Maid had carried into and through the SEA en route to the car park — contained the device. He said it was equally plausible that Mr Maid had obtained access to the car park (itself in a secure area but not a SEA) from security gates adjacent to the roadway. He emphasises that although there were keys for the patrol vehicle in the HSB Control Room, which the CCTV footage establishes were uplifted by Mr Maid at 3.50 pm,[5] there was also a spare set of keys located in the AVSEC office annex where the evidence established Mr Maid had been on various occasions during the day. He submits that although any circumstantial case is based on an accumulation of individual strands of evidence, nevertheless, if two possibilities were equally likely — placement of the device in the patrol car by passing through a security area or alternatively a SEA — then a jury verdict assuming proof beyond reasonable doubt of the latter would be unreasonable.

[20] Although not addressed in his oral submissions, Mr Andersen's written submissions also argued:

(a) the Judge's summing up was confusing in that it inappropriately allowed the issue of whether Mr Maid placed the IIED at the Hut to be interwoven with the issue of whether he had committed the actus reus of the offence under s 11(A);

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5 The exact time stamp is 15:50:18.

(b) the question trail should have separated the issue of whether Mr Maid placed the IIED at the Hut and the issue of whether he took it through the SEA; and

(c) in the discussion of the respective "circumstances" emphasised by the Crown and defence, the Judge did not specifically identify the defence submission that there was no direct evidence that such a device was in the Flylite backpack and "you can't rule out he was carrying something else in the black bag instead of an [imitation] IED".[6]

The principles

[21] These are uncontentious. The jury's verdict can only be considered unreasonable[7] if, "having regard to all the evidence, no jury could reasonably have reached [it] to the standard of beyond reasonable doubt".[8] In that context the cases recognise that the weight to be given to individual pieces of evidence is essentially a jury function, that reasonable minds may disagree on matters of fact and that because the body charged with finding the facts is the jury, appellate courts should not lightly interfere.[9]

[22] In respect of the balance of the appellant's arguments, this Court would need to be satisfied first that there was some error or omission in the Judge's approach and secondly that this gave rise to a miscarriage of justice in the sense that it created a real risk that the outcome of the trial was affected, or that it resulted in an unfair trial.[10]

Discussion

[23] We accept the conclusion, expressed by the Judge at sentencing, that the Crown case that Mr Maid assembled the IIED and deposited it at the Hut in the Voyager laptop

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6 The identified extract is from the defence closing address.
7 Criminal Procedure Act 2011, s 232(2)(a).
8 *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [87], approved in *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [15].
9 *R v Munro*, above n 8, at [87]–[88], approved in *R v Owen*, above n 8, at [13].
10 Criminal Procedure Act, s 232(2)(c) and (4).

satchel was "so compelling that the only piece missing was actually seeing [him] place the imitation IED by the hut".[11]

[24] We accept also that the reality of the trial was that the Crown had to prove the overall course of conduct. That is because Mr Maid's defence was one of identity. He claimed he had no involvement in assembling or placing the IIED at all. In that context we agree with Mr Eng's submission that the Crown could "hardly prove that he had taken the device into the SEA without answering that contention".

[25] As to identity, the Crown relied on multiple threads of circumstantial evidence including:

(a) the timing of Mr Maid's various movements that day, as recorded by his dedicated electronic swipe card or on CCTV, clearly established an opportunity for him to access the dangerous goods store via the landside corridor (which he entered at 11.19 am and 2.39 pm respectively) to procure relevant components;

(b) there was similarly adequate opportunity for him to assemble the components into an IIED in his office at the annex (in which there was no CCTV), either side of the 15 minutes (between 3.10 pm and 3.25 pm) when he was engaged in writing a report;

(c) there was CCTV footage of him uplifting a roll of sellotape and returning it empty (the IIED having been stuck together with a quantity of sellotape);

(d) the components in the IIED were among those which the evidence established were located in the dangerous goods storeroom;

(e) Mr Maid had been issued with a Voyager laptop satchel of the type used to hold the device (these satchels having since been decommissioned);

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[11] Sentencing notes, above n 1, at [40].

