

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Abdullahi, 2021 ONCA 82

DATE: 20210208

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Brown, Trotter and Paciocco JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Ahmed Abdullahi

Appellant

Alexander Ostroff, for the appellant

Katie Doherty, for the respondent

Heard: September 17, 2020 by video conference

On appeal from the convictions entered on June 2, 2015 and from the sentence imposed on June 30, 2015 by Justice Brian W. Trafford of the Superior Court of Justice, sitting with a jury, with reasons for sentence reported at 2015 ONSC 4163, [2015] O.J. No. 3443.

**BROWN J.A.:**

**I. OVERVIEW**

[1] After a trial by judge and jury with his co-accused, Naimo Warsame, on a number of gun-related offences that resulted from a police investigation dubbed “Project Traveller”, the appellant, Ahmed Abdullahi, was convicted of: five counts

of possession of an unauthorized firearm (*Criminal Code*, R.S.C. 1985, c. C-46, s. 92(1)); one count of possession of property obtained by crime, in respect of one of the five firearms (*Criminal Code*, s. 354(1)); one count of conspiracy to transfer firearms (*Criminal Code*, ss. 99(1) and 465(1)(c)); and one count of participation in the activities of a criminal organization for the purpose of trafficking weapons (*Criminal Code*, s. 467.11).

[2] On June 30, 2015 the sentencing judge imposed a total sentence of 12 years imprisonment, less nearly three years' credit for pretrial custody (two years, 11 months, and 24 days), calculated on the basis of 1.5 days for each day of custody, resulting in time to be served of nine years and six days.

[3] The appellant appeals his conviction and sentence.

[4] On his conviction appeal, the appellant advances three grounds of appeal:

- (i) The trial judge erred in admitting the opinion evidence of the Somali-language translator regarding portions of the intercepted communications;
- (ii) The trial judge failed to charge the jury adequately on the definition of criminal organization in s. 467.1(1) of the *Criminal Code*; and
- (iii) The trial judge erred in charging the jury that they could consider certain after-the-fact conduct, specifically the flight from a car, on the issue of the identity of the car's driver.

[5] On his sentence appeal, the appellant advances two grounds of appeal:

- (i) The trial judge erred in finding that the appellant was the criminal organization's leader; and
- (ii) The trial judge erred in his consideration of the principles of general and specific deterrence and denunciation.

[6] The appellant requests that his conviction be set aside and a new trial ordered. In the alternative, the appellant submits that his sentence should be reduced by an unspecified amount.

[7] For the reasons set out below, I would dismiss the appellant's appeal from conviction. I would allow his appeal from sentence and reduce the sentence from 12 years to 10 years.

## **II. FACTS**

[8] The following summary of the facts is taken from the reasons for sentence in which the trial judge made findings about the circumstances of the offences, consistent with the verdict of the jury.

### **The investigation**

[9] In March 2013, the Toronto Police Service ("TPS") obtained a court order authorizing the interception of phone conversations of several people, including the appellant, his co-accused Warsame, Daud Hussein ("Hussein"), Siyadin Abdi ("Abdi"), Mohamed Siad ("Siad"), Ayanle Omar ("Omar"), Ahmed Farah, Khadra

Omer, and Hanna Hassan. The languages spoken on the intercepts were English, Somali, and Jamaican Patois.

[10] The calls were monitored live by the TPS at a central facility. Many were recorded and, where necessary, interpreted by civilian employees, including Mahamed Osman, as to the Somali language. Transcripts of the conversations were prepared.

[11] Various investigative steps were devised and implemented, such as the surveillance of some suspected persons by the Ontario Provincial Police (“OPP”) and the TPS. Search warrants were executed at places such as Warsame’s apartment at 370 Dixon Road, Toronto.

### **Events of March 31, 2013**

[12] On March 31, 2013, two OPP officers, Constables Fraser and DiPietro, left Windsor around 1:55 p.m. and proceeded eastbound on the 401 in pursuit of a vehicle in which they believed, based on intercept information, the appellant was transporting illegal firearms. They did not know the make of the car but believed it was a rental car. Fraser and DiPietro were both driving unmarked police vehicles.

[13] Near Campbellville, Fraser and DiPietro observed a white Chrysler 200 with a Québec licence plate (the “white car”) with two black men in the front seats. DiPietro believed that one of them was the appellant. The trial judge found that

Hussein was in the front passenger seat. They did not see Khadra Omer, who was in the rear seat behind the appellant.

[14] Around the Milton area, the white car began driving erratically. When it exited the 401 at Dixon Road in Toronto, Fraser and DiPietro followed, now joined by a marked OPP cruiser with its lights and siren on.

[15] At a red light, the white car suddenly turned on Chetta Place and drove into an apartment complex at 330 and 340 Dixon Road. Fraser and DiPietro lost sight of it near the building's underground parking garage. They observed that the entrance door to the garage was damaged, as if someone had driven through it. Fraser and DiPietro found the white car inside the parking garage, unoccupied and with damage to the passenger side, hood, and windshield.

[16] Both officers observed a black bag on the front passenger seat. Fraser searched the bag and found three firearms, each in a black sock. It was determined that two of the guns were Ruger P95 semi-automatic pistols; the other was a .40 calibre Smith & Wesson Military & Police gun. One gun had a clip and all three had magazines, but none were loaded.

[17] Evidence was led that an orange bag in the car trunk contained mail addressed to the appellant, as well as car rental records showing that he had rented the car. In the glovebox, the police found a rental package for the car and a wallet containing identification and banking cards in the appellant's name. His

fingerprint was found on the exterior of the driver's side door. A fingerprint on a bottle found on the front passenger's side of the car matched that of Hussein.

[18] Uniformed police officers arrived in the area in an effort to find the occupants of the white car in the apartment complex, but were not able to locate anyone.

[19] The trial judge concluded that there were five firearms in the white car driven by the appellant on March 31, 2013: three of them were in the black bag and two others were taken by Khadra Omer when she took flight from the car. She gave them to Hussein, who sold them to someone in the neighbourhood. They were not recovered by the TPS.

[20] In his sentencing reasons, at p. 6, the trial judge made the following additional findings regarding the events of March 31, 2013:

Abdullahi had planned with Daud Hussein and Ayanle Omar to pick up the five firearms in Windsor and bring them to Toronto. [Khadra] Omer went with Abdullahi and Daud Hussein to courier them, by bus, to protect the others against a possible arrest. However, she did not take a bus because the schedules were reduced for the Easter weekend.

...

Abdullahi's motivation was purely financial in my view, as was Warsame's. However, both of them knew of the lethal character of the trafficked firearms and the risks they presented to the lives and safety of people in the Toronto area once they were in the hands of the ultimate users of the firearms. This was high risk crime to facilitate more high risk crime. Abdullahi expressed in one intercepted conversation an intention to kill the people

who had custody of the two missing firearms if he discovered their identity and if they did not return them.

### **Events of April 9, 2013**

[21] The wiretaps continued after the events of March 31. Intercept evidence that formed part of the Crown's case revealed that Warsame had transported a firearm from Windsor to Toronto on April 9, 2013 for Siad and Abdi.

[22] The trial judge found that a transfer of firearms took place on April 9, 2013, when Abdi and Siad purchased a handgun at the Rack N' Roll Bar in Windsor from Lamar Porter. Siad gave the gun to Warsame, who brought it to Toronto.

### **Events of April 25, 2013**

[23] As a result of further information obtained from the intercepts, the police obtained and executed a search warrant of Warsame's apartment at 370 Dixon Road on April 25, 2013. A search of Warsame's bedroom revealed a revolver stored under her mattress. The trial judge found that it was the gun Warsame had brought from Windsor on April 9, 2013.

### **The criminal organization**

[24] In his reasons for sentence, the trial judge found that a criminal organization existed from March 2013 to June 2013, with its core members being the appellant, Hussein, Omar, Abdi, and Siad. The objective of the organization was to transfer firearms from Windsor to Toronto to be used for the benefit of the group, or one of

them, in the area of the apartment buildings near Dixon Road and Chetta Place, to commit crimes or otherwise make money.

### **III. FIRST ISSUE ON THE CONVICTION APPEAL: THE ADMISSION OF OPINION EVIDENCE FROM THE SOMALI LANGUAGE TRANSLATOR**

#### **The issue stated**

[25] Intercepted communications formed a critical component of the Crown's case against the appellant and Warsame. The Crown relied on a number of the intercepts as evidence of the appellant's involvement in: planning the transport of guns from Windsor to Toronto; driving the white car on March 31; and, in the following days, trying to locate the guns that had been left in the white car in the underground parking garage.