(f) the handwriting expert was sure that Mr Maid had written the cryptic note;

(g) Mr Maid also told a police officer that the note had been handwritten when that was not information discernible from examination of the satchel (the note was rolled up and placed inside the handle with the text facing inwards);

(h) when Mr Maid drove to the Hut he parked it in an unusual way from which an available inference was that he sought to obscure the Hut from the Control Tower;

(i) he purported not to be able to identify the satchel as a bag from landside in the course of his perimeter check despite using binoculars;

(j) he showed unusual nonchalance in approaching the device consistent with knowledge that it posed no actual danger, and when other personnel sought to approach it he did not seek to discourage them; and

(k) he had motive, given a history of professional complaints about the adequacy of security at the airport and, in seeking maximum publicity for the incident, acted in a manner consistent with such motive.

[26] However, we accept Mr Andersen's submission that of itself, proof that Mr Maid assembled the device and/or placed it at the Hut can be considered only as a part of the Crown's circumstantial case that he took the device through the SEA. As we have indicated, Mr Andersen emphasises alternative routes by which the device could have been taken to the patrol vehicle; the absence of evidence as to what was in the black Flylite backpack when Mr Maid went into the SEA; and the absence of any compelling reason to take the IIED into that area en route to the vehicle because a spare vehicle key was in the AVSEC annex office.

[27] Clearly, the fact that there is no direct evidence of the contents of the satchel at the relevant time is not of itself decisive. That is the very point of circumstantial

evidence. It allows the fact finder to infer the existence of a particular fact from a variety of surrounding circumstances.

[28] Although the circumstantial evidence that the backpack contained the IIED at the point Mr Maid carried it into and through the baggage make up SEA is not as overwhelming as the circumstantial evidence of his involvement in the wider scheme, we nevertheless regard it as strong. We refer in particular to the following circumstances:

(a) whereas previously in the day Mr Maid was observed on CCTV using his personal Adidas backpack (with three white stripes), he uses the plain black Flylite backpack for the 12 minute interval during which he leaves the annex, walks through the door to the SEA, enters the HSB Control Room, leaves the building, and then returns;

(b) the Flylite backpack could more comfortably fit the Voyager laptop satchel;

(c) because it was a quality assurance bag he could, if questioned about it or caught, either deny ownership or play off his involvement as part of his quality assurance role;

(d) in walking out to the patrol vehicle with the backpack he avoided a room occupied by his colleagues but on the return trip (by which point the Crown said the IIED had been deposited in the vehicle) he was apparently happier to do so;

(e) the alternative theory — that he used the Flylite backpack to take things from his locker to his personal vehicle — was inherently unlikely when he had, up until that point, used his own bag and it would mean him doing so in the middle of his shift when he would be finishing only a few hours later; and

(f) his involvement in the wider scheme.

[29] We accept as conceivable that there was an alternative route to the AVSEC vehicle whereby Mr Maid would not have infringed the SEA. It is conceivable also that Mr Maid knew about the spare key for the vehicle in the annex office. But, in the absence of evidence (whether CCTV or otherwise) that he took some alternative route to the car and with the CCTV evidence clear that he uplifted keys to the vehicle from the HSB control room at 3.50 pm, it was, in our view, more than open to the jury to conclude that the various circumstantial threads together established (to the requisite standard) that he in fact passed through the SEA carrying the IIED. The case was, in our view, a considerable distance from that postulated by Mr Andersen: equally likely possibilities existing in terms of how the satchel was placed in the car.

[30] Moreover, the argument on appeal assumes that Mr Maid knew of the nuances of s 11(1) and (1A) of the Act and on that basis reasonable doubt that he would pass through the SEA when passage through a simple security area would not have seen him prosecuted. As Mr Andersen acknowledges, there is no evidence of his having turned his mind to that matter specifically.

[31] We are not therefore persuaded that the jury's verdict was unreasonable.

[32] In respect of the subsidiary points in Mr Andersen's written submission, we can be comparatively brief.

[33] We do not accept that the Judge's summing up failed to focus appropriately on the core element of the charge, or created an environment where the jury improperly proceeded from (1) an assessment Mr Maid was responsible for assembling the device and depositing it at the Hut to (2) the conclusion that he must therefore be guilty of the offence under s 11(1A). To the contrary, the Judge made the position, in our view, plain. He said:

> [35] The first question is, "Has the Crown made you sure that Mr Maid intentionally took an imitation explosive device into a security enhanced area?" So, remember, this is the aspect of the case where the Crown says that you may infer from all of the facts that what he had in the black pack was an IED and he took that into a security enhanced area. As I will say to you later on, it being found somewhere else is one of the inferences that the Crown says enables you to conclude that he must have taken it through the security enhanced area. So in that respect it invites you to work backwards. …

[34] Earlier he likewise said:

> [9] The Crown case is that it was Mr Maid who assembled and placed the IED in the computer bag, placed it in the door of the ILS hut and then raised an alert. However, that of itself is not the charge he faces. The charge he faces is that he took the IED into and/or through an airport security enhanced area. That security enhanced area is the area within the northern part of the airport building at Momona. …
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> [11] In this case the underlying and ultimate issue is whether you are satisfied beyond reasonable doubt that he, without lawful authority or reasonable excuse, intentionally took an IED into a security enhanced area at Dunedin International Airport.