[26] Approximately 65% of the intercepted communications contained words spoken in the Somali language. The Crown tendered a TPS civilian employee, Mahamad Osman, to give opinion evidence on the translation into English of the Somali language portions of the intercepts.

[27] The defence opposed the admission of Osman's evidence on the basis that he was not a qualified expert and the prejudicial effect of his opinions exceeded their probative value.

**The *voir dire* and the trial judge's reasons**

[28] The trial judge conducted a two-day *voir dire*, at which Osman was the only witness. Osman stated that the Project Traveller wiretap transcripts were the cumulative effort of three TPS Somali-language translators. Osman was the third and final translator to review the intercepts. He employed a two-step translation process: first, he listened to the audio in full without stopping; second, he re-listened to the audio and translated or revised the existing translations. During the second stage, Osman replayed or slowed down the audio as many times as necessary to understand the intercepts. Any changes he made were tracked through a revisions chart. Osman relied on his own understanding of the Somali language to add or correct translations.

[29] Osman testified that his general practice was to write “unintelligible” if he was unsure of a word or could not hear the audio clearly. In this case, he was never unsure. Osman understood all the Somali words used on the Project Traveller intercepts – they were “basic” conversations. Osman translated the intercepts verbatim, based on their context. He did not guess at the meaning of any slang terminology or attempt to interpret the meaning of the subjects’ conversations.

[30] Following the *voir dire*, the trial judge qualified Osman as an expert to give opinion evidence translating the Somali language used on the tendered

intercepted conversations into English: 2015 ONSC 2806. He held that Osman's translations fell within the scope of expert opinion evidence, and that the "live conditions precedent to the admissibility of the Osman opinion in the circumstances of this case" were: (1) whether Osman was a properly qualified expert; and (2) whether the probative value of his opinion exceeded its prejudicial effect.

[31] The trial judge found that Osman was "an expert by reason of his experience", his membership in the Somali community, his frequent use of Somali, and his fluency in English. The factors the defence relied on to attack Osman's expertise could go to the jury on the issue of weight and his credibility and reliability. The "significant" probative value of Osman's opinions exceeded their prejudicial effect and would not "impair the fairness of the defendants' trial through patently unreliable evidence." Osman's evidence was not complex, was critical to the case, and could be the subject of cross-examination.

### **The errors submitted by the appellant**

[32] The appellant submits that the trial judge made two main errors in admitting Osman's translation opinions:

- (i) First, in determining whether the Crown had established that Osman was a properly qualified expert, the trial judge employed too low a standard. The appellant contends that the trial judge, in effect, applied the standard

articulated in *R. v. Brown* (2002), 66 W.C.B. (2d) 42 (Ont. S.C.) that a properly qualified expert need only possess a certain measure of expertise, beyond that of the average juror, to the extent that it will assist the trier of fact. In the appellant's view, mere proficiency in the Somali language was not sufficient to establish Osman as a properly qualified expert. Instead, satisfaction of the properly qualified expert threshold criterion in *R. v. Mohan*, [1994] 2 S.C.R. 9 required the presence of anchors, or benchmarks, in the evidence that could assist the jury in assessing the reliability of Osman's translations or translation methodology. The appellant submits that the trial judge failed to give sufficient weight to the absence of such anchors;

- (ii) Second, the trial judge erred in exercising his gatekeeper function by leaving to the jury's consideration any limitations on Osman's expertise, credibility, or reliability that arose during cross-examination. The reliability concerns identified by the trial judge in his ruling went directly to Osman's expertise, methodology, and the reliability of his opinion. They should have played a key role in admissibility.

[33] As framed by the appellant, these errors are inter-related and infected the trial judge's analysis of both the fourth *Mohan* factor – a properly qualified expert – and his cost/benefit gatekeeping analysis.

### **The standard of appellate review**

[34] A trial judge must use a two-step framework to consider the admissibility of expert opinion evidence. First, the proponent of the evidence must establish the threshold requirements of admissibility summarized in *Mohan*, at p. 20: logical relevance; necessity in assisting the trier of fact; absence of an exclusionary rule; and a duly qualified expert. The second step requires the trial judge to exercise his discretionary gatekeeping function by assessing whether the potential benefits of admitting the evidence justify the risks: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R.182, at para. 24; *R. v. Abbey*, 2009 ONCA 145, 97 O.R. (3d) 330 (*Abbey (No. 1)*), at para. 76.

[35] The application of the *Mohan* requirements in any proceeding is case-specific. In each case, the trial judge determines issues of relevance and necessity within the factual matrix of the trial in which he or she is presiding. The inquiry is very much a function of the other evidence and issues in the case being tried: *R. v. Shafia*, 2016 ONCA 812, [2016] O.J. No. 5627, at para. 229.

[36] Appellate courts proceed from a stance of deference to decisions of trial judges to admit or reject expert opinion evidence: *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 13. As to the first step of the analysis, appellate interference with a finding of threshold admissibility under *Mohan* is justified where the finding is clearly unreasonable, contaminated by an error in principle, or reflective of a

material misapprehension of evidence: *Shafia*, at para. 230. As to the second step, absent an error of law or of principle, or a material misapprehension of the evidence, a trial judge's decision applying the cost-benefit analysis at the gatekeeper stage is entitled to deference on appeal: *R. v. Johnson*, 2019 ONCA 145, 145 O.R. (3d) 453, at para. 56.

**First error: Properly qualified expert**

[37] The tapes of intercepted communications constitute the best evidence of the facts of the conversations sought to be proved: *R. v. Shayesteh* (1996), 111 C.C.C. (3d) 225 (Ont. C.A.), at pp. 254-55. Where the communications are in a foreign language, opinion evidence in the form of a translation will be essential for the trier of fact, either through *viva voce* evidence, a transcript, or both: *Shayesteh*, at p. 256.

[38] In the present case, the trial judge applied the principles set out in *Mohan* and *Abbey (No. 1)*. There was no dispute that the jury lacked the knowledge or experience to understand those portions of the intercepted communications in which persons spoke Somali. There was also no live dispute that Osman possessed knowledge that was “beyond the ken [or understanding] of the average juror”, namely the ability to translate conversations in the Somali language into English: David M. Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020), at p. 259. It is well-established that

a properly qualified expert may acquire his special knowledge through study or experience: Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2018), at §12.89. The trial judge found that Osman acquired that knowledge by reason of his experience. He committed no legal error in so finding.

[39] The trial judge summarized the factual basis for that finding in the following portion of his *voir dire* reasons:

[Osman] was born and raised in Somalia to the age of 5 years, when he came to Canada with his family. He has used, and continues to use, the Somali language throughout his life, within his family of origin, during some of his education, in normal social discourse with friends and in the course of employment with the TPS. He is a member of the Somali community in Toronto.

[40] Those findings were firmly anchored in the evidence.

[41] The main attack by the appellant on the trial judge's finding that Osman was a properly qualified expert rests on the trial judge's failure to give sufficient weight to the lack of anchors, or benchmarks, in the evidence that could assist the jury in assessing the reliability of Osman's translations or translation methodology. In the appellant's view, Osman's evidence lacked two kinds of anchors: accreditation as a translator, and lack of formal training in his translation methodology.

[42] I am not persuaded by the appellant's submission.

[43] First, the appellant's suggestion that a translator of intercepted communications must possess formal accreditation in order to be qualified as an expert goes against the weight of authority.

[44] Counsel referred to several Ontario and British Columbia cases that involved applications to admit as expert evidence translations made of intercepted conversations carried on in a foreign language: *Brown*; *R. v. Sanghera*, 2012 BCSC 995, [2012] B.C.J. No. 1483; *R. v. Chegini*, 2013 ONSC 1082, [2013] O.J. No. 2758; *R. v. Chan*, 2014 BCSC 2560, [2014] B.C.J. No. 3329; *R. v. Bidesi*, 2015 BCSC 206, [2015] B.C.J. No. 235; *R. v. Nguyen*, 2017 BCSC 833. In each case, a member or civilian employee of a police force was tendered to give opinion evidence translating the content of intercepted conversations in a foreign language into English. The person tendered had listened to the tapes of the intercepts and then either prepared an English transcription or reviewed and corrected a transcription prepared by another monitor.

[45] In most of the cases, the court accepted the tendered person as qualified to give opinion evidence about the translation of the foreign language on the intercept tape into English. The courts regarded the proffered witness as possessing special knowledge and expertise going beyond that of the trier of fact: *R. v. Béland*, [1987] 2 S.C.R. 398, at p. 415. The courts reached that conclusion based in large part on: (i) the witness's experience as a native speaker of the language, in which the witness remained fluent, and which the witness continued to use frequently in

family or professional activities; and (ii) the witness's experience in listening to intercepted communications and preparing or reviewing translations of them. Although in *Chan* the witness also had a certificate in community services interpretation, those qualified in all the other cases did not have any formal language or interpretation certification.

[46] The one case in which the court regarded the absence of formal certification as an obstacle to qualification as an expert was *Sanghera*, a 2012 decision of the British Columbia Supreme Court. Subsequent B.C.S.C. decisions have, for a variety of reasons, distinguished *Sanghera* and declined to follow it: *Chan*, at paras. 22-24; *Bidesi*, at para. 21; and *Nguyen*, at paras. 22-24. *Chan* declined to follow *Sanghera's* approach on the basis that the court in *Sanghera* had not distinguished the skills required for real-time in-court interpretation from those required for the translation of intercepts, the latter affording time to review and proofread the translation: at paras. 22-23.

[47] Second, I am not persuaded by the appellant's argument that there was inadequate evidence regarding Osman's formal training to permit the trial judge to accept him as a properly qualified expert. Prior to testifying, Osman had worked as a TPS intercept translator for a year, and he had been accepted as a reliable translator of intercepts from Somali to English in two provincial court proceedings involving Project Traveller. On the *voir dire*, Osman testified in some detail about the process the TPS used in hiring him, the method he used to translate the

intercepts into English, the internal TPS limits placed on the method that he used, and the lack of review of his final work product. The trial judge concluded that the defence could marshal those factors on the issue of the weight to be given to Osman's opinion.

[48] In the circumstances of the case, I do not see that as a clearly unreasonable conclusion.

[49] Third, although neither the appellant nor his co-accused testified at the trial, the trial proceeded on the basis that both spoke Somali. The Crown disclosed the intercept tapes and Osman's translations to the defence well in advance of trial. The defence therefore had ample time to assess the accuracy and reliability of those translations ahead of trial. On the *voir dire*, the defence did not call any evidence to contradict or undermine the accuracy of Osman's translations. (Nor did the defence call any such evidence before the jury.)

[50] The defence cross-examined Osman for the better part of a day at the *voir dire*. Most of the cross-examinations focused on the limited nature of the testing Osman was subjected to on his hiring by TPS; his lack of formal education in the Somali language or as a court interpreter; his limited knowledge of Somali dialects and the use of dialects in intercepted communications; his experience speaking Somali in Somalia, Yemen, and Canada; errors by Osman in spelling English and Somali words; and the use of slang in Somali.

[51] Very little of the cross-examinations concerned the actual corrections Osman made to transcripts prepared by other translators. The questions that were asked about corrections related to peripheral matters: whether the proper translation was “this man is fishy” rather than “a man is fishy”, or “he only brought three” rather than “he only brought me three”. Assertions by the defence in cross-examination that a word translated by Osman bore some other meaning (for example, whether “habid” meant gun or stick) ultimately came down to whether Osman’s understanding of the word was based on a dictionary definition or its use in everyday conversation, such as the way it was used on the Somali TV programs that he watched.

[52] Given the limited attack on the reliability of Osman’s actual translations and the nature of the attack that was made, it was not unreasonable for the trial judge to conclude that the critiques of the reliability of Osman’s opinion asserted by the defence went to the issue of the weight the jury assigned to the opinion.

[53] For those reasons, I see no error in the trial judge’s finding that Osman was a properly qualified expert based on his experience.

### **Second error: Exercising the gate-keeping function**

[54] When considering the potential probative value of opinion evidence as part of his or her gate-keeping function, a trial judge must consider the reliability of the evidence: *Abbey (No. 1)*, at para. 87; *R. v. Abbey (No. 2)*, 2017 ONCA 640, 140

O.R. (3d) 40, at para. 54. The appellant submits that the trial judge erred by considering “reliability only implicitly as part of probative value”, thereby failing to give sufficient weight to reliability.

[55] I am not persuaded by this submission.

[56] The trial judge gave concise, but comprehensive, reasons for his conclusion that the probative value of Osman’s opinions exceeded their prejudicial effect, with the result that the trial judge declined to exercise his discretion to exclude the opinions. Regarding the probative value of the proffered evidence, the trial judge wrote:

Seventh, the probative value of the opinions is significant. The affected intercepted conversations are reliably proven through the audiorecording. Osman’s method of translating the Somali parts of the conversations may be duplicated in court, in the presence of the jury, with full cross-examination by the defence on the Somali words used by the speakers and his translation of them. The Somali dictionary is also available to the defence if it is helpful. The various factors marshalled by the defence against the expertise of Osman may also be marshalled on the issue of the probative value of the opinions, as advocated by the defence. While they tend against their probative value, they do not, individually or collectively, reduce their probative value significantly in my view. The jury is well situated to reliably interpret conversations, through the submissions of counsel, in the context of the evidence as a whole, including the Osman opinions and any contrary opinions called by the defence. [Emphasis added.]

[57] As indicated by the highlighted portions of the trial judge's reasons, he took into account the reliability of the proffered evidence in the course of exercising his gate-keeping discretion. I see no error of principle or material misapprehension of the evidence in the trial judge's gate-keeper analysis. His reasons disclose that he focused on the factors that were fundamental to the reliability of Osman's opinion and responsive to the specific dangers posed by expert opinion evidence: *Abbey (No. 1)*, at para. 142. At the same time, the trial judge clearly kept in mind that the assessment he was required to perform was not the same as the jury's ultimate assessment of the evidence: a trial judge decides only whether the evidence is worthy of being heard by the jury and not the ultimate question of whether the evidence should be accepted and acted upon: *Abbey (No. 1)*, at para. 89.

## **Conclusion**

[58] For the reasons set out above, I conclude that the trial judge did not err in admitting the opinion evidence of Osman translating the Somali language used on the intercepts into English.

## **IV. SECOND ISSUE ON THE CONVICTION APPEAL: THE JURY CHARGE ON CRIMINAL ORGANIZATION**

### **A. The issue stated**

[59] Count 1 of the indictment charged the appellant and his co-accused with participating in the activities of a criminal organization for the purpose of enhancing the organization's ability to commit the indictable offence of weapons trafficking,

contrary to s. 99(1) of the *Criminal Code*, thereby committing an offence contrary to s. 467.11.

[60] The appellant submits that the trial judge's charge on this court contained two errors that merit appellate intervention:

- (i) it failed to instruct the jury that central to the definition of a criminal organization is the presence of some structure and continuity, which differentiates a criminal organization from other groups of offenders who sometimes act in concert: *R. v. Venneri*, 2012 SCC 33, [2012] 2 S.C.R. 211, at para. 27;
- (ii) it failed to relate the evidence to those core elements. The appellant submits that in the present case there was little or no evidence of an organization with structure and continuity, any hierarchy or leader from whom others took direction, and no clear division of labour or consistent roles.

## **B. Analysis**

[61] The basic principles governing appellate review of a trial judge's jury instructions were summarized in *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581, at para. 39:

- (i) The alleged error must be examined in the context of the entire charge and of the trial as a whole;

- (ii) Trial judges are afforded some flexibility in crafting the language of jury instructions;
- (iii) While trial judges must seek to ensure that their instructions adequately prepare the jury for deliberation, the standard for jury instructions is not perfection. Appellate review of jury instructions is meant to ensure that juries are properly – not perfectly – instructed;
- (iv) The charge should not be endlessly dissected and subjected to minute scrutiny and criticism. Instead, what matters is the general sense which the words used must have conveyed, in all probability, to the mind of the jury, and not whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case; and
- (v) Appellate courts should not examine minute details of a jury instruction in isolation, as it is the overall effect of the charge that matters.

[62] When the trial judge's charge on the definition of a criminal organization in s. 467.1(1) is examined in light of those principles, I am not persuaded that it suffers from the errors asserted by the appellant.