[35] The Judge therefore clearly identified where the jury's focus should lie. Evidence that Mr Maid had fulfilled his ultimate objective was, equally clearly, identified as only part of the Crown's circumstantial case.

[36] Nor are we persuaded that the question trail should have commenced by asking "Did the defendant place the Imitation IED at the localiser hut" as Mr Andersen suggests. He says that if it had done so this would have enabled the jury to focus on the issue appropriately and independently of the two subsequent questions.[12] However we agree with the Crown that this would have elevated one aspect of a circumstantial case to the status of an element of the offence and that this is not permissible, let alone desirable.[13] Although placement of the satchel at the Hut was an important part in the Crown's circumstantial case, it was not a condition precedent for consideration of the charge under s 11(1A). The Crown's closing address was unambiguous in that respect,[14] as was the Judge's summing up.

[37] Mr Andersen's final point is that the summing up did not repeat defence counsel's observation that "[y]ou can't rule out he was carrying something else in the black bag instead of an Imitation IED". He says this should have been referred to in the Judge's long recitation of the circumstances supporting the respective cases.

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12 1.1 "Has the Crown made you sure that Mr Maid intentionally took an imitation explosive device (IED) into a security enhanced area?".
1.2 "Has the Crown made you sure that he did so without lawful authority or reasonable excuse?"

13 In *Perez v R* [2015] NZCA 267 at [45] this Court observed that "[i]t is axiomatic that a question trail must reflect the elements of the relevant charge and the factual decisions to be made in respect of each element".

14 In his closing address Crown counsel observed that "a significant amount of evidence" was peripheral to the core elements of the offence noting that "I want you to remember that it's only the elements of the offence the Crown has to prove".

We do not consider it a defence circumstance as such. It was simply an observation forcefully made in the defence closing as to the existence of reasonable doubt on a key aspect of the Crown case. We have no doubt that this proposition would have been at the forefront of the jury's mind in its assessment of the s 11(1A) charge having regard to the way in which the Judge otherwise summed up — in particular his focus on the fact their job was to determine that "what he had in the black pack was an [imitation] IED and he took that into a security enhanced area". There can be no miscarriage of justice in this context.

[38] Accordingly we dismiss the conviction appeal.

Sentence appeal

The District Court's approach

[39] The Judge imposed a sentence of three years' imprisonment having recognised discounts for personal factors of 20 per cent. His starting point was three years and nine months' imprisonment against a statutory maximum of five years.

[40] In fixing this starting point he considered that the offending exhibited a number of aggravating features, namely:[15]

(a) Mr Maid was an aviation security officer "sworn to protect" the targeted premises;

(b) he used his training as an AVSEC officer to construct a realistic IIED and caused serious alarm;

(c) he breached security protocols by doing things which were not part of his duties, including using swipe cards and pin numbers to access rooms and spaces for which there was no proper purpose;

(d) the offending involved a gross breach of trust;

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15 Sentencing notes, above n 1, at [23]–[27].

(e) there was a high degree of premeditation and planning;

(f) Mr Maid would have known from his training and experience that the offending would cause significant disruption and alarm, including the diversion and/or cancellation of flights; and

(g) the close proximity in time of the offending to the Christchurch Mosque attacks at a time when all AVSEC staff were on high alert.

[41] The Judge then referred to two other cases, one involving an imitation explosive device and another a device intended to explode but not having the capacity to do so.[16] He noted that the Act did not distinguish in terms of penalty between actual and imitation devices for the reason that "it is the act of taking the device into a security enhanced area itself that is the mischief".[17] He said that he agreed with the Crown that it was difficult to imagine a more serious example of such an offence given the aggravating features identified and that this was relevantly reflected in the requirement to hold Mr Maid to account under s 7(1)(a) of the Sentencing Act 2002.[18]

[42] Next the Judge considered the requirement to denounce the conduct.[19] He said it was "cynical" and "cruel" offending occurring two days after the Christchurch Mosque attacks while the country was "reeling and in mourning".[20] He again emphasised that the defendant would have known from his experience how significant and costly the disruption from an airport closure would be. But it was not, he said, "a stunt by a larrikin or a cry for help by someone with mental health issues".[21] It was a "gross breach of trust" by someone who knew what the effect would be on the airport, the public and emergency services.[22] As such he said it warranted significant denunciation.

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16 *Taylor v R* [2017] NZHC 1356; and *R v Nicholas* [2017] NZHC 3043.
17 Sentencing notes, above n 1, at [35].
18 At [36].
19 Sentencing Act, s 7(1)(e).
20 Sentencing notes, above n 1, at [37] and [39].
21 At [39].
22 At [39].

[43] Finally, the Judge referred to the need for deterrence.[23] He said it was significant that there had never previously been such an incident in New Zealand which "must be because Civil Aviation and aviation security provide an effective preventative service".[24] He said it was significant that "one of their own" circumvented the safety and security of the airport, that this was done in a covert way and that there was accordingly:

> [40] … a need through this sentencing today to deter such acts, to uphold the importance of aviation security and to react firmly when a member of that service utilises their knowledge and trust to commit such a cynical offence against the Act.

[44] In establishing his starting point the Judge did not expressly refer to s 8(d) of the Sentencing Act (requiring a penalty near to the maximum prescribed if the offending is near to the most serious case), but must be considered to have approached the sentencing on that premise.

[45] The Judge then turned to personal mitigating factors. He considered a discount of 10 per cent appropriate to reflect Mr Maid's absence of previous convictions and allowed a further discount of 10 per cent for his "family's personal difficulties"[25] and his "offer to make amends".[26]

[46] The final sentence imposed was therefore three years' imprisonment.

[47] We note that the reparation of $6,000 which Mr Maid committed to making has not been paid.

The appellant's submissions

[48] Mr Andersen submits that the Judge's starting point was manifestly excessive because it proceeded from a fundamental mistake in the assessment of Mr Maid's

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23 Sentencing Act, s 7(1)(f).

24 Sentencing notes, above n 1, at [40].

25 Mr Maid's wife suffers from complex vertigo meaning his family are reliant on him as the primary caregiver of the couple's two young children aged 12 years and 16 months.

26 At [45]. The offer was to pay $6,000 which the Judge described as "relatively insignificant against the total costs that have been set out by the relevant victims but also that additional human cost" (at [42]). Victim Impact Statements indicated that Air New Zealand's total costs as a result of the disruption (primarily passenger accommodation costs) were $31,386.07, DIA's costs were approximately $4,225.00 and Virgin Australia's estimated costs between $7,000 and $8,000.

culpability. He says that Mr Maid was in fact sentenced for the wider scheme of gathering components and constructing and planting the imitation IED, which would not have been an offence if he had not travelled through the SEA. As a result he submits it was irrelevant that the airlines and DIA suffered losses of approximately $42,000 or that significant disruption was caused to the public. These, he said, were functions of the IIED having been placed at the Hut which was not in itself criminal offending.

[49] He submits that while it was necessary for the Crown to prove Mr Maid was responsible for planting the IIED as part of the wider factual narrative surrounding the case, because this did not of itself constitute an offence, the actual offending must be seen as purely incidental to non-criminal activity and as such in the "technical" category.

[50] He submits that the overall legislative purpose of s 11 of the Act is to prevent IIEDs being carried or loaded onto an aircraft and that, in this context, s 11(1A) can appropriately be seen as creating a "preventative" offence. He draws an analogy with the law of attempts, submitting that the s 11(1A) offence was intended to "extend the boundary" of the s 11(1) offence by criminalising actions proximate to the loading of any such device on to an aircraft.

[51] He submits that the offending in *Taylor v R*[27] and *R v Nicholas*[28] was significantly more serious given that it involved threats to the public and/or to property and, in the case of *Nicholas*, caused emotional harm. He points out that in *Nicholas* there was an actual attempt to detonate the device, albeit that the expert evidence was that this was not possible. He submits that this demonstrated a clear intention to cause terror not present in the case of Mr Maid's offending.

[52] He further submits that the primary motive identified by the Crown was a desire to highlight deficits in aviation security in the hope that Mr Maid's concerns might be addressed. As such he says Mr Maid's motive was ultimately public spirited, not to cause terror, and that this mitigates his culpability.