### **The trial judge's charge**

[63] The trial judge structured the case-specific portions of his charge in the following way. First, he reviewed the expert evidence. Next, he dealt with the issue of the identification of the parties heard on the intercepted conversations. Then, he reviewed the counts contained in the indictment. To do so, the trial judge divided the counts into three categories: those that related to the events of March 31, 2013; those that related to the events of April 9 and 25, 2013; and, finally, those that related to the events from the middle of March 2013 until the middle of June 2013, focusing on the alleged participation in the activities of a criminal organization by the appellant and Warsame. For each category, the trial judge provided detailed overviews of the positions of each party, extensively reviewed the evidence, and identified the issues for determination by the jury. During this discussion, the trial judge reviewed the applicable legal principles.

[64] The charge did not treat the three categories as water-tight compartments. As I will discuss later, throughout his review of the evidence the trial judge linked particular pieces of evidence to various counts in the indictment, with the review of evidence for the first two categories containing some references to the criminal organization count.

[65] The trial judge's charge on the criminal organization count covered 19 transcript pages. He commenced this part of the charge by providing the definition

of the offence of participating in the activities of a criminal organization: *Criminal Code*, s. 467.11(1). He told the jury that, aside from the issue of identity, the offence contains three elements: (i) the existence of a criminal organization; (ii) the knowing participation in or contribution to any activity of the criminal organization by the accused; (iii) for the purpose of enhancing the ability of the criminal organization to facilitate or commit an indictable offence. He then provided instructions regarding each element.

[66] For the first element, the existence of a criminal organization, the trial judge stated, in part:

A requirement of a group of three or more persons is not met if the group of three or more persons was formed randomly for the immediate commission of a single offence. The formation must not be random. The formation must not be for the purpose of committing an offence. The Crown is not required to prove that a Defendant knew the identity of the persons who are in the group. The Crown is, however, required to prove the Defendant knew of the existence of the group and its essential character or purpose.

The requirement of the purpose of the group relates to its essential objective, that is, to facilitate or to commit at least one serious offence such as transferring illegal guns. The only other qualification to the purpose is that the serious offence will likely lead to a material benefit, such as a financial benefit, for at least one of the group. This is a requirement of purpose. It is not a requirement of facilitation or commission. The Crown need not prove the group, as defined, actually facilitated or committed such an offence or received benefit. [Emphasis added.]

**First error: Definition of criminal organization**

[67] The appellant acknowledges that this portion of the trial judge's charge accurately set out the statutory definition of a "criminal organization". Section 467.1 (1) of the *Criminal Code* defines "criminal organization" as:

[A] group, however organized, that

(a) is composed of three or more persons in or outside Canada; and

(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence.

[68] However, the appellant submits that the rest of the charge did not adequately equip the jury to decide the issue in the circumstances of the case because it did not provide appropriate or fulsome guidance on the requisite degree of structure and continuity to constitute a criminal organization. The appellant points out that his trial counsel provided the trial judge with a summary of the defence's theory for use in the charge that specifically referenced the elements of structure and continuity mentioned in *Veneri*, yet the trial judge did not include that in his charge.

[69] To assess the appellant's submission, it is worth recalling this court's comments in *R. v. Beauchamp*, 2015 ONCA 260, 326 C.C.C. (3d) 280 and *R. v. Saikaley*, 2017 ONCA 374, 135 O.R. (3d) 641 about whether a targeted group is a "criminal organization". The determination must be done on a flexible basis, not on the basis of pre-conceived notions about what organized crime may look like: *Beauchamp*, at para. 152. Courts must take a flexible approach, appreciating that criminal organizations have no incentive to conform to any formal structure: *Saikaley*, at para. 120.

[70] The *Veneri* decision struck a balance between flexibility and overreach, in part, by highlighting the need for "some form of structure and degree of continuity" and coordination, as a means of distinguishing between a criminal organization and other forms of illegal group activity, such as conspiracies: *Beauchamp*, at para. 153. While the group therefore must have some form of structure and degree of continuity, "even a minimal amount may suffice": *Beauchamp*, at para. 155. The guiding question in assessing whether a group of individuals forms a criminal organization is whether, as put in *Veneri*, the group "poses an elevated threat to society due to the ongoing and organized association of their members": *Saikaley*, at para. 119.

[71] One must also recall the Supreme Court's caution in *Veneri*, at para. 41:

Courts must not limit the scope of the provision to the stereotypical model of organized crime — that is, to the

highly sophisticated, hierarchical and monopolistic model. Some criminal entities that do not fit the conventional paradigm of organized crime may nonetheless, on account of their cohesiveness and endurance, pose the type of heightened threat contemplated by the legislative scheme. [Emphasis added.]

[72] While the charge stated that the formation of a criminal organization must not be “random”, the appellant contends that it was defective by failing to highlight the need for some form of structure, degree of continuity, and coordination. When that portion of the charge is assessed in the context of the trial as a whole, I am not persuaded that it contains the deficiency alleged by the appellant.

[73] First, portions of the evidence the jury heard concerned the issues of structure, continuity, and coordination. The Crown called Detective Constable Kerr as an expert on the existence of urban street gangs in Toronto. He testified about the nature, customs, culture, characteristics, identifiers, terminology, behaviour, and activities of urban street gangs. The trial judge reviewed his evidence at some length in his charge, relating it to photographs of the appellant that showed certain indicia of gang membership – wearing clothing of a certain colour and making hand signs – as well as certain words used in the intercepted calls. After reviewing the evidence of Detective Constable Kerr, the trial judge explained to the jury the relevance of the evidence to the issues in dispute:

Now, members of the jury, the defence did not contest the expertise of Detective Constable Kerr nor did it challenge much of the substance of his opinion. Rather,

the contest in this trial relates to the application of the opinion to the circumstances of the case. Has the Crown proven the existence of an urban street gang in the area of the apartment buildings on Dixon Road in the spring of 2013 and implicated Abdullahi and Warsame in its affairs? More will be said about this factual issue in connection with the definition of a criminal organization later in the Charge. This opinion, if accepted, may be helpful in your determination of this issue. [Emphasis added]

[74] The other piece of evidence concerned the place of the appellant in the structure of the alleged criminal organization. In some intercepted calls, the person whom the Crown alleged was the appellant was referred to as “H”, “HNI”, or “HNIC” by the other speaker. The Crown contended that those designations referred to the appellant as standing at the head of the gang’s hierarchy as the “head”, “head n\*\*\*\*\*” or “head n\*\*\*\*\* in Canada”.

[75] Second, the trial judge’s charge must be read in light of the closing submissions by counsel for the parties.

[76] In its closing, the Crown advanced the position that there was a criminal organization consisting of seven core members, one of whom was the appellant, whose objective was to traffic arms from Windsor to Toronto. The Crown ascribed certain roles to certain people: Warsame and Abdi were couriers, or runners, of guns between Windsor and Toronto, while Siad arranged transportation for the couriers. The Crown contended that the intercepts were evidence of an urban street gang that constituted a criminal organization:

The intercepts evidence the membership, the hierarchy, the territory, the activities, and even the language of the gang. This gang's activities included the possession of and trafficking in firearms. The most important thing about this gang is not their name. It's their neighbourhood. Their turf. Their territory. Their hood. That turf is the buildings in the 300 block of Dixon Road.

[77] The Crown referred the jury to evidence demonstrating “the cohesiveness of this gang” and that it was “a continuous enterprise”. The Crown told the jury that the group had “a cohesiveness that is characteristic of urban street gangs”.

[78] In his closing, appellant’s trial counsel took strong exception to the Crown’s submission, arguing that the evidence did not disclose a group of people who displayed the characteristics of a criminal organization. Appellant’s counsel stressed that the *Code*’s definition of a criminal organization:

“[D]oes not include a group of persons that forms randomly for the immediate commission of a single offence.” And I want to read that to you again. Criminal organization “does not include a group of persons that forms randomly for the immediate commission of a single offence.” The law tells us that to substantiate a criminal org charge you need some form of structure and a degree of continuity to the group, structure and continuity. So, I put this to you, members of the jury; where is the structure and continuity to this group that's alleged to be a criminal organization? You have a number of people on the wires talking about bringing shekos, stories, which the Crown alleges to be guns, to Toronto, from Windsor, on Easter weekend, which is March 30 to 31st, 2013. There is no organizational structure ever discussed on the wires. In fact, I submit to you that this totally seems like a group of people forming randomly for the immediate commission of a single offence.

...

You have one event, Easter weekend 2013. You have the following allegations. My client and another male are allegedly in a car on the highway travelling from Windsor to Toronto. The police follow them. The car crashes. Three guns are left behind. Efforts are made to locate the people. The police are investigating. I submit to you these allegations do not meet the threshold of a criminal organization. [Emphasis added.]