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27 *Taylor v R*, above n 16.
28 *R v Nicholas*, above n 16.

[53] Against this background he suggests an appropriate maximum starting point was one year's imprisonment which, after a discount of 20 per cent, would take the sentence to approximately nine-and-a-half months.

The Crown's submissions

[54] Mr Eng submits that the sentence was not manifestly excessive and that, having regard to the aggravating features identified by the Judge, and in particular Mr Maid's gross breach of trust, s 8(d) of the Sentencing Act was engaged. He says that characterising the offending as "technical" disregards "the recognised seriousness of the offence", and that it fell within the mischief contemplated by s 11(1A) by "compromising New Zealand's aviation security and causing major disruption". He endorses the comment in the Judge's sentencing notes that "[i]t is difficult to imagine how much more one could have done in terms of what was required to commit the offence and the consequences".[29]

Discussion

[55] Assessing the appropriate level of Mr Maid's sentence raises a seemingly novel point — certainly one for which neither counsel nor we have been able to obtain any substantial assistance from the authorities. Although the consequences of his composite actions on 17 March 2019 were substantial, involving significant disruption and cost to the various entities and individuals involved, these were all consequences of a non-criminal act (placement of the IIED outside the Hut). The criminal offending (transporting the IIED through the SEA) was essentially incidental to this non-criminal act and was not itself an act with material consequences. Indeed it took place within a period of less than three minutes, between 3:48:37 and 3:51:35 pm, and, because no one was aware of the contents of the Flylite backpack, caused no anxiety, alarm, or consequence of any kind.

[56] We start with what we identify to be the purpose of s 11(1A). As indicated, this was inserted in 2007 as part of a suite of aviation reforms. These were stated in the explanatory note of the relevant Bill to provide "enhanced security measures for

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[29] Sentencing notes, above n 1, at [36].

New Zealand civil aviation", to "allow New Zealand to support its obligations under the Convention on International Civil Aviation (1944)", to strengthen "the legal framework for New Zealand's aviation security system" and to contribute "to the goals of the New Zealand Transport Strategy, in particular by assisting safety and personal security and assisting economic development".[30]

[57] The explanatory note contains a useful statement of the purpose of the proposed subs (1A):[31]

> In addition, while it is an offence to carry, or attempt to carry, a potential weapon onto an aircraft, it is not an offence to take such an item into the sterile area. This creates a security risk and a legal loophole whereby a passenger found with a potential weapon in the sterile area cannot necessarily be proved to be trying to board the aircraft with the item.

[58] This underscores the fact that subs (1A) was intended to be an adjunct to the prohibition in subs (1) against taking on board any aircraft a firearm, weapon, ammunition, explosive device or imitation thereof. As such it filled a lacuna whereby anyone identified with such an item in a SEA (and who therefore was clearly a security risk) could be successfully prosecuted without establishing an intention to board an aircraft with the item (obviating for example a defence based on a professed intention to dispose of the item before boarding).

[59] Against this background, Mr Maid's offending can, in our view, be correctly identified as incidental to the mischief which the legislation was attempting to address. He had no intention of boarding an aircraft with the IIED or even placing it in the vicinity of one. His objective was not to cause terror to any one or more individuals. It was therefore in the nature of happenstance that an offence took place. Had he placed the IIED in the AVSEC security vehicle via a different route, no offence would have occurred under the Act.

[60] We do not consider that offending which is incidental to the legislative purpose of the relevant prohibition could ever be described as near to the most serious of its kind for the purposes of s 8(d) of the Sentencing Act. We would reserve such

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30 Aviation Security Legislation Bill 2007 (110-1) (explanatory note) at 1.
31 At 19.

description to transit through a SEA with a firearm or live explosive with the intention of subsequently boarding an aircraft. Nor do we consider the Judge was correct in saying that the offending represented a "cynical offence *against the Act*".[32] Although cynical in a general sense, it was not within the specific purposes of the Act.

[61] As such we consider the Judge to have been in error in the way he approached the assessment of the starting point. Rather than focusing on the legislative purpose of the section and how the criminal component of Mr Maid's various activities related to the prescribed purpose, he appears to have focused on the consequences of Mr Maid's overall activities that day — in small part criminalised by the Act, in most part not. The significant disruption and cost identified by him in fact resulted from a non-criminal action not captured within the conduct s 11(1) and (1A) was designed to address.