[79] From the closing submissions it was clear that there was no dispute between the parties that to constitute a criminal organization the group of people had to have a cohesiveness (the Crown) or structure (defence counsel) and continuity of enterprise, as put by the Crown.

[80] No doubt that common ground between the parties underlay the lack of objection by counsel for both accused to the portions of the charge concerning the criminal organization count. The trial judge provided counsel with a draft of the charge and sought their comments in a two-day pre-charge conference. During that conference, Crown counsel sought changes to the portion of the charge dealing with the factors set out in s. 467.11(3) of the *Criminal Code*, which the trial judge ultimately declined to make. Appellant's trial counsel made no submissions on the criminal organization part of the charge; counsel for Warsame stated that the impugned part of the charge was balanced. After further Crown submissions on the charge, appellant's counsel advised he did not have any submissions on

the matter; counsel for the co-accused made a few submissions, but none on the instructions concerning the criminal organization count.

[81] While defence counsel's failure to object to a jury charge is not determinative of a ground of appeal based on jury charge misdirection, it can indicate something about the overall accuracy of the jury instructions and the seriousness of the alleged misdirection: *R. v. Jacquard*, [1997] 1 S.C.R. 314, at paras. 37-38. In the present case, I regard the lack of objection by defence trial counsel as indicative of the legal adequacy of the trial judge's instructions on the definition of criminal organization given the evidence heard by the jury and the positions taken by the parties in their closing submissions.

**Second error: Relating the evidence to the elements of the offence**

[82] The appellant further submits that the trial judge failed to relate the evidence to the elements of the criminal organization offence, in particular the definition of a criminal organization. When the charge is read as a whole, I see no such defect.

[83] Each member of the jury was given a copy of the charge to use during the deliberations. As mentioned, the trial judge organized his review of the evidence by providing an initial detailed overview of the positions of each party, and then identifying the issues for the jury to determine in each of the three categories into which he had grouped the counts. Although his third category specifically focused on count one, which contained the criminal organization allegation, in the course

of his overview of the positions of each party and his review of the other two categories, the trial judge would point out evidence, or the absence of evidence, that a party contended also related to count one.

[84] For example, when initially summarizing the Crown's position, the trial judge pointed out the evidence the Crown regarded as relevant to the existence of a criminal organization, its membership, and its objective. The trial judge spent about 20 transcript pages identifying and reviewing some of the intercepted conversations that the Crown was relying upon to prove its case on count one. He completed his overview of the Crown's case on count one by stating:

That completes my case of the Crown as it relates to the alleged participation in the activities of a criminal organization by Abdullahi. This is not a group that was randomly founded to commit one crime. Rather, it was a continuing group that was involved in the transfer of and the negotiations for the transfer of some illegal firearms with Bihi on March 30, 2013 ... Ayanle Omar on March 28, 2013 ... [and] Abdi and Porter on April 9, 2013....

[85] The trial judge followed a similar structure when he reviewed the evidence relating to the appellant's position, including pointing out for the jury what the defence contended were weaknesses with some of the intercepted conversations.

The trial judge concluded his overview of the appellant's position by stating:

Count number one alleges that Abdullahi participated in the activities of a criminal organization. This offence does not include a group randomly formed for the commission of one offence. The organizational structure of the alleged group was not discussed in any of the

conversations. The events of March 31, 2013 are, if proven beyond a reasonable doubt, one crime committed by two people. This does not meet the definition of criminal organization. You should reject the position of the Crown on the issue of criminal organization in the submission of the defence. Return a verdict of not guilty on count one.

To the extent that the Crown is attempting to augment its position on the issues of criminal organization through the opinion of Detective Constable Kerr about the existence of an urban street gang in the area of the apartments on Dixon Road, reject it.

[86] So, by the time the trial judge came to instruct the jury on the legal issues involved with the third category – the criminal organization count – he had already reviewed a considerable body of evidence that the Crown and the appellant contended related to count one. After going over the three elements of the criminal organization offence, the trial judge recalled for the jury the earlier overviews he had given of the positions of the Crown and the appellant. In recalling the evidence relating to the first element of the criminal organization offence, the trial judge stated:

Recall the overview of the case for the Crown especially insofar as it relates to the participation and the activities of the criminal organization. Recall as well the overview of the case for Abdullahi especially insofar as it relates to the frailty of the Crown's case concerning the identity of the driver of the white car. On the evidence, the most the Crown has proven against Abdullahi is that he was part of a group randomly formed for the commission of one crime on March 31, 2013. Such a group is not a criminal organization. The opinion of Detective Constable Kerr about the existence of urban street gangs especially

insofar as it relates to the colour red and the Bloods gang and the photograph of Abdullahi wearing red and displaying the Bloods' hand sign should be given no weight. Some young people do foolish things. Do not interpret the circumstances of this case through a lens that is clouded by ethnocentric or classist attitudes. Return a verdict of not guilty in favour of Abdullahi on count one.

[87] The trial judge then continued by recalling evidence relating to the other two elements of the criminal organization offence.

[88] Consequently, when the charge is read as a whole, I am satisfied that the trial judge adequately highlighted for the jury what evidence related to the first element of the criminal organization offence, namely the existence of a criminal organization.

### **C. Conclusion**

[89] For these reasons, I am not persuaded that the trial judge made any reversible error in charging the jury on count one, the criminal organization offence.

## **V. THIRD ISSUE ON THE CONVICTION APPEAL: THE JURY CHARGE ON THE FLIGHT FROM THE WHITE CAR**

### **The issue stated**

[90] Early in his charge, after concluding his preliminary instructions to the jury, the trial judge dealt with the issue of the appellant's alleged actions and words on March 31, 2013. The trial judge stated that the alleged actions and words included:

[T]he evasive driving on the 401, the driving through a red light at the intersection of Chetta Place and Dixon Road where a marked OPP cruiser with its flashing lights and siren on joined the pursuit of the white car by Constable Fraser and Constable Dipietro, the driving through the door to the underground parking area of one of the apartment buildings in the complex near that intersection, the flight from the white car, abandoning it and its contents and the false reports to Hertz that the white car was stolen on March 30, 2013, the day before the pursuit of the [Police Support Unit]. [Emphasis added.]

[91] If the jury accepted that evidence as conduct by the appellant, the trial judge told them that it was circumstantial evidence they could use to determine two issues: (i) the identity of the driver of the white car; and (ii) the driver's knowledge of the presence of the illegal guns in the black bag found on the front passenger seat of the white car after it was abandoned.

[92] After explaining to the jury some of the frailties of circumstantial evidence, the trial judge continued:

Approach the evidence allegedly related to Abdullahi's conduct on March 31, 2013, as summarized, in three steps. First, consider the rest of the evidence that tends to identify Abdullahi as the driver of the white car. The rest of the evidence includes the evidence tending to identify his voice on the many pertinent intercepted conversations, the presence of Abdullahi's fingerprint on the outside of the driver's door of the white car, and the presence in the white car of the driver's license with the photograph of the Defendant, Abdullahi, on it.

Second, if, after considering the rest of the evidence as a whole, you are satisfied that Abdullahi was one of the

persons in those conversations, consider the evidence of flight and the evidence of false reports of theft to Hertz in deciding whether or not the count is proven beyond a reasonable doubt that Abdullahi was the driver of the white car. And further, that Abdullahi knew the black bag had three illegal firearms in it. You may only use the evidence of the report of the theft of the white car as a false report only if you are satisfied by the other evidence that it was false.

Third, assuming you are satisfied Abdullahi was a party to those conversations, in determining the weight to be given to this evidence, decide whether there may have been an innocent reason for such flight and such false reports. Sometimes people who are entirely innocent do such things as a result of panic, of fear of being improperly apprehended as the guilty party, a distrust of the police or someone unwilling to get involved in a case at all for reasons personal to them. Other reasons may be apparent to you.

[93] The appellant's trial counsel did not object to this part of the charge.

[94] On appeal, the appellant submits that although it was open to the jury to use the evidence of flight by the car's driver to find that he knew there were guns in the black bag, the evidence of flight had no probative value on the issue of whether the appellant was the driver of the car. As a result, the trial judge erred in so instructing the jury.

### **Analysis**

[95] After-the-fact conduct may constitute circumstantial evidence of guilt. Whether such evidence is admissible is simply a matter of relevance. As with all other evidence, the relevance and probative value of post-offence conduct must

be assessed on a case-by-case basis: *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 22. As the Supreme Court noted in *White*, at para. 39, in some cases flight *per se* may be relevant in determining the identity of the perpetrator of the offence.

[96] The appellant contends that this is not such a case. I accept the appellant's submission that in the circumstances the evidence of flight offered no probative value on the issue of whether the driver was the appellant. While the evidence of flight could be probative on the issue of knowledge of the presence of guns in the car, it is not apparent how it could assist on the issue of who was driving the car, particularly where all the car's occupants fled before the police arrived.

[97] That said, I regard this error by the trial judge as one of no consequence given the significant evidence of the appellant's connection to the white car available for the jury to consider, such as: the presence of the appellant's fingerprint on the exterior of the driver's side door; a rental car agreement in the appellant's name; and a wallet in the glove compartment that contained identification and banking cards in the appellant's name. Moreover, the impugned direction invited the jury to treat flight as evidence of identity; it did not require the jury to do so. The jury was therefore left to reason for itself. Given that there is no logical connection between flight and the identification of the driver, it is not probable that this misdirection would have led the jury into error in any event.

[98] Accordingly, I would not give effect to this ground of appeal.

### **Conclusion on conviction appeal**

[99] For the reasons set out above, I would dismiss the appellant's appeal from conviction.

## **VI. SENTENCE APPEAL**

[100] The Crown sought a sentence of 12-13 years; appellant's trial counsel sought a sentence of six to eight years. The trial judge imposed a global sentence of 12 years (less pre-sentence custody credit), apportioned as follows:

- Count 1: participation in the activities of a criminal organization, three years consecutive;
- Counts 2-6: possession of an unauthorized firearm (one for each of the five firearms), four years concurrent on each possession count, consecutive to the other counts;
- Count 7: possession of property obtained by crime, one year consecutive; and
- Count 8: conspiracy to traffic illegal firearms, four years consecutive.

[101] The appellant submits that the trial judge's sentencing reasons disclose two errors that should attract appellate intervention and result in the reduction of his sentence by some amount. First, the trial judge's finding that the appellant was the leader of the criminal organization was unreasonable on the evidence. Second,

the trial judge improperly applied, in effect, a unique aggravating factor to members of minority groups.

## **VII. FIRST ISSUE ON THE SENTENCE APPEAL: FINDING THE APPELLANT WAS THE LEADER OF THE CRIMINAL ORGANIZATION**

### **The issue stated**

[102] During the course of her sentencing submissions, Crown counsel stated:

Despite that Mr. Abdullahi is a first offender, the offences that he is involved in and his position, level of trust and the influence that he seems to have is evidence that he is not a neophyte within the criminal organization. He gets to say what the plan is to Ayanle Omar. He gets to change the plans when he changes the car he is driving on March 30 and then tells Daud Hussein what is going to happen on March 31. Even his name reflects his position in the group. HNIC stands for Head N-word in Charge.

Prior to March 31 he seemed well on his way to becoming one of the heads of the Bloods operating in the Dixon area. He was one of the first people to be called if other members of the group had guns to sell or wanted to purchase firearms. He made the plans and arrangements along with Daud Hussein for the shipment of guns from Ayanle Omar in Windsor to Toronto to distribute amongst the gang members in the Dixon neighborhood on March 31.

...

In terms of the aggravating factors for Mr. Abdullahi, it would be the Crown's position that he was one of the leaders well on his way to being a person who would give direction and get financial benefit. He makes

arrangements. He makes changes in plans. He tells others how to plan and what to do.

[103] The trial judge obviously was persuaded by those submissions. He found, at p. 9 of his sentencing reasons, that the appellant was a principal member and leader of the criminal organization:

A “criminal organization” existed from March 2013 to June 2013. Its core members were Ahmed Abdullahi, Daud Hussein, Ayanle Omar, Siyadin Abdi and Mohamed Siad. Abdullahi was one of its principal members; he was its leader, and was regarded as such by the other participants. He was trusted and respected by the others.

...

Third, Abdullahi was one of the principal members of the group. He was its leader, and was regarded as such by the others in the group. They referred to him as H.N.I.C. (Head N[\*\*\*\*] in Canada), HN or H. He was trusted and respected. He planned much of its activities, the buying and selling of firearms. The area around the apartment buildings on Dixon Road was the group's area. It had safe houses to store the firearms, and lookouts to undermine the policing of crime in the area. Abdullahi directed the method of payment for some sales of firearms... He established the group, selected its members and maintained its cohesion despite its frequent disputes. His primary motivation was a financial one... He knew of the risks of bodily harm or death to people who would be confronted by the ultimate users of the firearms to further their own crimes. Nevertheless, he continued to operate the criminal organization.

[104] The appellant submits that those were unreasonable findings by the trial judge, especially given the circumstantial nature of the evidence. The Crown contends that the findings were reasonable and supported by the evidence.

### **Analysis**

[105] I accept the Crown's submission. The intercept evidence disclosed that the appellant was addressed as the Head, HNIC, HNI, or H by principal members of the organization (Ayanle Omar and Siyadin Abdi) and a person with whom the appellant arranged to sell firearms (Abdulkadir Bihi).<sup>1</sup> The intercept evidence also supported the trial judge's finding that the appellant planned activities of the organization, such as the buying and selling of firearms.<sup>2</sup>

[106] The appellant submits that in finding he was the leader of the criminal organization the trial judge went further than the Crown's submissions. In closing to the jury, the Crown described the appellant as "one of the leaders" of the criminal organization. Given the use the trial judge made of the appellant's position in the organization, I do not regard that as a material difference. The trial judge considered the appellant's position in the criminal organization relative to other Project Traveller accused in order to fashion a sentence for the appellant that satisfied the parity principle: *Criminal Code*, s. 718.2(b).

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<sup>1</sup> Intercept sessions 16, 1970, 2051, 4048, 4207, 7505 and 16192.

<sup>2</sup> Intercept sessions 1092, 1966, 1970, 6455, 7505, 7514 and 7521.

[107] The trial judge was sentencing both the appellant and Warsame. As part of the sentencing process, the trial judge requested counsel to inform him about the dispositions for other Project Traveller accused who had been sentenced and whose names were part of the case before him. He was informed that Siyadin Abdi had entered guilty pleas in respect of charges relating to the April 9, 2013 events and received a global sentence of six years. And, as set out at p. 22 of his sentencing reasons, the trial judge was told that Daud Hussein – who was a passenger in the car Abdullahi had driven from Windsor to Toronto on March 31, 2013 – had pleaded guilty to charges relating to the March 31, 2013 events and received a global sentence of eight years.

[108] The trial judge concluded that Hussein played a more significant role in the organization than Warsame, who had acted as a courier and custodian of firearms.

[109] However, he found that Hussein’s role “was of less significance” than Abdullahi’s, given the latter’s leadership role in the group. As well, the trial judge noted that Hussein had expressed remorse “through the plea of guilty and his other remarks to the sentencing court”: at p. 22. Those were factors that led the trial judge to impose a higher sentence on Abdullahi than Hussein had received.

[110] Accordingly, I do not regard the trial judge’s finding about the appellant’s relative position in the criminal organization as unreasonable or the use he made of that finding as erroneous.

## VIII. SECOND ISSUE ON THE SENTENCE APPEAL: APPLYING THE PRINCIPLES OF DENUNCIATION AND DETERRENCE

### The issue stated

[111] The appellant is a black man. In considering the fit sentence for the appellant, the trial judge wrote the following as part of his discussion of the need to apply the principles of denunciation and deterrence for offences involving the trafficking of firearms:

Crimes involving the use of firearms that are committed by people of racial minorities, such as the defendants, may lead to stereotypical or other racist attitudes against the minority group at large.

[112] The appellant submits that this comment was an improper basis for increased emphasis on principles of deterrence and denunciation over rehabilitation or mitigating factors. In his factum, the appellant submits:

The implicit logic of this statement is that crimes committed by members of marginalized communities that align with stereotypes or other prejudicial beliefs about their community are necessarily more serious and merit greater denunciation because they can reinforce bigoted attitudes. Although the intent of this consideration may be well-meaning and motivated by a desire to reduce prejudice, its result is to apply a unique aggravating factor to members of minority groups, and convey that marginalized offenders are responsible for bigotry directed against their communities. Effectively, this would require longer sentences for offenders from marginalized backgrounds whenever they commit crimes that bigots believe their community is more prone to committing, as a punishment for reflecting poorly on their community. This was improper.