[62] We do not find a great deal of assistance in the two cases referred to by the Judge and counsel. *Taylor* involved four separate fake bomb threats of increasing sophistication over a two-week period.[33] The last of these involved creating an IIED which included an electronic buzzer and home-made pressure switch. It buzzed continuously with a note attached suggesting that, if the person reading it moved, the bomb would be set off. The Court considered it minor to moderate offending of its kind adopting a starting point of two years and six months' imprisonment with an end sentence of 10 months' home detention.

[63] In *Nicholas*, the defendant built an explosive device out of flammable chemicals and went to a high rise building with the device in a suitcase.[34] He notified staff he intended to blow himself and the building up. When the Police arrived he attempted to detonate the device by lighting a wick which protruded from the suitcase. He was unsuccessful and the expert evidence was that the contents could not be detonated. Potentially, however, they could have produced toxic fumes if exposed to a sufficient heat source. Brewer J adopted a starting point of 14 months' imprisonment which was confirmed as the final sentence after all adjustments.

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32 Sentencing notes, above n 1, at [40] (emphasis added).
33 *Taylor v R*, above n 16.
34 *R v Nicholas*, above n 1616.

[64] In one respect at least the offending in *Nicholas* was more serious than that in the present case. The defendant's clear intention was to cause terror and no doubt his threats did cause significant anxiety to those exposed to them. Moreover, he attempted to detonate the device, assuming that in so doing he would cause an explosion.

[65] Likewise in *Taylor* the device was calculated to create terror in anyone who approached it and read the attached message. There was also a high level of premeditation as evidenced by escalation in the offending over a two-week period.

[66] Both cases involved charges under s 307A of the Crimes Act 1961 relating to threats of harm to people or property.[35] Mr Maid was not prosecuted under this section for which we note the maximum penalty is seven years' imprisonment.

[67] However, despite the limitations of the comparison, *Nicholas* and *Taylor* reinforce the conclusion that the starting point adopted by the Judge in this case was too high. Indeed it exceeded by nine months the starting point upheld by this Court in *R v Coombs* where functional dry ice bombs were exploded resulting in injury to one bystander.[36]

[68] In this case we consider the Judge was overly influenced by what he considered "cynical" and "cruel" behaviour in the context of the Christchurch Mosque attacks. He conflated all of Mr Maid's actions that day into a single tranche of criminal offending and failed to relate the actual (and largely incidental) offending to the legislative purpose of s 11. In so doing he adopted a starting point which we regard as manifestly excessive.

[69] We consider that the appropriate starting point was in the order of 20 months' imprisonment. We accept that, even in respect of the limited conduct properly categorised as criminal, Mr Maid's actions involved a gross breach of trust having regard to his dedicated role as a security officer. He had no legitimate purpose in

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[35] It seems to us that the same section could have been involved against Mr Maid. Section 307A(1)(b) provides that it is an offence to communicate information:
(i) that purports to be about an act [creating, inter alia a risk to health or causing major property damage].
(ii) That the offender believes to be false.

[36] *R v Coombs* [2008] NZCA 329.

transporting an IIED through a SEA that day. We also consider it artificial in assessing Mr Maid's culpability to completely insulate the specific and proven offending from his wider purposes, which, although not criminal, themselves constituted a gross breach of trust to his employer and the wider community he was dedicated to serve.

[70] Having regard to all the circumstances of this somewhat unusual case we consider a starting point at this level adequately meets the relevant purposes of accountability, deterrence and denunciation, particularly having regard to the inevitable consequences that his conviction will have in the context of his chosen career in aviation security.

[71] In respect of discounts from the starting point, we note that the Judge's 20 per cent allowance included a component for reparation which has not been paid. From our starting point of 20 months' imprisonment we therefore make total deductions of three months (15 per cent), for a finite sentence of 17 months' imprisonment.

[72] Mr Maid has already served approximately six months of his custodial sentence and will be automatically released in less than three months. Existing advice to the Courts is that a proposed home detention address was unsuitable. We grant Mr Maid leave to apply to the District Court to substitute home detention for the adjusted sentence imposed.

Result

[73] The appeal against conviction is dismissed.

[74] The appeal against sentence is allowed.

[75] The sentence of three years' imprisonment is quashed and substituted for a sentence of 17 months' imprisonment.

[76] Leave is reserved to apply to the District Court to commute the balance of the custodial sentence to one of home detention.

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