## Analysis

[113] I accept the appellant's submission about the implicit logic of the trial judge's comment and the risk that it applies a unique aggravating factor to members of minority groups. While I have no doubt that the trial judge made the comment in furtherance of the fundamental purpose of sentencing to protect society and to contribute to respect for the law and the maintenance of a just, peaceful, and safe society, his apparent imposition of a unique aggravating factor on members of minority groups has no place in Canadian sentencing principles. It was an error for the trial judge to have made that statement.

[114] Did that error have an impact on the sentence imposed, thereby permitting appellate variation of the sentence, as articulated in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 11 and 44? On my reading of the sentencing reasons, I am persuaded that it did.

[115] There is no doubt that at several places in his sentencing reasons the trial judge drew on permissible sources<sup>3</sup> and principles to emphasize the role of deterrence and denunciation for offences involving the trafficking of firearms: at pp. 17, 18, 23, and 27. Given those appropriate references, there was no need for the trial judge to resort to his erroneous comment. That he did signifies that he

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<sup>3</sup> The trial judge cited the decision of this court in *R. v. Danvers* (2005), 199 C.C.C. (3d) 490 (Ont. C.A.), at para. 78, and the decision of Kelly J. in *R. v. Lambert*, 2011 ONSC 3906, [2011] O.J. No. 3389, at para. 48.

must have seen that erroneous factor as adding to the gravity of the appellant's offences.

[116] In those circumstances, I would reduce the appellant's sentence by two years to reflect the impact on the sentence of the trial judge's erroneous comments. I would apply that reduction to the four-year sentence imposed by the trial judge for Count 8, conspiracy to traffic illegal firearms. I would reduce the sentence on Count 8 to two years consecutive.

### **Conclusion on sentence appeal**

[117] For these reasons, I would allow the appellant's appeal from sentence and reduce the sentence on Count 8 to two years consecutive.

### **IX. DISPOSITION**

[118] For the reasons set out above, I would dismiss the appellant's appeal from conviction. I would allow his appeal from sentence and reduce the sentence on Count 8 to two years consecutive, which reduces the global sentence from 12 years to 10 years.

"David Brown J.A."  
"I agree. Gary Trotter J.A."

**Paciocco J.A. (dissenting in part)**

**OVERVIEW**

[119] I agree with my colleague's disposition of the conviction appeal, save on one ground. For reasons that follow, I would find that the trial judge erred by failing to adequately charge the jury on the definition of criminal organization in s. 467.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. I would therefore set aside the appellant's conviction, on count 1, of participating in the activities of a criminal organization for the purpose of trafficking weapons, contrary to s. 467.11 of the *Criminal Code*, and order a new trial on that charge.

[120] I also agree with my colleague's disposition of the sentence appeal but, given that I would set aside the s. 467.11 conviction, I would also set aside the accompanying three-year consecutive sentence.

[121] In my view, the jury charge on the s. 467.11 offence was not functionally adequate. For this offence to occur, there must be a criminal organization. As I will explain, as a matter of law, a criminal organization must have structure and continuity. The absence of structure and continuity in the group that the appellant was alleged to be part of was central to the appellant's defence on this count. Yet, there is nothing in the trial judge's charge to the jury, when examined as a whole and in the context of the entire case, that would "in all probability" have conveyed

these elements of the offence to the jury: *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 30.

[122] This was not an imperfection in the jury charge. It was a non-direction on a key and material element of the criminal allegation, an element that the jury was obliged to consider.

[123] “At the end of the day, the overriding question is whether the jury was properly equipped”: *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 9. I am persuaded that the jury was not properly equipped to resolve the s. 467.11 charge.

## **THE STRUCTURE AND CONTINUITY REQUIREMENTS**

[124] I will begin with the need for a charge on structure and continuity.

[125] The requirement that a criminal organization have structure and continuity is not expressed in the definition of “criminal organization” in s. 467.1(1). However, it is not uncommon for additional unexpressed elements to be read into *Criminal Code* provisions that define criminal offences, based on a purposive and principled reading of those provisions. This is the case with the structure and continuity requirements in the definition of “criminal organization” in s. 467.1(1).

[126] In *R. v. Venneri*, 2012 SCC 33, [2012] 2 S.C.R. 211, at paras. 25-41, Fish J. explained that the requirements of structure and continuity are inherent in the concept of an “organization” in s. 467.1(1), and are needed to set criminal

organization offences apart from conspiracies, aiding and abetting, and “common intention” crimes. Structure and continuity give rise to the criminal advantages that criminal organizations enjoy. Structure and continuity therefore play an important role in justifying “[t]he increased penalties and stigma associated with the organized crime regime”: *Venneri*, at para. 36. Simply put, structure and continuity are not incidental to criminal organization offences. They are central attributes that a criminal organization must have.

[127] My colleague correctly notes that the determination of whether a criminal organization exists must be flexible, and that even a minimal level of organization suffices. I do not understand him to say, however, that the determination is flexible enough, or the required level of organization so minimal, that the requirements of structure and continuity can be disregarded. Such an interpretation of *Venneri* would be mistaken.

[128] Fish J. made two material points. First, whether there is a criminal organization is not determined based on the typical attributes of particular kinds of organization: *Venneri*, at paras. 37-41. Instead, the question is whether, on all the relevant evidence, there is a group “of three or more persons that [poses] an elevated threat to society due to the ongoing and organized association of [its] members”: *Venneri*, at para. 40. Second, a group that has “even a minimal degree of organization over a period of time” may meet this description: *Venneri*, at para. 36.

[129] It follows that when structure or continuity are live, material issues in a case, to correctly charge a jury on an alleged criminal organization offence, the trial judge must successfully communicate these requirements to the jury. This need not be done using particular words or in a prescribed sequence, but it must be done. Where a trial judge fails to do so, there is a non-direction amounting to a misdirection that can only be saved, if at all, under the curative proviso.

### **THE NON-DIRECTION**

[130] Here, structure and continuity were live, material issues. The trial judge requested that the parties provide their theories of the case, in writing, to assist him in preparing the charge. Defence counsel cited *Veneri*, posed the rhetorical question, “Where is the structure and continuity to this group that is alleged to be a crim org?”, and made related submissions over the course of almost a page in his six-page summary addressing the eight charges that his client faced. He also made submissions in his jury address about structure and continuity.

[131] Yet, nowhere in his charge does the trial judge communicate to the jury that structure and continuity are essential to the s. 467.11 offence.

[132] As he began to canvas the elements of that offence, the trial judge told the jury, “[t]he definitions of these elements are important. You must understand them.” His message was clear: he was about to direct the jury on what they would have to find in order to convict the appellant under s. 467.11.

[133] Describing the elements of s. 467.11, he said:

The first element is the existence of a criminal organization. A criminal organization is

(a) a group, however organized, that is composed of three or more persons in or outside Canada; and that

(b) has, as one of its main purposes or activities, the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit including a financial benefit by the group or any one of the persons who constitute the group.

[134] This definition, which faithfully captures the language of s. 467.1(1), does not communicate the need for structure and continuity. It communicates three things about the required composition of the group: (1) that it must be a group, however organized; (2) that it must be composed of three or more persons; and (3) that one of its main purposes must be the commission of one or more criminal offences for the material benefit of the group or one of its members.

[135] The latter two requirements relate to number and purpose, and say nothing about structure or continuity. While structure and continuity may be suggested by the phrase, “a group, however organized”, it is evident that this phrase does not, in itself, communicate the need for structure and continuity. After all, before discussing these requirements extensively in *Veneri*, Fish J. noted that, erroneously, “[s]ome trial courts have found that very little or no organization is required before a group of individuals are potentially captured by the regime”:

*Venneri*, at para. 27. Clearly, the *Criminal Code* definition of criminal organization did not alert these trial courts to the need for structure and continuity.

[136] After communicating elements (a) and (b) from s. 467.1(1), quoted above, the trial judge said, “It is necessary to elaborate upon each of the components of that definition”, no doubt causing jurors to conclude that he was about to provide a complete description of the elements of the offence.

[137] Critically, in his elaboration, the trial judge did not mention the requirement that the organization have structure and continuity. Nor did he mention the need for structure or continuity during the balance of his 19-page charge on the criminal organization count. He did tell the jury that the requirement of a group of three or more persons is not met if the group was formed randomly for the immediate commission of a single offence, but this direction relates not to the structure and continuity of a group, but to how it must come together.

## **THE CONTEXT OF THE CASE**

[138] My colleague offers three points, each arising from the context of the case, in rejecting the appellant’s submission that the charge was defective: (1) portions of the evidence concerned structure and continuity, (2) the charge must be read in light of the closing submissions by counsel for the parties, and (3) trial counsel did not object to the charge. I will explain why, respectfully, I cannot agree that these

considerations ameliorate the trial judge's non-direction on the essential elements of structure and continuity.

**(1) Portions of the evidence concerned structure and continuity**

[139] I recognize that “[a]llegations of non-direction amounting to misdirection must be assessed contextually, in line with the facts and circumstances of the particular case”: *Calnen*, at para. 11.

[140] Such an assessment may reveal that the charge, as a whole, adequately addressed the issues in the case. For example, in *Calnen*, the trial judge failed to direct the jury not to draw the prohibited inference from evidence of extrinsic misconduct. However, after examining the extrinsic misconduct evidence, the majority was satisfied that its proper use had been adequately explained to the jury in the balance of the charge: *Calnen*, at paras. 26-31.

[141] An assessment of the facts could also lead to a determination that the missing direction was not required. For example, in *R. v. Ellard*, 2009 SCC 27, [2009] 2 S.C.R. 19, a review of the material evidence showed that the prior consistent statements at issue offered neither assistance to the Crown nor harm to the defence, making a direction on the permitted uses of prior consistent statements unnecessary.

[142] In both of these illustrations, which are not exhaustive, the facts and circumstances of the case shed light on the sufficiency of the charge. Here,

however, the fact that evidence on the record could be related to structure and continuity does not support the sufficiency of the charge. No solace can be taken from its existence, as that evidence could not have alerted the jury that they could not convict on the criminal organization offence without finding that the group had structure and continuity. If anything, the existence of that evidence reinforces that structure and continuity were live issues that the trial judge was obliged to equip the jury to grapple with.

**(2) The charge must be read in light of the closing submissions by counsel for the parties**

[143] I also accept that the closing submissions of the parties may be relevant to the sufficiency of the charge. For example, in *R. v. Niemi*, 2017 ONCA 720, 355 C.C.C. (3d) 344, at para. 103, leave to appeal refused, [2019] S.C.C.A. No. 117, the trial judge's summary of counsel's submissions, given as part of the jury charge, supported the finding that the jury would not have taken the trial judge's description of the need for a temporal connection as a direction that only a temporal connection was required. Neither counsel focused on temporal connection in their submissions and the balance of the trial judge's charge reinforced that a connection must be more than merely temporal to suffice.

[144] Alternatively, counsel's submissions may be relevant to the sufficiency of the charge because they illustrate that an issue is material enough to require a

direction. Here, defence counsel's closing submissions highlighted that structure and continuity were live issues on which the jury required direction.

[145] The obligation to direct the jury, however, rests with the trial judge, not counsel. Only a judge can direct or instruct a jury. In my view, it is only in rare circumstances, if ever, that counsel's words can compensate for a trial judge's non-direction. While defence counsel told the jury that the law requires structure and continuity, his statements cannot compensate for the trial judge's non-direction, for three reasons.

[146] First, the jury were told different things by counsel about the meaning of "criminal organization". Defence counsel said that the law requires structure and continuity, but Crown counsel did not. Crown counsel described a criminal organization as "a group composed of three or more people whose main purpose is to facilitate or commit serious offences such as firearms trafficking, to benefit the group financially or otherwise", and said nothing about the need for structure and continuity. Which counsel, if any, did the jury listen to?

[147] Second, the jury was told to take the law from the trial judge, not counsel. Crown counsel gave submissions first. Before describing a criminal organization to the jury, Crown counsel said, "His Honour will give you the definition of what a criminal organization is, so I won't dwell on it here." Immediately before telling the jury that structure and continuity are required, defence counsel said, "His Honour

will elaborate on this for you”. It cannot be assumed, in these circumstances, that the jury would have relied on what either lawyer said about the law. They would have attended to what the trial judge said.

[148] Third, of course, is the effect of what the trial judge did and did not say about the law. As I have described, after alerting the jury that he was going to tell them about the “important” definitions of the elements of a criminal organization that they “must understand”, the trial judge said nothing about structure or continuity. As a result, the trial judge not only gave a non-direction on an essential element of the offence, but invalidated defence counsel’s claim that the law requires structure and continuity.

[149] For these reasons, if it is ever appropriate to overlook a judicial non-direction because counsel has furnished the legal information, this is not such a case.

### **(3) Trial counsel did not object to the charge**

[150] The failure to object can be an “important factor in appellate review”: *R. v. Adan*, 2019 ONCA 709, at para. 63. However, “[t]he failure to object is not decisive” and “does not make whole what is otherwise an error”: *Adan*, at para. 63. Given the variable impact of such failures, the relevance of a failure to object requires close consideration. A failure to object will generally be significant in two circumstances.

[151] First, the failure to object can impede an appeal where it appears to have been tactical: *Calnen*, at para. 67. Essentially, a party cannot strategically withhold an objection at trial and then make it on appeal.

[152] Alternatively, “[a] failure to object to an instruction later advanced as erroneous before a reviewing court may say something about the overall accuracy of the instructions, the fairness of the charge, and the seriousness of the alleged misdirection”: *Adan*, at para. 63 (citations omitted).

[153] My colleague does not suggest that defence counsel’s failure to object in this case was tactical. There was no good reason to choose not to object, a point I will return to below. Instead, he concludes that the “common ground between the parties”, that structure and continuity had to be proved, “underlay the lack of objection”.

[154] With respect, I cannot join in this conclusion. First, it is not clear that the parties agreed that structure and continuity are required elements of a criminal organization. I have already noted that when Crown counsel defined criminal organization for the jury, she did not include structure or continuity as requirements. In summarizing her theory of the case, Crown counsel referred to the “cohesiveness” of the group. In her jury address, she spoke of “cohesiveness and continuity”. No mention was made of structure. In my view, it cannot be inferred with any degree of confidence that defence counsel concluded, from what Crown

counsel had said, that they were in agreement that structure and continuity were elements that the Crown had to prove to gain a conviction in a criminal organization offence.

[155] The inference that defence counsel did not object to the non-direction because the parties were on the same page requires closer scrutiny for other reasons. Ultimately, the significance of the failure to object must be determined in the totality of the circumstances. In this case, those circumstances include that structure and continuity are essential components of the charged offence, and that the appellant was defending the charged offence, in large measure, on the theory that the Crown had not proved these essential components. With respect, I cannot accept that, in the circumstances, defence counsel would have refrained from asking the trial judge to instruct the jury on the need to prove structure and continuity because he believed that the Crown also saw these elements as essential. I cannot see why he would be concerned with what the Crown understood. His concern, had he considered it, would have been with what the jury understood.

[156] The fact remains, of course, that defence counsel did not object to the trial judge's non-direction on this crucial point. No doubt he should have done so. But the trial judge's non-direction furnished the appellant with no tactical benefit. Defence counsel's failure to object to the non-direction could not have helped his client. It could only have hurt his client by obscuring a key plank in his defence.

More importantly, the non-direction left the jury unequipped to understand the legal implications of a failure by the Crown to prove structure and continuity. This was a significant omission. In these circumstances, defence counsel's lack of objection says nothing, in my view, about the overall accuracy of the instruction, the fairness of the charge, or the seriousness of the non-direction. The only reasonable inference is that, like the trial judge, defence counsel failed to notice the non-direction.

[157] In this regard, defence counsel failed in his obligation to assist the trial judge in preparing the charge. So, too, did Crown counsel, a quasi-judicial officer obliged to ensure that the accused gets the benefit of the law. Ultimately, though, the trial judge is responsible for charging the jury on the law. The failure to fulfil this obligation should not be overlooked because counsel failed to provide the expected assistance by objecting. The appellant was entitled to a properly charged jury and he did not get one.

## **CONCLUSION**

[158] I would reject all other grounds of conviction appeal advanced by the appellant but, for the reasons just offered, would allow the conviction appeal on count 1, the s. 467.11 offence. I would set aside the conviction on that charge and order a new trial.

[159] I would join my colleague in allowing the appellant's appeal from sentence and reducing the global sentence by 2 years. However, having set aside the conviction on count 1, I would also set aside the 3-year consecutive sentence imposed on that count.

Released: "DB" FEB 08 2021

"David M. Paciocco J.A."